Case Numbers: 3304495/2018 & others

EMPLOYMENT TRIBUNALS

Claimants		**Respondent**
Ms K Element & others	v	Tesco Stores Limited

Heard at: Watford, in person and by Cloud Video Platform ("CVP")

With the parties present on:
6, 8, 9, 10, 13-17, 20-24, and 28-31 March, 17-21, 24-28 April, 2-5, 15, 16, 23 and 24 May 2023

Without the parties present on:
7 March, 11, 12 and 14 April, 9, 10, 12, 17, 25, 30 and 31 May; 3, 4, 6, 7, and 10 July 2023

Site visits:
22 February 2023 and 13 April 2023

Before: Employment Judge Hyams

Members: Mr R Clifton
Ms M Harris

Additional sitting days without the parties present, spent deliberating:

10 October, 7 and 8 November, 5-6, 12-14 and, 18-20 December 2023

2-4, 9-11, 30 and 31 January, 1, 6-8, and 27-29 February, 5-7, 12-14, 20-22 March, 18, 19, 23-25, 29-30 April, 1, 7-9, 14-16 May, and 4-6 and 11-13 June 2024.

Representation (principally):

For the claimants represented by Leigh Day: Mr Sean Jones, KC, Mr Andrew Blake, of counsel and Ms Rachel Barrett, of counsel

For the claimants represented by Harcus Sinclair: Mr Keith Bryant, KC, and Mr Stephen Butler, of counsel

Case Numbers: 3304495/2018 & others

For the respondent: Mr Paul Epstein, KC, Mr Matthew Purchase, KC, and Ms Louise Chudleigh, of counsel

UNANIMOUS RESERVED JUDGMENT ON THE FACTUAL ISSUES ARISING AT THE STAGE 2 HEARING WHICH OCCURRED ON THE ABOVE DATES

The tribunal's conclusions on the factual issues arising in relation to the question what was the work for the purposes of section 65(6) of the Equal Pay Act 2010 of the six sample claimants and the eight comparators about whose work the tribunal heard evidence at the stage 2 hearing which started on 6 March 2023 are stated in the eight schedules at pages 30-619 below.

REASONS

Introduction

1 We have already, on 12 July 2023, issued a reserved judgment on a number of points of principle which arose in relation to the things which were in issue at the stage 2 hearing which commenced on 6 March 2023 and ended with closing submissions on 23 and 24 May 2023. That judgment was signed on 12 July 2023 and it was sent to the parties on the same day. As with all reserved employment tribunal judgments, it consisted of things said by way of judgment and a set of reasons for those things. Unusually, the things which were said in the "judgment" section related not to liability but to the manner in which the parties had presented and pursued their cases. What we said in that judgment was to the effect that we had concluded that the parties should recast their cases since what they had put before us was so markedly inconsistent with what in our judgment, arrived at after a careful consideration of the legal principles, was required that it was in the interests of justice that the parties re-present their cases to us. We therefore said what we had concluded should be done by the parties and said that we would discuss with them, at the procedural hearing which had previously been agreed would take place on 19 and 20 July 2023, the orders which we should make accordingly.

2 In this set of reasons we first correct several minor errors and omissions in our reasons for our reserved judgment of 12 July 2023. (For the sake of simplicity, we refer below to those reasons as the judgment itself, and refer to the judgment as "our judgment of 12 July 2023".) We then expand what we said in our judgment of 12 July 2023 about the applicable legal principles. We then state what happened after that judgment was given, including what orders were in fact made by us and what the parties did by way of purported compliance with those orders. Finally, we state our

conclusions on a number of points of principle, or general application, which arose during the course of our determinations of the thousands of factual disputes which the parties had left us to determine in relation to the work of the 14 employees about whose work we heard evidence in the stage 2 hearing which started on 6 March 2023. Those determinations are stated in eight appendices, which, taken together, are over 500 pages in length. We have added them to this document and paginated them with this document so that there is only one document recording our conclusions at this stage. However, the paragraphs of the appendices are numbered internally, so that each appendix starts with a paragraph numbered 1, and where we refer to a paragraph number simply by saying that it is "above" or "below", we refer to a paragraph of that appendix. Where we refer to a paragraph in for example another appendix, we refer to it as a paragraph of that appendix and state the page number of this [592]-page document where the paragraph appears.

3 Each appendix was written as a separate document, and our approach to the task before us changed as we went along. There are, as a result, differences of form, but not substance, between the first three appendices and the final five. We say more about the reason why there are eight appendices in paragraphs 56-60 below, but we thought that it would be helpful to say here that the final appendix, Appendix 8, is the longest by far. That is because we determine in it all of the factual disputes which arose in relation to the work of the eight comparators. We do that by first referring to the training materials for each aspect of the work of the comparators which was in evidence before us and then referring to the work of the comparators, taking each comparator's work in turn and seeking to avoid, or at least minimise the need for, repetition, by concentrating on the tasks which they did and about which we had heard evidence. Because of its length and the fact we state our conclusions on the factual issues relating to the work of all eight comparators, it has its own index. In addition, while we preferred in general not to put quotations in italics, in several places in Appendix 8 where we put a complete quotation in a paragraph, we found it helpful from the point of view of legibility to put it into italics as well as quotation marks. The use of italics in that way had no significance: if we emphasise anything in the text below, we underline it.

Contents

4 This document is accordingly in the following sections.

4.4 Appendix 3, where there is our initial attempt to state our determinations of the disputes maintained by the parties about the work of Ms Janice Cannon, a sample claimant. That is at pages 153-180.

4.5 Appendix 4, where we state our determinations concerning the work of Ms Cannon. That is at pages 181-247.

4.6 Appendix 5, where we state our determinations concerning the work of Ms Rebecca Thompson, a sample claimant. That is at pages 248-292.

4.7 Appendix 6, where we state our determinations concerning the work of Ms Toni Oz, a sample claimant. That is at pages 293-319.

4.8 Appendix 7, where we state our determinations concerning the work of Ms Roxanne Garrod, a sample claimant. That is at pages 320-378.

4.9 Appendix 8, where we state our determinations relating to the work of all eight comparators. That is at pages 379-619.

Corrections

5 In our statement, in paragraph 49 of our judgment of 12 July 2023, of the evidence which we heard, we inadvertently failed to refer to hearing from the following witnesses on the following days.

5.1 **Mr Garry Black**. He gave evidence on behalf of the respondent for all of 15 May 2023. At the time of giving evidence to us, he was employed by the respondent as Lead Security and Shrinkage Partner (UK). He had held that role since November 2022. Before then, so far as relevant, he was employed by the respondent as a Regional Security Partner, having been in that role since 2017.

5.2 **Mr Gideon Roux**. He gave evidence on behalf of the respondent during the morning of 16 May 2023. He started working for the respondent in 2017. He was initially employed in the respondent's "Group Safety" department. He was at the time of giving evidence employed by the respondent as Head of Safety for Distribution and Fulfilment. He had been in that role since July 2022.

5.3 **Mr Richard French**. He gave evidence on behalf of the respondent. He did so in the afternoon of 16 May 2023. He was employed by the respondent as a Distribution Work Study Manager.

6 We failed to refer to the evidence of those witnesses because in our desire to let the parties see our initial conclusions on points of principle with sufficient time to consider them before we held our pre-arranged hearing of 19 and 20 July 2023, we inadvertently overlooked their evidence.

7 That haste led also to the following minor textual errors in our judgment of 12 July 2023, which, for the sake of completeness (despite the likelihood of there being rather more textual errors in the long appendices to these reasons, for which we apologise in advance), we now correct.

7.1 The word "and" in the fifth line of page 4 was superfluous and should have been omitted.

7.2 The word "in" at the end of the penultimate line of paragraph 12.1, on page 7, was superfluous and should have been omitted.

7.3 The passage of the judgment of Orr LJ in *Shields v Coomes (Holdings) Ltd* ("*Shields*") which we set out in paragraph 16, starting on page 8, was at 1174G-1175C (not 1175CH).

7.4 An opening bracket before "Nelson" in the first line of paragraph 19, on page 10, was omitted.

Our further reasons for our conclusions on the correct approach to take here

Introduction

8 Between 12 July 2023 and the writing of these further reasons, we had a number of opportunities to reconsider our understanding of the law expressed in our judgment of that date. We took them. They resulted in us being fortified in our understanding, or view, of the applicable legal principles. Indeed, we found ourselves being repeatedly baffled by the approach taken by the parties to the evidence in this case, especially when seen in the light of the applicable basic principles and what we thought of as common sense.

Legal principles

9 The most basic principle of all was this: an employee's job is not what the employee says it is, but what the employer says it is. The employer requires the employee to do work, and the employee is required to do that work. Putting it in a slightly different way, the employer agrees to pay the employee for the work which the employer requires the employee to do. If the employee does not do that work then the employee is not doing his or her job. If the employee does not do the job well, then, albeit to a lesser extent, the employee is also not doing his or her job, i.e. the work which he or she was employed to do. The employee cannot by failing to do his or her job or doing it badly change the nature of the job. Only if the employer agrees to the employee not doing the work in the manner required by the employer will the employee be able credibly to say (both generally and, in our view, for the purposes of a claim for equal pay for work of equal value) that his or her work is now to be done in that different manner.

10 Why, then, did the parties focus exclusively on oral evidence about what the sample claimants and the comparators actually did on a day-to-day (and in some cases on a minute-by-minute, and in a few cases, for example as described in paragraph 920 of Appendix 8, at page 610 below, even on a second-by-second) basis to prove what was the work, for the purposes of section 65(6) of the EqA 2010, of the sample claimants and their comparators? By the time of writing these reasons, we could see that it was probably because of what was said in *Shields* about the need to look beyond what was in the contract of employment and to see instead of what was in the contract, what the employees (the claimant and the comparator) actually did.

11 The facts of *Shields* were helpfully summarised in this way in the headnote at [1978] ICR 1159E-F.

> "The employee worked as a counterhand in a betting shop in South-East London which was one of 90 such establishments owned by the employers. She was paid at the rate of 92p an hour while a male counterhand working at the same shop received £1.06 an hour. The employers considered the shop to be one of nine situated in areas where the prospect of robbery and customers causing trouble was high and they paid the male counterhand more than the employee because he was employed to act as a deterrent and to render immediate physical assistance if required. He was also expected to be available in case of trouble when the manager opened the shop in the morning and, when necessary, to carry cash between the employers' betting shops. There had been no trouble of the kind feared since the employers took over the shop."

12 The relevant holding of the Court of Appeal was summarised in this way at 1160C-E:

> "[A]lthough the appeal tribunal's decision was based on the erroneous belief that male counterhands were employed in all the 90 betting shops, the employee was doing work of a broadly similar nature to the man and, therefore, under section 1 (4) of the Act, consideration had to be given to whether the differences between her duties and those undertaken by the man were of practical importance; that the man's contractual obligations were irrelevant unless those obligations resulted in actual and not infrequent differences in practice; and that, since the man's responsibility to deal with trouble if it ever occurred could not represent a difference between the things done by him and the employee as counterhands, it had not been shown that there were differences of practical importance between their work and the employee was entitled to succeed on her claim under section 1 (2) (a) of the Act".

13 Those facts and that ruling were of only very little relevance to at least the majority of the factual disputes before us here. That was for the following reasons.

13.1 The claimants claim that their work is equal in value to that of their comparators, not that they are doing like work.

13.2 The respondent does not rely on any substantive provisions in the contracts of employment of the comparators as a justification for the higher rates of pay for those comparators.

13.3 What was going to need to be decided by us was what were the tasks which the sample claimants and their comparators were required to do by their employer.

13.4 If there had been no documentary evidence in existence showing what were the tasks which the sample claimants and their comparators did in the course of their work, then only oral evidence could have been put before us about those tasks.

13.5 However, in this case the respondent is a very large employer which

13.5.1 operates in a highly regulated environment, which includes strict criminal liability for the sale of food products which (summarising the situation broadly) have exceeded their shelf life or are contaminated,

13.5.2 uses sophisticated digital stock control and related systems, and

13.5.3 has in place an extensive and detailed set of training materials for use in training employees to do the work of the claimants and their comparators.

14 Those factors meant that

14.1 the respondent had a strong business need for the work of the claimants to be done in the same way throughout the respondent's stores, and

14.2 the training materials stating how that work was to be done were going to be determinative of what the respondent required the claimants to do unless there was cogent evidence before us to show that one or more aspects of those training materials was not (or was no longer) determinative.

15 We add that the work of the comparators was done in circumstances which reduced yet further the need for, i.e. the relevance of, oral evidence about the work of those comparators. That is for the following reasons.

16 The respondent's digital systems necessarily relied on the software programs used in them. A critically important example of the digital equipment used by employees of the respondent is the arm-mounted computers (or terminals) ("AMCs") used by the comparators in the respondent's distribution centres ("DCs") at which they worked. Those AMCs (which were operated by the user pressing buttons on the computer) could not be operated without what was in effect a manual. Oral descriptions of what steps were required to be taken in operating those AMCs were highly likely, if not certain, to be of far less value than the relevant parts of that manual and any training

materials which helped to explain how the AMCs had to be used in the course of the employees' work. (We discuss the practical implications of that factor in paragraphs 900-901 of Appendix 8 (at page 606 below.) In any event, the only alternative to referring at least primarily to the pages of that manual would be either to repeat its terms in a witness statement or some other document stating evidence, or to paraphrase its terms, which would be potentially misleading. Especially where it was impossible reliably to understand what steps were to be taken if the software was to be operated correctly without seeing screenshots of what would be on the AMC's screen, pictures would need to be included in the repeated material. But there was obviously no point in repeating the content of a document in evidence. That is because the document will speak for itself and will do so unambiguously.

17 Having said that, the precise commands to follow and which button needed to be pressed next on the AMCs were (and, we thought, always would be) unlikely to need to be determined by an employment tribunal for the purposes of enabling independent experts of the sort who are appointed by the tribunal from the list of ACAS-appointed experts in equal value hearings, to do their job. That is because those experts' job is (applying the words of section 65(6) of the EqA 2010) to assess the value of the work of an employee in "terms of the demands made on [the employee] by reference to factors such as effort, skill and decision-making" and because we could not see how the demands could differ according which AMC button needed to be pressed next. Nevertheless, here the AMCs contained instructions, so that where the work of the comparators had to be done by following those instructions, it was at least possible that the instructions would be determinative of the work. Those instructions were likely to be stated and explained in the respondent's training materials, which were as a result going to be even more obviously likely to be determinative of how the work which the comparators did was required by the respondent to be done.

18 A further critical factor here was that the claims in this case are made by thousands of employees doing the job of customer assistant, who compare their work for the purposes of their claims with that done by thousands of employees doing the job of warehouse operator. It would be very surprising if the value of the work of those thousands of employees could be said to differ according to which employee did it (so that it was affected by how well or otherwise the employee did it), and where it was done (which might result in for example a difference in the physical state of the building in which the work was done). The parties may say that at least some of the roles of the claimants and their comparators differ significantly, but that is irrelevant to this aspect of the matter.

19 Those factors all pointed firmly in favour of the analysis of Underhill P in *Prest v Mouchel Business Services Ltd* [2011] ICR 1345 which we set out in paragraphs 25 and 26 of our judgment of 12 July 2023. It was noteworthy that none of the parties' representatives referred us to that authority either in their opening skeleton arguments or their written closing submissions. Only when EJ Hyams pressed the parties' representatives on the issue of the proper approach to take when assessing

the value of the work done by a claimant or a comparator in an equal value claim and asked whether anyone was aware of any further authority on the point, was that authority drawn to our attention. The authority was not, we saw, referred to in the section of *Harvey on Industrial Relations and Employment Law* in which the substance of the law of equal pay is discussed. Rather than seeing that as a reason to doubt the correctness of our understanding about the manner in which the parties should have approached this case, we regarded that as an omission on the part of the editors of that work.

20 That conclusion was supported by parts of the most recent authoritative judgment before us (which was that of Lavender J in *Beal v Avery Homes (Nelson) Limited* [2019] EWHC 1415 (QB) ("*Beal*")) which we did not set out in our judgment of 12 July 2023.

21 The first additional passage in *Beal* which we found to be relevant was paragraph 23, where Lavender J said this.

> 'The question whether one person's work is of equal value to another's is not a matter for determination by the Court at this stage. That question will be addressed at a later stage, at which point the Court will have the assistance of the expert's report. The aim of this stage of the proceedings is to produce a factual statement of each individual's work, to be used by the expert as the basis for his assessment of the question whether they are of equal value. Those statements have, for the sake of convenience, been described as job descriptions, but it was common ground that the use of this term (which tends to be associated with the sort of document prepared, for example, when a job vacancy is being advertised) should not distract attention from what the Act requires, and that the key word in the Act is "work" rather than "job". In addition, Mr Linden also drew attention to the words "employed on" in section 64(1)(a).'

22 We return in paragraphs 26-28 below to the question of what is required by way of a "job description" within the meaning of the Employment Tribunals (Equal Value) Rules of Procedure 2013 ("the EV Rules"). Otherwise, paragraph 23 of the judgment of Lavender J in *Beal* was helpful to show what was the aim of a stage 2 hearing, namely to "produce a factual statement of each individual's work, to be used by the expert as the basis for his assessment of the question whether they are of equal value".

23 The second additional passage in the judgment of Lavender J in *Beal* which we found to be of particular value was this.

> '***(2)(iii) Work***
>
> 27. The judgment in *Potter* [i.e. *Potter v North Cumbria Acute Hospitals NHS Trust* [2008] ICR 910] also contains some guidance on what constitutes a person's "work" for the purposes of the relevant provisions Act. In dealing

with the facts of *Potter*, the EAT rejected a submission that an order made in that case had excluded from the experts' consideration tasks which were not actually being performed as at the date of the evaluation, but which nevertheless remained part of the jobs in question. In doing so, the EAT made the following general observations, which were relied on by both parties in the present case:

> "There are in many employments – and no doubt in nursing – tasks which fall to be performed only occasionally or at long intervals, but that does not mean that they are not part of the package of tasks and responsibilities that requires to be evaluated (though their infrequency may be important in assessing the weight accorded to them); nor is the job to be regarded as different in the periods when such tasks are actually being performed and when they are not."

28. At the end of this sentence, the EAT referred to its footnote 7, which stated as follows:

> "Of course sometimes a task may last have been required to be performed so long ago that it can no longer be regarded as part of the job at all. If that is really established, there may indeed have been a job change. Drawing the dividing-line between tasks which are rarely performed but still a real part of the job and tasks which have fallen outside the scope of the job through desuetude may not be easy: much will depend on why the task has not in practice been performed."

29. The parties did not refer to any other authorities on the meaning of "work" in the present context. However, there were a number of issues as to what constitutes "work" and, if it is different (which I doubt), what it is to be "employed on work".

30. There was some common ground. In particular, it was agreed that it was appropriate to look at what the employee actually did, and not simply at documents (such as contracts, job descriptions or work manuals), even if they had contractual force. Such documents are relevant, but not necessarily determinative, when considering what constitutes someone's work. Likewise, what the employee actually did is an important consideration, but is not necessarily determinative. To take an obvious example, an employee who loafs around during work hours does not thereby convert loafing into part of their work. Likewise, as the parties agreed, if an employee refused or neglected to do something which they were supposed to do, that activity would remain part of their work.'

24 The parties had in our view failed to see the significance of the words in paragraph 30 of the judgment of Lavender J in *Beal* describing "contracts, job descriptions or

work manuals" as being "relevant, but not necessarily determinative". While it was important not to place too much reliance on the words of a judgment, so that it should not be treated as being like a statutory provision, we were fortified in our understanding of the importance of the training materials here by the fact that Lavender J in paragraph 30 of *Beal* recognised that for example a "work manual" might be determinative, although it was not necessarily so.

25 That was entirely consistent with the approach of the European Court of Justice in paragraph 48 of its judgment in *Brunnhofer v. Bank Der Österreichischen Postsparkasse AG*, Case C-381/99 [2001] IRLR 571, which we set out in paragraph 11 of our judgment of 12 July 2023. There, the European Court of Justice ("ECJ") did not say that it was necessary to ascertain what a claimant and a comparator did, but, rather, that it was "necessary to ascertain [among other things] the nature of the activities actually entrusted to each of the employees in question in the case" (our emphasis). It is true that in the preceding paragraphs of its judgment, the ECJ stated an approach which was comparable to that which the Court of Appeal took in *Shields*, but that was also supportive of the proposition that an equal value claim concerns what tasks the employee was in fact entrusted to do, i.e. his or her job tasks, and not the manner in which they were done. That is because the preceding passage concerned a situation which was comparable to that in *Shields*, namely where (as stated in paragraph 44 of the ECJ's judgment in *Brunnhofer*) "the employees concerned are classified in the same job category under the collective agreement applicable to their employment".

The relevant parts of the Employment Tribunals (Equal Value) Rules of Procedure 2013

26 As we understood it, rule 4(1)(d) of the EV Rules required the parties to provide to us before the start of the stage 2 hearing in relation to each employee whose work was in question the following things:

26.1 a statement of the tasks which the parties agreed constituted the work of the employee for the purposes of section 65(6) of the EqA 2010 (i.e. a statement complying with the requirements of rule 4(1)(d)(i) of the EV Rules);

26.2 a statement of the facts which both parties agreed were relevant in addition, i.e. relating to the conditions in which that work was done (i.e. a statement complying with the requirements of rule 4(1)(d)(ii) of the EV Rules); and

26.3 a statement of the factual assertions of each party on which they disagreed (whether because the factual assertion was opposed, or because it was asserted that the factual basis for the assertion was irrelevant to the matters to be determined at the stage 2 hearing) and a summary of their reasons for disagreeing. Those factual assertions might have related to the tasks which the respondent required of the employee, or the conditions in which those tasks

were done, or both of those things. That was a statement complying with the requirements of rule 4(1)(d)(iii) of the EV Rules.

27 Those things followed on from the requirements of rule 4(1)(b) of the EV Rules, which were so far as relevant for the parties to

27.1 "provide each other with written job descriptions for the claimant and any comparator", and

27.2 "identify to each other in writing the facts which they consider to be relevant to the question".

28 It seemed to us that both of those things amounted to what are traditionally called pleadings. They are assertions both of fact and of relevance, which may or may not be accepted by the tribunal after the hearing of evidence. The same had to be true of things said by the parties pursuant to rule 4(1)(d) of the EV Rules with the exception of the things that were agreed. We observe that it is not the norm for courts and tribunals to consider whether the parties have correctly agreed facts, i.e. whether or not those things that have been agreed about the facts have, in the view of the court or tribunal in question, been correctly agreed in the sense that the court or tribunal either accepts or rejects the proposition that the things which have been agreed are well-founded factually. The court or tribunal might, however, and as far as we could see in appropriate cases would have to, decide whether or not any agreed fact was relevant to the issues before the court or tribunal. However, if something which has been agreed to be relevant is not thought by the court or tribunal to be of central importance then it is usually simply ignored.

The way in which the parties adduced their evidence

29 Here, the parties adduced evidence only about how each relevant employee did his or her work and, in the case of the work of the sample claimants, the respondent adduced evidence in reply which was for the most part about how the sample claimant in question did the work. The respondent's evidence in reply mostly sought simply to undermine the evidence of the sample claimants about how they in fact did their work. Only very rarely was evidence adduced by the respondent about how the work was required by the respondent to be done. Only very rarely did the respondent adduce any evidence to the effect that it did not condone something which a sample claimant did, and therefore to the effect that we should conclude that the claimant's work for equal value purposes did not include that thing. The only clear example of that being done was in relation to the handover notes which Ms Garrod left for the weekend bake-off baker to which we refer in paragraph 5 of Appendix 7 (at page 321 below). The respondent did not adduce evidence to say that the way in which the claimant in question did her work was specifically condoned. That was probably because the respondent's position was (with, it has to be said, several exceptions, some of which related to the work of Ms Garrod) that its own training materials were not relevant material to be taken into account when the work of the claimants and

their comparators was determined. As can be seen from what we said in paragraphs 75-87 of our judgment of 12 July 2023, it was the respondent's stated position in submissions that those training materials were relevant only to show what training a claimant or a comparator had in fact received.

30 The claimants did not adduce any evidence in response to that of the respondent about the manner in which the comparators did their work. That may well have been because the claimants were unable to procure any such evidence in response.

31 The respondent adduced no evidence to say that the way in which a comparator worked was not approved by the respondent. The way in which the respondent adduced its evidence was to (a) create what it called equal value job descriptions ("EVJDs") for the comparators which were very detailed and contained many parts which were not about the tasks themselves and then (b) have (1) the comparators who gave evidence (one did not) and (2) some managers of the respondent or in some cases colleagues of the comparators say (at least for the most part) that the EVJD was accurate. Thus, if the manner in which a comparator did his work differed from the manner in which the relevant training materials said it should be done, that difference was not the subject of any primary evidence, and it was the subject only of cross-examination and submissions on behalf of the claimants.

32 The claimants too produced very detailed EVJDs. The parties said that they had spent two years preparing for the hearing before us which started on 6 March 2023. We observe here that if the parties had focused on the matter in the way in which we have had to in the appendices to these reasons, rather than by (1) making lengthy, detailed, factual assertions in the EVJDs about the precise way in which the claimants and the comparators in practice did their jobs and (2) responding to the other side's factual assertions in great detail, then their factual disputes would necessarily have been better focused and there would necessarily have been far fewer of them. The parties' closing submissions would also in all probability have been far easier to read (irrespective of their format, to which we return in paragraph 82 below), and the submissions which were no longer necessary because they related to a contention which was no longer opposed would probably have been omitted.

What we proposed in our judgment of 12 July 2023

33 In any event, in the circumstances, we concluded for the reasons stated in our judgment of 12 July 2023 that it was necessary for the parties to restate their cases. In paragraphs 92 and 93 of our judgment of 12 July 2023 we stated the manner in which we had concluded the parties should restate their cases. We made it clear (or at least we thought that we made it clear) that the parties would need to liaise and agree what training materials and other relevant documents showed best the tasks of the sample claimants and their comparators, and then state in addition anything which they agreed about the conditions in which that work was done. We said too that it was necessary

"if it is contended that the job-holder carried out [a] task in a way which differed from the manner shown by that training, [to] state

92.3.1 whether that manner was known about by the respondent, and, if so and it was correct to say it,

92.3.2 that the respondent had approved or at least knowingly tolerated that different manner."

What happened on 20 July 2023

34 The tribunal did not sit on 19 July 2023, as one of the parties' counsel was not available to do so. We sat only on 20 July 2023. On 26 July 2023 EJ Hyams signed a document stating our conclusions and the order which was in fact agreed with the parties on 20 July 2023. The reasons for the order were expanded in a detailed passage in paragraphs 24-41 of the "Case Management Summary" part of the document, which we thought showed how the parties should have presented their cases at the stage 2 hearing and how we thought they should now re-present them. The Harcus claimants declined to be involved in the process which was in the event agreed with the respondent and the Leigh Day claimants and which led to the following orders, which were first proposed by the Leigh Day claimants and for the sake of compromise agreed to by the respondent:

'**Further information to be provided by the Leigh Day claimants and the respondent**

2 On or before 29 September 2023 the Leigh Day Claimants and the respondent must in relation to a single job task ("the Task") for, respectively, a sample claimant and a comparator, produce separately and send to each other and the tribunal (for the attention of Employment Judge Hyams):

2.1 a recast description of the agreed aspects of the Task for inclusion in a job description within the meaning of rule 4(1)(d)(i) of the EV Rules;

2.2 a statement of any agreed facts relating to the Task (but excluding the Task itself); and

2.3 a statement of any factual assertions relating to the Task (including any aspects of the Task itself which are in dispute), which are not agreed either because the factual assertion is not agreed or because the factual issue is asserted by one party to be relevant and the other party not to be relevant, or for both of those reasons.

3 Each such description and statement must cross-refer to any relevant training material and shall append any relevant extract of that material.

4 On or before 29 September 2023 the claimants and the respondent must send to the other parties and the tribunal (for the attention of Employment Judge Hyams) an estimate of the time to be spent and the costs to be incurred in recasting the job descriptions and the statements of facts which are agreed and those which are disputed (whether on the basis that it is said by one party that they are irrelevant or on the basis that what is claimed by one party to be a fact is denied by the other), i.e. in recasting what they have so far provided pursuant to rule 4(1)(d) of the EV Rules, for all of the sample claimants and the comparators.'

What we received in purported compliance with those orders

35 The parties' cases in regard to the single task in relation to which they had agreed to provide a restated and honed case were no shorter: just different. One way to describe the situation is by saying that we had before us a number of playing cards (consisting of a very large deck; rather more than the usual number of 52), and that we had hoped that the parties would reduce that number of cards significantly. Instead, what we had was the same number of cards, with some helpful additional content consisting of some of the relevant training materials, but much that was a repeat of what had already been said. In effect, we had simply a shuffled deck of the same cards, but now with some more information about the training materials on which the party's case could originally have been based.

36 In addition, the parties both said that it would take them a large number of hours of lawyers' time to restate their cases in regard to the rest of the work of the relevant employees. The Leigh Day claimants said in a letter dated 23 September 2023 that they estimated that it would take a total of 885.6 hours to do a first draft of the documents stating afresh the work for equal value purposes of all three of the sample claimants for whose work Leigh Day was responsible. Given that there were six sample claimants, the claimants' estimate of the time which that work would take was 1771.2 hours. Leigh Day continued:

> "Those are the potential costs of preparing first drafts. But before any recasting is complete and ready to be put before the Tribunal for determination of the disputes, the other party must have had an opportunity to review and input. They will need to confirm:
>
> 1. whether they agree with what has been identified in the first draft as agreed;
> 2. whether they disagree where disagreement has been identified;
> 3. whether all disagreements have been accurately recorded; and

4. whether all the training they consider relevant has been included. This will require the parties to search for and review in this context all potentially relevant training documents.

It is hard to estimate how long this might take, but it would not surprise us if it was at least half as much time again as the time it takes to prepare the first drafts.

Once the party that prepared the first draft has received these comments, they will then need to spend further time considering them and updating the recast documents where appropriate."

37 In addition, Leigh Day wrote this in that letter.

"Having now recast Replenishment, and seen a copy of the recast Loading, the Leigh Day Claimants consider that further recasting is unlikely to assist the Tribunal in the manner hoped for and will be difficult to reconcile with the overriding objective. In particular:

1. Recasting the job descriptions into three separate documents and incorporating further training material documents is likely to make the process of resolving disputes more difficult than using a single document which includes both agreed and disputed paragraphs. Considerably more reading is required to grasp the disputes.

2. Recasting the job descriptions with a focus on training materials, and not oral evidence, creates a risk that the Tribunal may fall into an error of law. While training materials are significant documents and evidence that will assist the Tribunal in determining how tasks were performed, they are not determinative. As the Tribunal recognised in paragraph 37 of its Case Management Summary sent to the parties on 26 July 2023, it may be the case that tasks were performed in a different way than set out in training materials. As is apparent from document 2.3 in relation to Carole Worthington, many of the disputes in relation to her work arise precisely because one party contends that the task was carried out differently than the training materials suggest.

3. Recasting the job descriptions will take significant time. It will also almost certainly lead to a requirement for further submissions and, potentially also, further evidence. This would lead to further delay in resolving the Stage Two process.

4. Recasting the job descriptions into three separate documents will require the parties to incur significant costs in circumstances where previous Tribunal directions required a single job description for each Claimant and Comparator. That approach reflected practice in all other equal value

> cases of which the Leigh Day Claimants' legal advisers are aware. It was endorsed by the Independent Experts who reviewed and commented on the first drafts."

38 We were unperturbed by the assertion (in numbered paragraph 2 set out immediately above) that we might fall into an error of law as a result of the claimants recasting their cases to any extent, since we were of course not intending to fall into such error. We could see that all that the Leigh Day claimants were proposing to do was in effect to continue to reshuffle the cards. We saw too that the bundle of documents which the Leigh Day claimants had appended to their recast case documents consisted of documents (or extracts from documents) which were in the hearing bundle before us, but that the claimants had not given us in that new bundle the hearing bundle references for those documents (or extracts). By way of illustration of the oddity of the situation generally, there was in the claimants' new bundle an extract from one critical document, which (we were able to ascertain using a digital search) was C7/268, concerning "Horticulture", to which no party had referred us in closing submissions, but to which we later referred ourselves and found to be of particular importance in resolving a dispute about the work of Ms Garrod (as we say in paragraphs 161-162 of Appendix 7, which is at page 362 below).

39 As for the respondent, its recast case consisted of a series of amendments to parts of the existing EVJD for Mr Pratt, principally by adding references to training materials and deleting some words. That too amounted to a reshuffling of the cards rather than what we had hoped for, which was the restating in far fewer (notional) cards the things which were in our view required by rule 4(1)(d) of the EV Rules. In addition, the respondent said, in the email (sent on 29 September 2023) enclosing its recast documents relating to the task of loading as done by Mr Pratt, that its estimate of the time which it would take for a single lawyer to do the work of recasting the respondent's documents stating the work of the comparators was "approximately 3,400 hours".

40 Therefore, both parties were saying that the work which we had concluded they should do was going to take thousands of hours of lawyers' (chargeable) time. The number of hours was the equivalent to over two years of the time which would be spent by a judge sitting full-time and doing no other work.

41 The respondent's estimate of the cost of the work was "in the region of £1.3 million".

42 In those circumstances, we concluded that we would have to just do the best that we could with what we had, and that we should just get on with the job without further delay. We informed the parties of that decision in an email from EJ Hyams of 6 October 2023, in which we said this.

> "**Introduction**

1. We the tribunal have today sat to consider the things that the Leigh Day claimants and the respondent have produced as a result of the orders which we made at the hearing of 20 July 2023, as set out in the record of that hearing which was sent to the parties on 26 July 2023.

No further order for the provision of further information at this stage

2. We have concluded that the only way forward which is consistent with the interests of justice is not to make any further orders for the provision of further information by the parties at this stage, and for the tribunal instead to do the job which we said needed to be done, which is to go back to the beginning and create a new set of documents stating our conclusions on (a) the job tasks of each sample claimant and each comparator, and (b) such additional facts as we see as being relevant for each claimant and comparator. As we said in our documents sent to the parties on 12 and 26 July 2023, we thought that the parties could assist us in themselves creating fresh documents, focusing on the training materials where they applied and applying the principles which we stated in our judgment of 12 July 2023. Whatever the parties have done, it appears that they have not done precisely what we thought we had ordered them to do, but in any event, the time which they estimate will be required to be spent on doing what they understood us to have required is enormous. We will be giving full reasons for the conclusion stated in the first sentence of this paragraph in the judgment which we give when we have completed our deliberations and recorded the results of those deliberations in the manner stated in that sentence.

What we will be doing next

3. We therefore plan to produce a new set of documents for each sample claimant and comparator. If and to the extent that a task is done by more than one claimant or comparator, then because that task will be stated primarily by reference to training materials, we envisage there being a certain amount of repetition. The possibility of such repetition means that we see ourselves spending less time on each set of documents as our deliberations continue."

What actually happened

43 Unfortunately, despite numerous repetitions in the EVJDs (which occurred both internally, since the same thing was stated in a number of places in the same EVJD, and through different EVJDs dealing with the same subject-matter), we had to consider the whole of each individual EVJD with care. That was because (1) the words of each of them differed in a number of ways even where they purported to describe what we regarded as the same work, and (2) we needed to see whether what was in each paragraph of the EVJD added anything material.

44 We therefore sat on the additional days stated at the top of this document, starting with 10 October 2023, and ending on 13 June 2024. In addition, EJ Hyams spent almost all of the rest of his available sitting time recording the result of our deliberations.

45 The manner in which the parties' evidence in relation to the work of the sample claimants and their comparators was adduced at the stage 2 hearing was a major complication here. The parties had used what they called EVJDs as vehicles for in some cases wide-ranging assertions about things which we concluded were irrelevant for the reasons which we gave in our judgment of 12 July 2023. They had also assumed that we had to decide precisely what words should be in the EVJDs. However, we concluded that our job was not to fit our determinations into the parties' documents which they called EVJDs. Rather, it was to determine relevant factual disputes. That was an obvious conclusion but it was firmly supported by what Lavender J said in paragraph 23 of his judgment in *Beal*, which we have set out in paragraph 21 above. We saw that at the end of the oral hearing of submissions, on 24 May 2023, Ms Spence said this (as recorded on pages 227-228 of the transcript of day 33).

> "I mean, obviously the determination of facts is totally up to the tribunal. All we would ask is that whatever you determine, the parties write into the agreed job description so we end up with a document for every post holder that has been agreed by both parties. We have tried to do it in the past where there have been some bits left to our interpretation and all that has produced is a dispute at the end of our report because – because obviously one party or the other disagrees with what we've decided. So we don't want to have anything like that happen in this case.
>
> So it's really important that the parties give us an agreed document at the very end after your determination."

46 Unfortunately, we were unable to arrange for, or do, what the IEs wanted in that regard. We regret it very much. However, we were by the time of writing these reasons (having made all of our determinations of fact that we thought were required) of the view that there were before us many factual disputes about things which the IEs would not be taking into account, either because they were about things which were outside the scope of the IEs' inquiry or because they were about something which was trivial. In addition, we thought that the only reliable way in which the IEs could do their job was to work through the tasks which we concluded, in the manner stated in Appendices 1, 2, and 4-8, were required by the respondent to be done, using such assessment method as the IEs thought was right, and then prepare a report by reference to the factual findings that we had made. The reason why we were in that situation was the manner in which the parties had approached the case, and there was, we emphasise, in our view no alternative or easier way for the IEs to proceed.

47 By way of amplification, or explanation, we make the following observations. What the parties had done here was to think that rule 4(1)(b)(ii) and rule 4(1)(d)(i) of the EV Rules meant that whatever the parties agreed by way of words to be included in a "job description" had to be taken into account by us and the experts. That was incorrect: the parties cannot, by agreement, make something relevant which is, as a matter of law, irrelevant. Of course in many cases relevance is not easily determined, but it is nevertheless a question of law, and not one of fact.

48 In addition, given the parties' approach to the case, most if not all of the agreed matters were only about what the relevant employee did: the agreed matters were not about what, applying our understanding of the applicable test, it was the employee's job (technically, using the word in section 65(6) of the EqA 2010, the correct word was "work", but in this context the word "job" fitted better) to do. In some cases, we found that what had been agreed as a matter of fact was unlikely to be correct in that we could not see why the factual assertion had been agreed. That was in turn because what had been agreed appeared to us either to be illogical or highly improbable. In those highly unusual circumstances, which included that we had not heard from the parties on the issue, we concluded that the agreement was not about the work of the employee for the purposes of section 65(6) of the EqA 2010: it was, rather, only about the way in which the employee in fact acted, which was in the circumstances a different thing.

49 We add that the parties had both used their EVJDs as vehicles for very detailed assertions about what the employee in each case did in the course of his or her work. The EVJDs had then been expanded by the inclusion of the parties' disagreements about what was said in the EVJDs, with the result being called a record of dispute, with the parties' reasons for their failure to agree stated in that record. As we say in the first sentence of paragraph 43 above, there was much repetition in some of the documents. In the records of dispute the parties had, wherever there was a repeated statement, repeated their reasons for disputing the statement.

50 Then, the parties had in closing submissions used the same documents (the so-called records of dispute) as the vehicle for their written submissions.

51 So, in summary, the parties had focused purely on what the sample employees and their comparators had done, not what work it was their jobs (i.e. the work which the respondent required them in the course of their employment) to do. The parties had then gone into great detail about the manner in which, they contended, the work of the sample claimants and their comparators was in fact done. They had then maintained disputes about some things which were in our view genuinely best regarded as trivial, so that the outcomes to those disputes were in our view highly unlikely to affect the assessment by the IEs of the demands of the work of the claimant or comparator in question.

52 Our solution to all of the problems arising from the manner in which the parties had advanced their cases was (unusually, and only because we could see that the parties were either unable or unwilling to do the work; we return to this aspect of the matter in paragraph 55 below) to do the job of determining what was the work of the sample claimants and their comparators for equal value purposes by

52.1 first analysing (with care and at some length with a view to avoiding doubt and minimising the possibility of future disagreements) what was said in the documents before us which recorded, or stated, the training provided by the respondent to employees doing work of the sort which it was claimed the sample claimants and their comparators did, and then

52.2 going through the parties' evidence relating to the way in which the relevant employee did his or her work. Only if that evidence added anything relevant to what was in the training materials did we take it into account in deciding what was the work of the employee for the purposes of section 65(6) of the EqA 2010.

53 Where a factual assertion about the work of a sample claimant or a comparator was not agreed and we concluded that it was necessary to do so, we resolved the dispute in relation to it, stating how we had resolved that dispute, and why we had resolved it as we had. After doing that, if (as frequently occurred) the same dispute was maintained, either later on in relation to the EVJD in question or in relation to another EVJD, we either repeated our conclusion on the point or said nothing about it on the basis that if the appendices were read in sequence then our conclusion on the point would by then be known.

54 We record here that we did not resolve a dispute even where it was about a relevant matter where the resolution of the dispute was in our view highly unlikely to affect the view of the IEs about the demands and therefore the value of a particular task. That was so where in our view the difference between (1) the thing for which a party was contending and which was not agreed and (2) what was agreed, was of no practical importance because even if we had accepted the contention that the factual assertion about the non-agreed thing was correct, that acceptance would have been highly unlikely to affect the IEs' view on those things.

55 Finally, we add something which is of critical importance from the point of view of the doing of justice. That is that we were in the circumstances forced by the interests of justice to do a job which in our view should have been done by the parties, but without the parties having an opportunity to address us on the things which we ourselves found by our own research. That is not the norm, and we would have avoided it if we could have done so. If any relevant party (i.e. the Leigh Day claimants, the Harcus claimants or the respondent) is of the view that we have made a material error in our understanding of the documentary or oral evidence before us, or their contentions in relation to it, then that party can apply for a reconsideration under rule 71 of the Employment Tribunals Rules of Procedure 2013 of any finding of

ours which is materially affected by such putative misunderstanding. We have also borne it in mind that the IEs can apply to us for in effect clarification of any of our findings, using the route provided for by rule 6(3) of the EV Rules. Having said those things, we do not encourage either route being used, if only because these proceedings have already taken up much more judicial time than in our view they should have done, and because there is a need to act proportionately and otherwise in accordance with the overriding objective stated in rule 2 of the Employment Tribunals Rules of Procedure 2013. Nevertheless, especially given the length and complexity of the appendices (which resulted from the length and complexity of the EVJDs and the parties' disputes about the content of those EVJDs), if any of the parties or the IEs seek clarification of any aspect of the appendices (including what appears to be an omission or a textual error which requires correction) then we will, through EJ Hyams, be willing (if the parties request it) to provide such clarification without the party or the IE having to use either of those formal routes or, as the case may be, correct the text and issue a certificate of correction.

The reason why there are eight appendices

56 When we worked through the very long sets of closing submissions for each sample claimant and comparator, we started with the work of Mrs Worthington. In doing so, we tried hard to work with the so-called EVJD for her and to adapt it to suit the approach which we concluded had to be taken. We found that it was possible to use it as a vehicle for determining a number of important factual disputes about the work of Mrs Worthingon, but by the end of the process of determining those disputes, we had realised that the respondent's evidence was in some respects markedly inconsistent with its own training materials.

57 We then worked through the parties' submissions in relation to the work of Ms Williams. In doing so, we went laboriously through the parties' contentions and the evidence. We found that we could not accept some key parts of the evidence of Ms Williams, and as a result, we had no alternative to considering each factual dispute with care.

58 We then turned to the evidence about the work of Ms Cannon and the parties' contentions in relation to that evidence. We describe in Appendix 3

58.1 the process which we initially followed in seeking to determine what was the work of Ms Cannon for the purposes of section 65(6) of the EqA 2010, and

58.2 the reasons why we concluded that we had to stop following that process and take a different approach in the determination of what that work was.

59 In Appendices 4-7 we followed what we considered to be the best approach to the determination of the disputes which the parties maintained in relation to the work of Ms Cannon, Ms Thompson, Ms Oz and Ms Garrod.

60 In Appendix 8, we took a different approach. We did so because the work of the comparators was even more extensively described in training materials than that of the sample claimants, and because we concluded that we could best determine what that work was (1) task by task, and (2) by first considering what were the things which the comparators had to do as part of their work for the purposes of section 65(6) of the EqA 2010, using as our factual source the bundles currently before us, and only then, secondly, considering the parties' factual assertions in relation to those tasks.

61 In the course of making our factual determinations and stating them in the appendices to these reasons, we arrived at some conclusions which were of general application and which we thought it would be helpful to mention here so that they were collected in one place.

Conclusions to which we came about relevant issues of principle after having made all of the factual determinations which we concluded at this stage needed to be made

The impact of the use of PI rates here by the respondent

62 In paragraphs 684-685 of Appendix 8 (at pages 551-552 below), we state the result of much consideration of the issue of the relevance of employer-imposed performance targets. That result was contrary to what we initially concluded in paragraphs 70-72 of our judgment of 12 July 2023. We arrived at that contrary conclusion because we could not see how it could properly be decided that an employer could, by imposing unreasonable productivity targets on an employee, increase the value of the work of the employee for the purposes of section 65(6) of the EqA 2010.

63 We add that in coming to that view, we took into account fully the factual material set out in paragraphs 111-113 of Appendix 8 (at pages 420-421 below). That material showed how clearly separate the imposition of a PI target was from the work to which it related, and confirmed for us that a PI target was purely incidental for present purposes. We add too that we did not decide that what we will call commercial pressures were irrelevant in determining the work of an employee for the purposes of section 65(6) of the EqA 2010, although we thought (subject to further consideration in the light of any submissions that might subsequently be made by the parties and such assistance as we might be given by the IEs) that those pressures were likely to be the same throughout a single employer's operations.

The impact of doing a task well

64 The other side of the coin was that if an employee responded well to PI targets, or simply worked effectively, then that had to have no effect on the value of the work done by the employee for the purposes of section 65(6) of the EqA 2010, i.e. the work which the employer required the employee to do in the course of the

employee's employment. Paying the employee more for doing the job well might be the subject of a successful material factor defence, but that was another matter.

The need to take care and the impact of a failure to do so or otherwise to do the employee's job properly

65 We also came to the (parallel) conclusions stated in paragraphs 687-689 of Appendix 8, which were in the following terms.

> '687 We add that the potential consequences of a failure to do a job well, or correctly, must in our view be irrelevant to the demands of the job. Those potential consequences might be a material factor justifying a difference in pay, but that was not relevant at a stage 2 hearing.
>
> 688 The same was true of risks to the health and/or well-being of an employee. We could not see how an employer could properly be said to increase the value of an employee's work by making him or her work in unsafe conditions. In addition, an employer is under obligations imposed by the Health and Safety at Work etc Act 1974 and regulations made under that Act. Those obligations apply to the work of a claimant as well as a comparator, and unsafe working practices of an employee in any environment cannot consistently with recognising those obligations add to the value of the work done by that employee.
>
> 689 We also came to the conclusion that the physical conditions in which work was done could not properly be said to increase the value of the work unless the physical conditions increased "the demands made on [the job-holder] by reference to factors such as effort, skill and decision-making" within the meaning of section 65(6) of the EqA 2010. There was, we saw, no authority on the point, but it was in our view another inescapable conclusion. If there was a difficulty arising from the point, then it was going to arise in the application of section 65(6) in practice.'

66 Accordingly, we concluded that any statement in an EVJD to the effect that the job-holder had to exercise skill and care merely stated the obvious and did not need to be there (although the impact of the need to take care had to be taken into account by the IEs). A good example of such a statement was paragraph 6.219 of the EVJD for Mr Hornak (at D6/1.2/81), where this was said (it was originally stated as an obligation to take care, and it was amended to the following words presumably on the basis that the respondent was persuaded that the claimants' contentions on the need to describe only what the relevant employees actually did, was correct).

> "The job holder took care when driving his Loading Truck and was alert to the presence and movement of others in order to avoid collisions with other operatives working in or around the Loading Bay area, and the risk of accidents and injuries."

67 We also concluded that if a failure by an employee to do his or her job properly could lead to (1) physical injury, (2) damage to stock, or (3) damage to equipment, then that too was obvious and did not need to be stated specifically either by the parties or us. That was in part because the impact of the failure would vary in line with the extent of the damage (for example its enormity or its triviality) resulting from the failure. It was also because if there was the potential for considerable damage then that will have been obvious and if it was relevant then it could be taken into account by the IEs.

68 There were in the EVJDs for the comparators numerous assertions that "it was part of the job holder's work to ensure that he carried out all related activities in such a way as to avoid the hazards associated with it and the risks arising from those hazards". (There was one such statement in paragraph 6.230 of the EVJD for Mr Jones, to which we refer in paragraph 282 of Appendix 8, at page 458 below.) We could not see how it could be said that any employee's work involved avoiding hazards. The work was the work. The hazards were the hazards. The work had to be done in such a way as to minimise the risk of the hazards arising, and that way was shown here at least for the most part by the training materials. Therefore, saying that "it was part of the job holder's work to ensure that he carried out all related activities in such a way as to avoid the hazards associated with it and the risks arising from those hazards" added nothing material to the evidential picture of what was the work of the job-holder for the purposes of section 65(6) of the EqA 2010.

69 We therefore do not (unless we found it helpful to do so) address in the appendices any dispute about statements of the sorts, or about the things, to which we refer in the three preceding paragraphs above.

The impact of a failure to ensure that equipment was in good working order

70 Similarly, we say this in paragraphs 333, 522 and 523 of Appendix 8 below (at pages 469 and 515 below).

> "333 ... It did not seem right to us to include in our analysis of the working conditions of either the claimants or their comparators hazards which would have arisen (if they did in fact arise) only because of a failure by the respondent to comply with its obligation to take reasonably practicable steps to ensure that the working environment was safe."

> "522 We could not see how, as a matter of law, the value of the work of loaders (bearing in mind the fact that there were many of them) could vary according to the incidence of difficulties with the equipment used by the loaders resulting from the equipment being faulty. That was because in our view it could not be correct as a matter of law to say that an employer could make an employee's work more valuable for the purposes of section 65(6) of the EqA 2010 by making it harder for the employee to do his or her job by failing to keep equipment used by the employee in good order

> or, if alternative equipment could be used, providing such alternative equipment. In our view, the value of the work had to be assessed on the assumption that the employer would either keep the equipment in reasonably good repair or, where it could not be so kept and it was possible to do so, immediately replace the equipment.
>
> 523 Of course, that principle, if correct, cut both ways, so that a failure to ensure that for example cages were in good order could not increase the value of the work of a customer assistant in a store for the purposes of section 65(6) of the EqA 2010 just as much as a failure to ensure that roller shutter doors were in good order could not increase the value for those purposes of the work of a loader."

The impact of a failure to provide or permit an employee to use a calculator

71 Also similarly, as we say in paragraph 762 of Appendix 8 (at page 571 below), where a comparator might need to do a calculation and a reasonable employer would provide the employee with an electronic calculator or permit the employee to use the calculator function on a mobile telephone to do it, then, we concluded, the respondent could not argue that the use by the comparator of mental arithmetic added in any way to the demands and therefore the value of the work.

Assertions about the impact on a job-holder of doing something

72 Similarly, the impact on a particular job-holder of undertaking a work task was irrelevant as such, not least because the issue here was what were the demands of the work and not how they affected a particular individual. One example is the content of paragraphs 6.259 of the EVJD for Mr Hornak and Mr Macko, which referred to the claimed impact on (it was alleged) both of them of shrink-wrapping multiple cages.

References to "responsibility" for something

73 We refer in paragraph 214 of Appendix 8 (at page 442 below) to the issue of responsibility as such. As we say there:

> "[W]e found very few among the plethora of references to responsibility on the part of a comparator which added anything material for present purposes. That is because stating that a comparator was responsible for doing something is no more than another way of saying that the comparator was given that something to do as part of his work for the purposes of section 65(6) of the EqA 2010, i.e. it was a task which it was part of his work for those purposes to do."

74 For the avoidance of doubt, the respondent's references in the EVJDs for the comparators to a claimed "burden of accountability and responsibility", to which we

refer in paragraphs 542 and 652 of Appendix 8 (at pages 520 and 544 respectively below), similarly in our view added nothing material for present purposes.

The relevance of the AMC guides

75 The claimants opposed the appending to the EVJDs of the comparators of extracts from what the respondent referred to in those EVJDs as "the AMC Guide". All references in those EVJDs to the AMC Guide were opposed by the claimants for the reasons given by the Leigh Day claimants in paragraphs 167 and 168 of their overarching closing submissions, which were in the following terms.

> "167. The Respondent seeks to add multiple appendices to its EVJDs. For Mr Davis these appendices would add 198 pages. These mainly constitute a number of Safe Systems of Work documents and documents created by the Respondent (or its lawyers) called AMC Guides. These should obviously not be appended: they are a combination of documents which reflect risk assessments, training material and manuals. They may contain some information which would amount to job facts, but any information they contain is almost certainly already included in the lengthy comparator EVJDs.
>
> 168. There are at least three further problems with the Respondent's approach:
>
> a. The EVJDs are meant to contain job facts. These appendices contain large swathes of information which are not job facts and are simply not relevant. As mentioned, any relevant facts they contain are already in the EVJDs.
>
> b. Appending them to the EVJDs would cause difficulties for the IEs who have requested a single document, not a document with over 100 pages of appendices the contents of which duplicates parts of the body of the EVJDs and is not limited to job facts.
>
> c. The Claimants have not sought to append equivalent information to their EVJDs. If the Tribunal permits the Respondent to do so, fairness demands that the Claimants add a selection of equivalent materials to their EVJDs."

76 The Harcus claimants on a number of occasions also opposed the respondent's references in the comparators' EVJDs to "the AMC Guide" on the basis that the guide was "irrelevant to what the job holder actually did". (That was said for example in response to paragraph 6.42 of the EVJD for Mr Pratt.)

77 For the reasons stated in paragraph 16 above, whatever was said in the AMC Guide was in our view capable of being at least relevant, or material. In fact, there were several AMC guides, none of which were in the bundle before us in their complete

form, and we did not have full copies of them until 2 May 2024 after we (through EJ Hyams) on 29 April 2024 had asked that they be sent to us. In any event, we concluded that the claimants' opposition to the references in the EVJDs to "the AMC Guide" was mistaken in principle. We have therefore unless otherwise stated ignored any dispute which was maintained by the claimants on the basis only that a part of the EVJD should not have referred to "the AMC Guide".

78 Having said that, both because of the practical factors to which we refer in paragraph 908 of Appendix 8 (at page 608 below) and as a matter of principle for the reasons stated in paragraph 17 above, we doubted that it was necessary for the IEs and us to know precisely what sequence of commands a comparator was required to follow on the AMC as such. That was because that precise sequence seemed to us to be immaterial once it was accepted (as it had to be) that for example a loader had to use an AMC and follow the instructions on it as part of carrying out any task which was delivered to the loader via the AMC. If, however, the IEs disagree with us in that regard, then they must say so under rule 6(3) of the EV Rules.

The irrelevance of the working hours of an employee and therefore of overtime

79 As we say in paragraph 5 of Appendix 1, we were unable to see how the fact that something was done outside an employee's usual hours, or in any particular hours, was relevant to the question of what was their work for the purposes of section 65(6) of the EqA 2010. That was despite what Lavender J said in paragraph 225 of his judgment in *Beal*, which was this.

> "As for [Mr Brooks, who worked for the employer doing maintenance work] working additional shifts to complete refurbishment, I consider that this formed part of his work which should be acknowledged in his job description, but that its nature as (optional) overtime should be acknowledged."

80 We racked our brains on this issue. We could not see why the time of day when work was done was relevant to the determination of what was that work. On that basis, it was not necessary for the claimants to put before us evidence about the work which was done by one sample claimant at night which was of the same sort as the work which was done by another sample claimant during the day. The work was the same, whether it was done during the day or during the night. On that basis, we concluded that we would make findings of fact at least at this stage only about the work done by the sample claimants and their comparators during their normal (i.e. non-overtime) working hours.

81 While it was not determinative, it helped us to know that it appeared that the IEs were of the same view. On 27 October 2023, EJ Hyams asked the IEs in an email for their view on the relevance of overtime. They sent us a note dated 2 November 2023 in reply, in which they said this.

> "The IEs would consider that any work included in the JDs that is subject to an additional payment, such as overtime, shift working or first aid, should NOT be included in the EV assessment."

A statement about the manner in which the parties' closing submissions were made to us and how they should in the future be made to us

82 We end these reasons with an observation on the manner in which the parties stated their written submissions to us. All parties used spreadsheets for their so-called "records of dispute". During the hearing, we, through EJ Hyams, expressed the hope that the parties would use tables instead of spreadsheets for their closing submissions. That was because tables were more likely to be legible and less likely than text in a spreadsheet to be difficult to follow. The respondent then put its written closing submissions into Word tables, but the claimants' closing submissions on the thousands of factual disputes which we were required to determine were in spreadsheets. Some of the content of the spreadsheets was not immediately visible, and the text in the cells of the spreadsheets (which were not designed to contain text, but, instead, figures, with formulae applying to the figures) was in very small font. As a result, the spreadsheets could be read with any kind of ease only if they were seen on a monitor whose screen was at least 32 inches size and of UHD (i.e. ultra-high definition) or 4K resolution.

83 We concluded that the use even of tables had the effect of encouraging prolixity and repetition, and that the parties' written submissions to us should in the future be made in purely narrative form.

_____
Employment Judge Hyams

Date: 4 July 2024

Sent to the parties on:

.....5 July 2024

.....
For Secretary of the Tribunals

Appendix 1

Carole Worthington

JOB DESCRIPTION AS DETERMINED BY THE TRIBUNAL, WITH REASONS FOR DETERMINATIONS STATED WHERE NECESSARY IN SQUARE BRACKETS (AND, IF IN THE BODY OF A PARAGRAPH, ITALICS)

(The following document is intended to be a coherent statement of Mrs Worthington's work in so far as it was in dispute, i.e. the job which she was employed by the respondent to do, to an extent shortened as compared with the 130-page EVJD for her. The numbers in square brackets at the end of the headings or (as the case may be) at the start of, or in, the paragraphs in this documents are references to the paragraphs of that EVJD which the following paragraphs in this document are intended to state or to which any reasons in this document relate. We have in some places included and/or amended the words of the EVJD even where they were agreed. That was done purely for the sake of clarity and consistency with the content which we have ourselves written: any such amendment is not intended to affect the substance of the agreed wording. We otherwise make no reference below to an agreed part of the EVJD. To the extent that we have recast the EVJD and amended its structure, we have done so because of the unwieldy and repetitive structure of the original EVJD. Any reference to a repetition in the EVJD below is to be read as a statement that the repeated part should be omitted.)

Overview [1], [25]

1 The job-holder ("the JH") worked as a "Customer Assistant – Replenishment" in the dairy department at the respondent's Woolton superstore ("Woolton" or, as the case may be, "the store"). The JH's role was primarily to replenish dairy products, cooked meats, uncooked bacon, ready meals, eggs, cakes and sandwiches. In addition, the JH was required to keep the department presentable, reduce the price of goods which were going out of date, and provide relief support on checkouts. Throughout the JH's shift, and regardless of the task JH was focussed on, the JH was required to give customer assistance by seeking to answer customer queries and otherwise provide good customer service.

The JH's working week [6], [8]

2 During the Relevant Period, the JH's working hours were as follows.

3 Between February 2012 and January 2014, the JH worked 24.5-25.5 hours per week:

3.1 on Tuesdays from 7am to 1pm;

3.2 on Wednesdays from 7am to 12:30pm;

3.3 on Saturdays from 7am to 3pm; and

3.4 on Sundays from 8am to 2pm initially, changing during 2012 or 2013 to 7am to 12 noon.

4 Between January 2014 and August 2018, the claimant worked 21.5 hours per week:

4.1 on Tuesdays from 7am to 1pm;

4.2 on Wednesdays from 7am to 12:30pm;

4.3 on Saturdays from 7am to 12 noon;

4.4 on Sundays from 7am to 12 noon.

5 When working between 4 and 5.75 hours, the JH was entitled to a 15-minute break. When working between 6 and 7.75 hours the JH was entitled to a 30- minute break. When working between 8 and 8.75 hours the JH was entitled to a 45-minute break. When working 9 hours or more, the JH was entitled to 90 minutes of breaks. As long as one member of the department remained on the shop floor, the JH was able to (and did) choose when to take a break.

[**[7], [28]** We could not see how what the JH did by way of overtime, whether paid or unpaid, was relevant to the question of what was her work for the purposes of section 65(6) of the EqA 2010. If it is relevant, then the question of what she did in that overtime might arise, but then again, it might not. We could not see how that question was relevant for the purposes of that subsection.]

The times when customers were present when the JH was working [9],[10], [366]

6 The times when the JH was working when Woolton was open to customers and the percentage of the working day when it was open were these.

6.1 On Tuesdays from February 2012 to December 2014, the JH's shift was 6 hours long, the store was open to customers for 4.5 of those hours, and the percentage of time when the store was open to customers was 75.

6.2 On Tuesdays from January 2015 to August 2018, the JH's shift was 6 hours long, the store was open to customers for 5 of those hours, and the percentage of time with the store open to customers was 83.33.

6.3 On Wednesdays from February 2012 to December 2014, the JH's shift was 5.5 hours long, the store was open to customers for 4 of those hours, and the percentage of time with the store open to customers was 72.72.

6.4 On Wednesdays from January 2015 to August 2018, the JH's shift was 5.5 hours long, the store was open to customers for 4.5 of those hours, and the percentage of time with the store open to customers was 81.81.

6.5 On Saturdays from February 2012 to January 2014, the JH's shift was 8 hours long, the store was open to customers for 6.5 of those hours, and the percentage of time with the store open to customers was 81.25.

6.6 On Saturdays from January 2014 to December 2014, the JH's shift was 5 hours long, the store was open to customers for 3.5 of those hours, and the percentage of time with the store open to customers was 70.

6.7 On Saturdays from January 2015 to August 2018, the JH's shift was 5 hours long, the store was open to customers for 4 of those hours, and the percentage of time with the store open to customers was 80.

6.8 On Sundays from February 2012 to December 2014, the JH's shift was 5 hours long, the store was open to customers for 3.5 of those hours, and the percentage of time when the store was open to customers was 70.

6.9 On Tuesdays from January 2015 to August 2018, the JH's shift was 5 hours long, the store was open to customers for 4 of those hours, and the percentage of time with the store open to customers was 80.

The manner in which the JH was required by the respondent to interact with, or generally assist, customers [304], [366-386], [403], [405], [608-609]

7 The manner in which the JH was required to assist and otherwise interact with customers is described in detail at **[366-368]**. It is mentioned at **[304]** and in the first two bullet points of **[403]**, superfluously given the content of **[366-368]**. To the extent that the content of **[366-368]** is not agreed, it should be regarded as determined by the following training documents of the respondent.

7.1 C7/75, showing that the respondent's "topline customer value" was 'No one tries harder for customers', and otherwise how to deliver "Great Service At The Checkouts". C7/26 was another document which helpfully showed what was required by way of customer service at checkouts.

7.2 C7/140, pages 1-8 of which were particularly material.

7.3 C7/143: page 3 of which described the respondent's core values and the general approach sought by the respondent from staff, including treating customers "how we like to be treated", and on the basis that "No one tries harder for customers", giving "Advice, inspiration and a smile". Pages 11-14 described the services offered by the respondent of which shop floor staff, including the JH, should be aware and showed that the content of **[386]** was

apt, albeit that the precise services of which the JH needed to be aware would have changed as time went by. If and to the extent that Mr Richardson was not aware of that content (as stated by him in paragraph 373 of his first witness statement), then that was irrelevant, given that the JH was required by the respondent's own training document to be aware of the things stated in C7/143.

7.4 C7/124 stated more specifically the services offered by the respondent of which the JH was required by the respondent to be aware.

7.5 C7/145: page 4, describing the "four important first steps" to being "First For Service", including acknowledging customers by saying "hello" to them "before they greet [the JH]"; page 5, emphasising the importance of having "a friendly, warm and welcoming face" when on the shop floor; page 7 stating the importance of "Checkout colleagues chatting [to customers] whilst scanning" and "greeting [them] in a friendly manner"; the store being kept "clean and tidy"; being willing to have a "friendly chat" with a customer; "offering to help with packing"; "helping to locate a product in the store"; being "very helpful" when asked to do something; page 11, regarding ensuring when "dealing with an unhappy customer", staff "approach the situation with a positive, 'can-do' attitude, and taking the unhappy customer to the Customer Service Desk if the customer has "a specific query, such as a refund or a complaint"; pages 12-17, concerning body language; page 19, describing the respondent's "Price Promise" policy and how to interact with customers when operating a checkout in relation to the information given by the checkout in that regard; and pages 21-24, describing in detail the respondent's loyalty card, called "Clubcard", including on page 22 what to do in regard to that card.

8 We saw that **[380(g)(v)]** was disputed. We accepted the JH's evidence in paragraph 186 of her first witness statement. If and to the extent that the dispute was material, we therefore accepted that the respondent's proposed words were not accurate. If it was material, then what the JH's work for the purposes of section 65(6) of the EqA 2010 was in this respect was to be ready and willing to answer questions about the cooking, using or storage of items, and that if she did not already know, then she was expected at least to look at the item's packaging to see if the answer was discernible from it, or what was said on it.

9 As for **[380(k)]**, the JH's role was to give good customer service as evidenced by for example C7/145, so that, as stated on page 6 of that document, the JH was required by the respondent to do her best to "make the customer shopping trip as fantastic as possible". If and to the extent that that involved being willing to take "particularly upset customers to the coffee shop" and spend 5 minutes there, chatting with them, then that was part of the JH's work for the purposes of section 65(6) of the EqA 2010. The respondent has accepted that she did in fact do that "around twice a year", but it says that after doing that, the JH "return[ed] to her job". Thus it is the respondent's case that that was not part of her job. In our judgment, what the JH did in fact do in this respect was consistent with C7/145, and doing otherwise would have been

inconsistent with that training document. The JH's own evidence (recorded on page 193 of the transcript for day 3) was that she was not told by any manager that she should not have done it. Accordingly, assuming that it was relevant on the basis that it was illustrative of what the respondent required of persons doing the job done by the JH, we accepted the claimants' proposed version of **[380(k)]**.

10 **[381]** The way in which the JH was advised or required by the respondent to deal with aggressive or angry customers was stated by the respondent at C7/147/6. The manner in which duty managers were trained to deal with conflicts was the subject of C7/683. That was in our judgment good evidence of the kind of situations which persons in the position of the JH, i.e. customer assistants, might encounter. The JH's own evidence in cross-examination, recorded at pages 67-68 of the transcript of day 3, was that she would first try to "take the heat out of a situation" and then, if she felt that she was not fully in control of the situation, seek assistance from a manager and "walk away". That was consistent not only with C7/147/6, but it was also consistent with C7/145/11 and with the whole of C7/705. We therefore accepted that the JH was obliged to "try to resolve the issue", as claimed by the claimants, so the word "must" was correct. In addition, however, we agreed that the following words, contended for by the respondent, slightly amended, were apt, and should be inserted before the last sentence of **[381]**:

> "If the JH was unable to resolve the issue or the customer showed any signs of aggression the JH was required to apologise and walk away, informing a manager."

11 The frequency with which the JH encountered frustrated, angry or aggressive customers was disputed. We saw that the JH had originally said, in the interview recorded at C6/4, on page 141, that she personally encountered antisocial behaviour "maybe once every six months". She then said that she encountered "frustrated, angry or aggressive" customers "at least twice a month". That was said in paragraph 190 of her first witness statement. We concluded that the latter referred to a wider set of circumstances than the former. The respondent led no direct evidence on this: Mr Richardson's witness statement dealt (in paragraphs 436-444) only with the things which he said were recorded on the respondent's Incident Reporting System and what the JH herself had said in her interview to which we refer in the second sentence of this paragraph. We saw that at C7/705/1, it was said that "Last year there was over ½ million incidents in our Convenience stores. The safety of our colleagues and customers is our number 1 priority". That rather suggested that the frequency with which persons in the position of the JH encountered difficult customers was rather more than twice a year, although the JH herself might not have encountered as many as other customer assistants because of her experience of defusing potentially difficult situations. In fact, we thought that the frequency with which the JH encountered frustrated, angry or aggressive customers was impossible to determine with any confidence, and that it was best for the purposes of section 65(6) of the EqA 2010 to say that the JH encountered them at least twice a year, but that the fact that she might encounter them was a material working condition. This was a matter which

was dealt with in **[608-609]**. Given what was said at pages 5-6 of C7/147, we accepted that the JH was not required by the respondent to do anything which might put herself in danger. For the reasons given in this paragraph, we concluded that it would be wrong to conclude that the JH observed a "security related incident" only once every six months, as contended for by the respondent in response to the claimants' proposed words of **[608]**. In all of the circumstances, we accepted the claimants' proposed words for **[608-609]**.

12 **[382]**: The final words of **[382]** which were opposed by the respondent were in our judgment apt, if recognised as a statement that the JH's work included being alert to the possibility of a difficult customer being difficult in order to distract the JH while another person sought to steal from the store. That was if nothing else because of C7/147/9, which required the JH to be "alert and vigilant at all times" with a view to "help[ing] reduce theft". It was also because it was in our judgment obviously part of the role of the JH.

13 **[385]** was not a statement of a task of the JH. It was, rather, a statement of the conditions in which the JH worked. Given that it was in the EVJD, however, we record here that unless and until the respondent told staff that it was no longer paying for a "mystery shopper" service, the JH and all other customer assistants were left with the impression that such a service was bought by the respondent so that the conditions in which the JH worked included knowledge of that service and the possibility of it having a negative impact on her if she gave less than good customer service. We saw that Mr Richardson did not say in paragraphs 374-376 of his first witness statement that the respondent had informed staff in the position of the JH, i.e. shop floor staff doing the same job as the JH, that mystery shoppers were no longer used. However, as we record in paragraph 50 of Appendix 2 (at page 96 below) which contains our determinations in relation to the facts of Ms Williams' work, we concluded that the respondent stopped using mystery shoppers in 2013 and that the respondent's stores workforce must have known that. We therefore agreed with the respondent's proposed words for **[405]**, but we disagreed with the respondent that the JH was not affected by the mystery shopper regime personally. We therefore concluded that the words of **[385]** should be read in the light of that finding. We also thought that the rest of the words of that paragraph should be amended and that the paragraph should be in this form.

> "The JH's performance in regard to customer service was monitored by (1) the JH's managers and (2) until 2013 by the mystery shopper regime as shown by C7/184 and C7/785. In addition, the JH worked in the knowledge that customers might make complaints to the respondent if they were unhappy about any aspect of the work which she did which affected them."

The distances which the claimant had to walk [12], [13], [173]

14 The floor plan which was called Appendix 4 to the EVJD for the JH (and therefore not Appendix 4 to this document) was an accurate representation of the layout of the JH's workplace.

15 The dairy department's produce was on sale in chiller cabinets for the most part in three aisles of the store. Two of these aisles were dedicated to the dairy department's products. The other one included also meat and fish, for the replenishment of which the JH was not responsible. The dairy department also included the "Food to Go" chiller cabinet at the front of the store and the occasional "integral chillers" referred to in paragraph 173 of the EVJD, which was agreed.

The ambient temperature around the chiller cabinets [15]

16 It was the JH's evidence that she worked for the majority of her time around the chiller cabinets on the store's shop floor and that the ambient temperature around them was 16 degrees Celsius. When working in the chiller cabinet aisles, the JH was reaching into and out of chiller cabinets which had a temperature of between 1 and 5 degrees Celsius. When the JH was working inside the dairy chiller in the Woolton warehouse, the temperature was between 1 and 5 degrees Celsius.

> [We accepted that evidence of the JH as the only evidence in response was that of Mr Richardson, who did not say that he had actually taken the temperature of the air in those places. The only material debate was whether the temperature was 16 degrees Celsius only in the middle of the aisles. Assuming that the issue was material, i.e. to the independent experts' determination of the value of the work done in relation to the replenishment of chiller cabinets, we accepted that the temperature might be lower than 16 degrees Celsius otherwise than in the centre of the aisle.
>
> We did not see a need to record a finding on the words proposed by the respondent at this point, namely "At any one time, JH would be in the chiller for a matter of 1-2 minutes to place or retrieve cages and between 4-8 minutes to sort back stock, which she would do for one cage per shift." That is because the reasons for that insertion, stated in the respondent's written closing submissions, focused on a number of things which in our judgment were irrelevant, including how the JH herself experienced cold temperatures. That factor was in our judgment irrelevant because, consistently with what we say in paragraph 72 of our second reserved judgment, at page 26 above, the issue here was the conditions in which the work was done, not the subjective experience of the worker of those conditions. That in turn was because, unless the independent experts tell us otherwise, we understand that the former affect the value of the work, but the latter does not.]

17 We concluded that the things said in the preceding paragraph above were sufficient to record the temperatures in which the JH worked when replenishing chilled cabinets on the shop floor at Woolton.

The extent to which the JH was supervised [16-17], [25-27]

18 From around 2015 one manager managed both the dairy department and the "produce" department. The JH's department manager's shifts varied, co-inciding with the JH's hours for about 70% of the time. The JH required little supervision and asked for little by way of assistance from managers. In the absence of the department manager, assistance was in practice available to the JH from other managers. Except when asked to assist at the checkouts, the JH was directed by a manager to carry out a specific task about once a month.

> [We did not see a need to say more than this in determining such disputes as there were in regard to paragraphs 25-26 of the EVJD. That was because the issue for us was the value of the work done by the JH and in that regard we understood that the material issue was the extent to which the JH was supervised, and not how many managers she had and who was in practice available to her for advice. That in turn was something which was best determined by reference to the individual job tasks.]

Time pressures on the JH [18]-[23]

<u>Generally</u>

19 **[23]** The JH was obliged to "clock in", using a card to do so.

20 The claimant was under pressure of time when she worked a shift starting at 7.00am. There was a target of all of the dairy delivery being out on the shop floor (and if not there then in the chiller section of the store-room) by 11.00am and that was enforced by the respondent's management by a manager speaking to the staff if they were in danger of missing that target, with a view to getting them to speed up. The pressure on the claimant increased if there were fewer staff to do the work.

> [This was borne out by the evidence of Mr Richardson referred to in paragraph 88 of the overarching closing submissions of the Leigh Day claimants. The number of staff who were present to do that work affected the pressure on the claimant. We accepted her evidence on that as recorded on day 2, at pages 88-95.]

21 **[20]** On Saturdays throughout the Relevant Period around 5 colleagues worked in the dairy department during the JH's shift, including the JH.

> [For the sake of clarity, we have here repeated the content of the agreed paragraph numbered 20. That is because we have otherwise, for the sake of clarity, reframed this section of the EVJD. We say more about this approach in our explanation paragraph above paragraph 26 below.]

22 **[21]** On Sundays at the start of the Relevant Period, there were 5 colleagues (including the JH) working in the Dairy department during the JH's shift. This number has steadily declined throughout the period and from 2016 there have been only two colleagues working primarily in the department during the JH's shift.

> [We preferred the claimant's evidence on this to that of Mr Richardson, but we accepted as the respondent submitted that the JH's own evidence showed that colleagues from other departments might be asked to work overtime to help in the dairy department.]

23 **[18], [19], [22]** The number of staff working in the dairy department has otherwise decreased over the Relevant Period, while the volume and variety of work which needs to be carried out has remained constant. This has increased the demands and the pressure on the JH and the JH's remaining colleagues. *[We preferred the claimant's evidence on this to that of Mr Richardson.]*

<u>The respondent's "Cold Chain" policy</u>

24 **[30], [31], [49], [53], [67], [99(k)], [299], [300]-[303]**. The respondent had a policy which it called its "Cold Chain" rule, with the objective of chilled items being at ambient temperature for no more than 20 minutes (after which they should be returned to a chilled storage area, including a chilled cabinet on the shop floor), and that policy was applicable to the JH's work when moving stock from the back door to a holding area and/or to the shop floor. We record here that we concluded that in practice, the respondent's managers recognised that the policy could not be adhered to precisely, so that in practice (1) it was recognised by the respondent's managers that the JH might not always be able in practice to comply fully with the policy, and (2) no disciplinary action was likely to be taken against the JH or any of her customer assistant colleagues unless there was a culpable failure to comply with the policy. Nevertheless, the Cold Chain policy applied to, and was a pressure on, the JH.

> [The Cold Chain's impact was evidenced very clearly in a number of places; for example at C7/240/2, this was said: "Getting the flow of stock from the backdoor to the Chilled Warehouse and onto the shopfloor efficiently is important as we must keep within the Cold Chain rules at all times. This means that chilled products can not be out of the Cold Chain (out of a refrigerator at the right temperature) for more than 20 minutes." If and to the extent that the respondent permitted stock to be at an ambient temperature for more than 20 minutes without wasting it, then that was inconsistent with the respondent's training document concerning waste of dairy and meat products, at C7/119/2, second bullet point.]

<u>Time pressure when helping unload a lorry</u>

25 **[30], [60]** While the JH did not assist with "turnaround", which is the process of filling the unloaded lorry with recycling and returnable equipment, the JH's store had a

delivery turnaround target (the time between a delivery wagon arriving and leaving the warehouse) of 45 minutes. The JH was aware of the need for speed in assisting with unloading the lorry and worked as quickly as she could with a view to helping to achieve that target.

[We accepted the claimant's oral evidence on this. The claimant's evidence on it was firmly supported by what was said on pages 5 and 6 of the document at C7/233.]

Assisting with deliveries received; moving stock within the warehouse and onto the shop floor

[We accepted that having a separate section of the EVJD entitled "Moving product in bulk" was unnecessary and unhelpful in that it involved duplication. We have therefore created a new heading for the job description of the JH for the purposes of section 65(6) of the EqA 2010, namely as set out immediately above this paragraph. The following section seeks to meld the various parts of the current EVJD, and is to be read as a replacement for the parts to which it refers. Where possible in the rest of this document, we have simply included a reference to parts of the EVJD as it stood at the end of submissions, taking into account the parts that were stated to be agreed by the respondent in its final submissions, ignoring, therefore, the claimants' submissions on those parts.]

26 **[29], [32], [33]** The JH would start her working day at 7.00am by going to the Woolton back door to see whether a chilled delivery was ready to be unloaded. If it was not, then she would get on with other work of the sort which she usually did, as described in paragraph 27 of her first witness statement.

[Except in paragraph 266 of his first witness statement, which did not refer to the JH in terms except by way of comment on what the JH said in an interview, which was purely argument, there was no suggestion by Mr Richardson that the JH sat around doing nothing if there was not a lorry ready to be unloaded at the back door, and there was no reason to think that she would need to be told by a manager what to do while waiting for it (or one) to be ready. The JH's evidence was cogent on this and there was no reason to disbelieve it. If and to the extent that she did from time to time, as she herself said as recorded at C6/4/7, internal page 26, "have a little chat ... at one point or another" if the delivery lorry was arriving imminently but there was nothing to do at the back door at that particular time, we did not see that as being part of her job for the purposes of section 65(6) of the EqA 2010. We accepted that the word "unload" was not appropriate to describe the work of moving cages and dollies from the back door to the shop floor and/or the chilled section of the warehouse if taken in isolation.]

27 **[34]** If a delivery arrived late, then the JH would be called over the store's tannoy to help with unloading it. When that happened, the JH would (1) conclude any customer

interactions, (2) stop whatever task she was carrying out at the time, returning any products in the Cold Chain to the dairy chiller, and (3) ensure that the aisle or other area where she was working was left clean and tidy, unless the JH was carrying out first reductions, in which case she would continue with that task.

[The only difference between the parties in this regard was the use of the word "unload" rather than "assist with moving cages". We decided that the reality was that the JH would help to unload the delivery.]

28 **[35]-[38]** Once or twice a year, when the Woolton Backdoor colleague was sick or on annual leave, the JH would open the gates to the yard in order to let the delivery lorry in.

[We accepted the claimant's oral evidence on this; nothing which Mr Richardson said on it, including in paragraph 267 of his first witness statement, was in truth contradictory, but in any event we preferred the JH's evidence in this regard.]

28.1 The JH would collect the key to the gate, put on a high visibility jacket, open the back door and leave the warehouse and go out to the store's yard.

[We accepted the claimant's evidence on this, which in any event did not appear to be contested.]

28.2 The door was an industrial roller shutter door. It had to be lifted up using a handle at ground floor level. It was sometimes stiff and it was often necessary for the JH to obtain the help of a colleague to pull it up to open it.

[This was accepted by Mr Richardson in paragraph 55 of his first witness statement.]

28.3 The JH would then use a key to unlock the gates and then manually pull both sides of the heavy (hinged) gate open. Each side of the gate was around 10ft high and 10ft wide.

[This was not contested except that it was said by Mr Richardson in paragraph 267 of his witness statement that it was "easy to open" the gates but (1) it was not contested that the gates were heavy, and (2) the word "easy" is relative and added nothing material here. Having said that, given what we say in paragraph 70 of our second reserved judgment, at pages 25-26 above, we concluded that the gate was to be regarded for the purposes of section 65(6) of the EqA 2010 as being typical and as being properly maintained.]

29 **[47]** Every two or three months the scissor lift at the door to the Woolton warehouse broke down. When that happened (and the length of time for which the lift was out of action varied), the tail of the lorry was used by the driver like a mini scissor lift to

lower two cages at a time. When, as sometimes happened, the driver stayed at the top of the lift, JH and a backdoor colleague would take them directly off the tail of the lorry.

> [We preferred the JH's evidence on this to the extent that it differed from that of Mr Richardson, including as recorded in the transcript for day 2 at page 107, and took into account the oral evidence of Mr Black as recorded in the transcript for day 33 at pages 142-143 on the issue of the frequency with which the scissor lift broke down. The respondent's closing submissions asserted that that evidence of Mr Black was not reliable and was the result of speculation. Those submissions relied on the fact that the JH accepted that she might have been mistaken and that the frequency was more like twice a year. However, the evidence of the frequency with which the lift broke down was in the form of a spreadsheet which was not proved by Mr Black, but rather referred to by him as containing evidence. Even if the lift broke down only on average twice a year, the length of time for which it was broken down was material. The things said by Mr Black in cross-examination as recorded at pages 146-151 of day 33 showed that (1) it would not be right to conclude that the scissor lift failed only twice a year and (2) the length of time for which the lift was out of action varied.]

[39]-[45]

30 Otherwise, the JH would assist (as part of a team of at least 5 other colleagues *[the precise number was in our view probably irrelevant but for the avoidance of doubt, in this regard we accepted the evidence of the claimant, including in paragraph 37 of her first witness statement, which was cogent, and preferred it to that of Mr Richardson]*) with moving a mix of units of delivery ("UoD") in the form of two-sided cages, four-sided cages, milk cages, Danish trolleys, merchandising units, pallets and stacks of green trays on dollies (the equipment in which stock arrived was stated at C7/262/6), for the most part to the designated places for them in the Woolton warehouse.

31 If a colleague had not already moved the Woolton scissor lift's front bar(s) from a horizontal position to an upright one, then the JH would move it/them to an upright position. In moving the UoDs, the JH and her colleagues would have to manoeuvre the UoDs to avoid getting in each other's way. They would take UoDs from the scissor lift and move them to their intended destinations.

32 The JH would usually be engaged in helping with unloading the delivery for 30-35 minutes.

> [We did not accept Mr Richardson's evidence in paragraphs 269-271 of his witness statement about the manner in which this was done, which was in itself inherently unlikely given that the store-room destinations of the units of delivery would vary, and was contradicted by the claimant's firm oral evidence on this, which we preferred to that of Mr Richardson. In fact, we doubted that the

precise manner in which the moving of UoDs from the lorry to their appropriate destinations at Woolton was material, since the work was probably comparable, however it was done.]

33 Every lorry which made a delivery to Woolton at the start of the day would contain between 30 and 43 cages or stacks of green trays on dollies, although not all of them were always for Woolton. The JH would pull from the back door area to their appropriate places six or seven cages or stacks of trays every delivery.

[We could not see why the respondent had submitted that the words "JH pulls 6 or 7 cages or stacks of trays each delivery" should be deleted, but we assumed that it was on the basis that the JH was asserted by Mr Richardson to have been part of a human chain rather than taking UoDs from the scissor lift to their appropriate destinations at Woolton.]

Sandwiches and fresh (cream) cakes

34 **[14], [55]** When moving cages from the scissor lift to the relevant storage areas from a delivery that had arrived after 7.15am, if the JH identified that a cage contained sandwiches or fresh cakes, the JH would usually stop assisting with moving newly-delivered cages and instead take the cage containing the sandwiches or cakes to the shop floor and replenish from it.

[The respondent accepted that paragraphs 14 and 55 of the EVJD were accurate.]

Eggs

35 **[46]** Some deliveries had a "dumper" of eggs and the JH or a colleague would push this directly from the scissor lift out to the shop floor to put it on display immediately unless the JH knew that there was a mostly full dumper on the shop floor, in which case the JH pushed the dumper to a storage place in the store's warehouse. Sometimes, a dumper of eggs would arrive covered in shrink wrap on a wheeled dolly as part of the chilled delivery. If the JH pushed the wheeled dolly with the dumper straight out onto the shop floor then she would remove the shrink wrap with a safety knife once the dolly was on the shop floor.

[The respondent's submission that it was only if a manager asked the JH to move eggs straight onto the shop floor that she did so was not supported by the paragraphs (290-291) of Mr Richardson's first witness statement, on which it relied. In any event, we accepted the claimant's evidence on this issue in its entirety.]

Ambient products mixed in

36 **[48]** While the daily 7am delivery was primarily made up of chilled products such as dairy, meat, fruit and vegetables, it also contained (1) products which had to be kept at an ambient temperature, such as flowers, alcohol, health and beauty items, and (2) frozen items, which came in a separate compartment of the lorry. The heaviest cages would be those with alcohol in them. On average between one and three such cages were in each delivery to Woolton.

> [The final sentence is based on the content of the document at C6/13, as analysed by Mr Black in paragraph 36 of his first witness statement. We saw no reason to decline to accept the accuracy of that analysis and therefore the content of that document (despite there being no direct evidence about the collation of the content of C6/13) given that it was consistent with the JH's own evidence in paragraph 46 of her first witness statement.]

Locations to which UoDs would be taken

37 **[50]** *[We did not believe that the amount of detail in this paragraph was required, but we record our findings on the detail given that the parties contested it and because at the time of determining this issue we had no indication from the independent experts about the need or otherwise for that detail. We thought that the real issue was simply how long the JH would take to get the units of delivery to their proper places in the warehouse or, as the case may be, the yard at Christmas.]* The JH would pull cages and stacks of trays on dollies of the following types to the following locations in the store warehouse:

37.1 dairy products to the right hand side of the dairy chiller

37.2 other chilled produce to the left hand side of the dairy chiller

37.3 frozen goods to the warehouse freezer

> [Mr Richardson's evidence in this regard was odd; he did not say why the bakery staff could not just move a cage of frozen product to one side in order to get to the bakery products, and in any event we preferred the evidence of the JH to his on this aspect of the matter, not least because there was no apparently good reason why he would have been in a position to see whether or not the JH put cages in the freezer, but also because, contrary to the respondent's closing submissions, the Cold Chain was plainly of concern to the respondent, as we record in paragraph 24 above.]

37.4 ambient bakery products next to the meat chiller

37.5 seasonal products to the wall to the left of the entrance to the dairy chiller

37.6 grocery products to the large open side of the warehouse, known as "the main bank"

37.7 wines and spirits to an empty space in the warehouse near the back door, ready for colleagues to take them to the relevant locked storage cage

37.8 health and beauty products to an empty space in the warehouse near the back door, ready for colleagues to take them to the relevant locked storage cage

37.9 flowers and/or plants to the main warehouse area, and

37.10 expensive home and high value products, phones and cigarettes to an empty space in the warehouse, as directed by the Backdoor colleague.

[This was in large part agreed by Mr Richardson, in paragraph 288 of his witness statement, but in any event we accepted the claimant's evidence in this regard.]

Tent in the yard

38 **[54]** From 2012 to 2015, around Christmas, the manager of Woolton set up a tent in the store's yard and when the tent was in place and the JH was directed to do so, she would pull cages/stacks of trays on dollies out into the yard, leaving them for a colleague to store in the tent.

[56]-[59] Flowers

39 While most of the 30-43 cages delivered to Woolton consisted solely of products destined for the same storage environment, some cages contained flowers as well as chilled food items. Flowers had to be stored at an ambient temperature and when they were in a delivery, the JH (1) went to the yard and got an empty 2-sided cage, (2) extracted the flowers from the unit of delivery where they were, and (3) put them onto the 2-sided cage.

[We saw no reason to reject, and therefore accepted, the JH's evidence in this regard, in paragraph 50 of her witness statement, which incorporated by reference paragraphs 56-59 of the EVJD for the JH, which we read in the light of such disputes as were maintained during closing submissions. Mr Richardson's evidence, in paragraph 140 of his first witness statement, that flowers did not need to be stored at an ambient temperature was contradicted by the document at C7/469/1, where it said that flowers "are delivered at +2°C and stock in the back of store must be held at +2°C in ambient areas to maintain their freshness".]

40 If there were any boxes of stock on top of the flowers then the JH would take those boxes out of the cage to access the flowers. If necessary, the JH would move the

boxes onto another cage or to the floor, lifting them back and re-stacking the cage after the flowers had been removed.

Cages and their weights when delivered

41 **[233]** Most cages arrived at Woolton full. Four-sided and two-sided cages were usually stacked above the JH's height, which was 167cm.

42 **[230]** Four-sided cages were 180cm tall, 82cm deep and 68cm wide. Empty, four-sided cages weighed around 40kg. When full, a four-sided cage could weigh up to 500kg. *[The figures in this paragraph and the next two paragraphs below were agreed.]* The average weight of a cage leaving a Fresh DC was 149kg. One side of a four-sided cage opened to allow to access to the contents of the cage.

43 **[231**] Full, a two-sided cage could weigh up to 500kg, for example if it were filled with packages of wine and spirits. However the average weight of an ambient two-sided cage sent by Magor DC was 292kg.

44 **[232]** A fully-loaded milk cage weighed around 200kg.

Moving cages from the back door

45 The JH's role in assisting with dealing with a delivery of stock is shown by the "Grocery Replenishment" card at C7/726. In practice, the JH did only the things referred to in the first of the two yellow rows.

46 **[51],** The JH was able to identify the type of goods in a cage at a glance.

47 **[52],** In order to identify the correct storage location of the products stacked in green trays, the JH would check the colour of the case end labels: a red label meant that the content needed to be stored in a chiller, a blue label meant that the product had to be stored in a chiller if there was space for it, and a white label meant that the product had to be stored in the warehouse. *[This was borne out by what was said at C7/232/2 and C7/451/2; the prohibition on white label produce being kept elsewhere than in the warehouse was stated in the latter.]*

48 **[53]** Stacks of trays regularly had mixed end labels. If there was a single red label in a stack of trays then the JH would put the whole of the stack in the dairy chiller. *[There was no need to refer here, again, to the Cold Chain.]*

Moving dollies and trays from the back door

49 **[41] [245-246]** There were 2 stacks of green trays on each dolly . Each stack was typically made up of 9 green trays, but there could be as many as 11 on it, depending on the size of the tray. The stack could arrive at a height of 2m, which was taller than both the JH and the Woolton stockroom's chiller doors. When that occurred, the JH

would ask a taller colleague to remove the top tray, as it would be significantly above the JH's head height.

> [It seemed to us that it was not the number of trays that mattered, but their combined height, for which we have catered in this section, noting that the respondent agreed that stacks could arrive at a height of 2m.]

50 **[43]** Nine to 12 cages/stacks of trays on dollies were lowered at a time in the scissor lift, in three rows of three or four.

51 **[247]** A single green tray full of products on a dolly could weigh up to 24.4kg but the average weight was *[we accepted that this was the best indication before us and concluded that we should accept it as accurate, despite the fact that it was not properly proved: for example it was stated in paragraph 5 of the second witness statement of Mr Pratt, but only on the basis of what he had been told by the respondent's representatives, not even the person who had extracted the data]* 8.4kg. A dolly with two stacks of nine trays could weigh in the most extreme circumstances up to 360kg. However, the average weight of a dolly leaving a Fresh DC was 132kg.

> [We could not see how the respondent could rely on a statement of a weight in regard to the fresh DC staff but not the store staff; if it was relevant to one set of staff, it was relevant also to the other. How relevant those weights were was, however, a different matter. We have included the figures here in case the IEs find them to be material.]

52 **[243], [249],** The JH would pull stacks of green trays (on dollies) initially to see how heavy they were and whether or not they were stable. If the trays were of different sizes and with heavier ones at the top, then the stack might be unstable.

> [We saw what Mr Richardson said about this in paragraph 281 of his first witness statement, but we could not accept his assertion that the stacks were never unstable through heavier trays being placed on top of lighter ones. In addition, knowing the weight of a tray will not alter the stability of the stack of which it forms part. In our view, bearing in mind the fact that we were making findings of fact on the balance of probabilities, we could not conclude that a stack of trays was never unstable. The reason for its instability was material if the solution was to re-stack the trays. However, it was not part of the JH's evidence that she re-stacked a dolly at any time. We therefore concluded that stacks on dollies were occasionally unstable.]

53 **[249]** *[We found as a fact that]* if the JH thought that the stack was unstable, she would move it by standing to the side of it and having one hand at the back and one hand at the font, pushing it with the hand at the back and stabilising it with the one at the front. *[That was what the JH said in paragraph 131 of her first witness statement. It was inconsistent with the content of C7/142/10, but we accepted that that is what*

happened in practice.] However, for the purposes of section 65(6) of the EqA 2010, the role should have been carried out in accordance with C7/142/10.

> [The content of paragraphs 281-282 of Mr Richardson's witness statement is consistent with the proposition that the role of the JH for the purposes of section 65(6) of the EqA 2010 in regard to moving stacks of trays on dollies was stated solely at C7/142/10.]

54 **[248], [250]** If the JH pulled the stack of trays then she would do so (1) by pulling on a handle in the manner stated by Mr Richardson in paragraph 281 of his first witness statement *[which, we concluded, best described what was required by C7/142/10]*, and (2) looking over her shoulder as she did so to see where she was going and whether the route was to any extent blocked *[which was in our judgment, on the balance of probabilities, the best way to describe what happened, which was in fact consistent with C7/142/10]*.

55 **[251]** The wheels on dollies could be wobbly, damaged and/or stiff. When that was the case, the JH would first attempt to pull the dolly in question with a colleague and if that did not work then she would ask the Backdoor colleague to move it using a hand pump forklift.

56 **[252]** If empty green trays were left in the stockroom's dairy chiller, the JH would stack them according to handle colour.

Merchandising units

57 **Paragraphs [261-262]** fit here.

Getting green trays of dairy products from other departments

58 **Paragraphs [253-256]** fit here.

Stock takes

59 **Paragraphs [221-225]** fit here.

Moving cages generally (whether from the back door or in the course of replenishing)

60 **[234]** Before moving a cage, the JH would need to *[we determined this by reference to C7/142/8]* check the cage to see:

60.1 whether there was any damage to the cage and that there were in place red straps to hold secure the contents of the cage;

60.2 whether those straps were loose;

60.3 whether the load was so high that it was unsafe for example through products being stacked higher than the side of the cage; and

60.4 whether the cage did had heavy goods stacked on lighter goods in such a way that there was a risk of the stack toppling when the red strap was undone.

61 **[243]** Despite the JH's best efforts, boxes of items would occasionally *[we decided on the evidence before us]* fall off (or out of) a cage. The JH would then either jump out of the way of the falling box, or (if it appeared to be possible to stop the box from falling by doing so) put her body in front of the box to stop it from falling or (as the case may be) to keep the rest of the cage's contents from falling out. Sometimes, that would result in a container of yoghurt or cream breaking and the contents leaking onto the JH's clothing. Occasionally *[that was the best description, we concluded, given what Mrs Worthington said in paragraph 128 of her first witness statement]*, the falling content would hurt the JH.

62 **[239], [240]** If there were problems with the cage itself, the JH would (consistently with C7/142/8 and C7/823/20) move the cage by first making sure that its green moveable wheels were closest to her, and then pulling the cage, gripping it using two hands on both of the upright bars on the JH's side of the cage with her hands in a comfortable position between shoulder and waist height. In almost all circumstances, the JH would pull the cage backwards, turning to look over her shoulder to check that the route was clear.

63 **[235]** If the JH found a cage that was unsafely loaded or so damaged that it would be unsafe to use it then (consistently with C7/142/9 and C7/823/20-21), she was trained, she should (as necessary)

63.1 notify a manager,

63.2 tighten any loose straps sufficiently to make it safe to move the cage,

63.3 if the load was too high, remove the contents that made the load too high put them in an appropriate alternative place, such as on another cage,

63.4 transfer the cage's stock to another cage, stacking it safely,

63.5 take the damaged cage to the store's back door, asking for assistance to move it if necessary, and either

63.5.1 alert the back door colleague to the fact that the cage was damaged and leave it to that colleague to put on a label showing that the cage was faulty, or (if there was no back door colleague there to do that),

63.5.2 put on such a label herself.

64 **[235-237]** In practice, however, the JH was only rarely able to do precisely what was required in order to make a cage safe or avoid using an unsafe cage, and she would usually *[we accepted her evidence in this regard]* just move it and do her best to accommodate for any damage or poor stacking by the way in which she dealt with the contents of, and handled, the cage. For example, she might be extra careful and pull a little slower with an unstable stack, or adjust the force she applied when pulling the cage if one (or more) of the wheels was not working properly. However *[as the respondent submitted]* the JH would inform a manager of any damaged cage which she encountered *and [as the JH herself said in cross-examination]* she would when a cage was "really badly damaged" take everything off it and put the contents onto another cage.

[We did not see that paragraph **[236]** added anything material.]

65 **[238]** About once a month, the JH would find that the wheels of a cage were so damaged that it was impossible for her to move the cage alone. She would then obtain the assistance of a colleague to move the cage. On rare occasions, it would not be possible to move the cage safely even with the assistance of a colleague and the JH would ask the store's "Backdoor" colleague to use a hand pump forklift to take the cage straight from the warehouse to the shop floor.

66 **[241]** Two or three times a month, the JH would find that a cage was too heavy to pull alone. She would then obtain the help of a colleague and they would together pull the cage to wherever it needed to go.

67 **[242]** The JH would also as necessary push cages short distances to "park" them, for example when positioning them against the wall in a stockroom chiller.

[61]-[64] Milk deliveries

68 If a milk delivery arrived when the JH was working on a Sunday, which was no more than once per month after 2013, the JH would assist with unloading it from the scissor lift at the back door, taking the cages with milk in them straight onto the shop floor. If the JH was doing reductions at the time, then she might ask a colleague to finish them off (and if she was in doubt then she would ask a manager for guidance) and then herself help with unloading the delivery.

[We accepted the JH's evidence in paragraphs 52 and 53 of her first witness statement and saw only a slight difference in the substance of paragraphs 300-302 of Mr Richardson's first witness statement. We did not see what he said in oral evidence, as recorded on pages 144-146 of the transcript for day 4, as undermining what the JH said about exercising a discretion, and we noted that she was not cross-examined on this. Nevertheless, we thought that it was likely on the balance of probabilities that the JH asked a manager for guidance if she was not sure what to do.]

Replenishment, both from deliveries and the warehouse

Interruptions

69 **[68], [304], [367]** When the store was open and the JH was undertaking replenishment, the JH was interrupted by customers approximately once every half hour on Tuesdays, Wednesdays and Saturdays and approximately once every 15 minutes on Sundays.

Opening packaging and putting stock on display

70 **[70]** The JH usually replenished two to four full cages of product every shift, sometimes working with a colleague to replenish from cages after completing first price reductions.

71 **[71]** The JH carried out her task of replenishing with limited supervision

72 **[72], [86]-[87], [89]** All products were delivered to the store either in cardboard boxes or encased in plastic packaging. The JH would have to remove that packaging before putting the products out on display for sale, taking care not to damage the products. She would wear gloves (which were given to her for use at work; she was responsible for their safe-keeping) use a "safety knife" (which was blunt by design; one was given to the JH for her use in the course of her work, and she was responsible for its safe-keeping, but if she lost it she would have one available to her: see C7/353/3) (1) to cut plastic binding (using the knife at a slight angle to make it work more effectively) (2) to cut the sellotape on a box which had no perforations, and (3) to open shrink-wrapped products' packaging, which was sometimes glued. The JH would make a hole using the beak of the knife, and then turn the knife and use the blade to open shrink-wrapping.

73 **[88]** Around half of the products were supplied in cardboard boxes with perforated edges, which the JH opened by pushing her thumb along the perforated edge.

74 **[90]** The JH would open between 20 and 85 containers of product per cage, depending on the size and type of product.

75 **[91]** Once the packaging had been opened, the JH would lift products directly from the box or tray and put them in the appropriate place for them in the chiller cabinet, known as a Facing *[defined at C7/248/7]*.

76 **[92]** Each chiller cabinet is 6' 4" inches tall. The bottom shelf is at JH's knee height, and the top shelf is 5' 5" high, which is just below the level of the top of the JH's head (5' 6").

77 **[93]** If there was space on the shelf to the side of the product line the JH was replenishing, the JH would put the product which was to be put out on the shelf in that space. If the product already there was in retail ready packaging ("RRP"), then the JH would move the box of product which was being put out onto the shelves to another shelf, usually the larger bottom shelf. Alternatively, the JH would put the new box temporarily on the cage or rest the box against the lower shelf, propping it up with the JH's body if necessary.

78 **[96]** In order to place product on a chiller shelf, the JH would lift the product to the shelf from its position on the cage or on another shelf. The JH would bend down to lift items to or from low levels (i.e. the bottom of the cage or the bottom of the chiller cabinet) and reach up to lift them to or from height (i.e the top of the cage or the top of the chiller cabinet). As the cage emptied, the JH would bend further to access the products, eventually to almost floor level, and stretch up to above head height to reach the top shelf.

> [This was all obvious but we included it because it was agreed and it was not, as far as we could see, stated in the training materials – probably because it was obvious.]

79 **[97]** The JH lifted items of various weights, from light to heavy. An example of a light item is a 125g packet of cooked meat. An example of heavy item is a box of 24 x 500g tubs of margarine, weighing 12kg. The JH could use a kickstool to reach the back of the top shelf.

> [This was obvious too but it needed stating because of the dispute maintained about whether the JH lifted items above her head to the top shelf of a chiller. If she had the use of a kickstool then she did not need to do that and the kickstool was provided to avoid the need to lift things above the JH's head, so the work for the purposes of section 65(6) of the EqA 2010 necessarily involved the use of a kickstool.]

80 **[101-103]** The JH would replenish products in the two and a half dairy aisles, the "food to go" chiller, and the cakes chiller. If she came across a product destined for a different aisle then she would move it to the top shelf of the cage or work around it and then move on to the next location to be replenished, putting any such set-aside products out on display in their appropriate locations.

> [This was obvious but we have included it as it was mostly agreed, the only disagreement being about the use of a blue top trolley. Since the JH did at times use a blue top trolley, we have catered for such use in the words which we have used here.]

81 **[263]** When pulling any form of equipment (including a cage, a dolly or a blue top trolley) through the warehouse, the JH would use the designated walkways and doorways.

82 **[264]** The JH had to guide the equipment which she was moving with a view to ensuring that it did not hit a customer or a colleague, or a fixture or a fitting, and that nothing fell off the equipment (for example stock).

83 **[65], [66], [94], [95] [and as stated in the subparagraphs of this paragraph.]**

The manner in which the JH was required to do the work of replenishment is stated in the following training documents, with page references if only a particular part was relevant to our determination; all references below to page numbers are unless otherwise stated to pages of the pdf documents themselves, not to the internal pagination. If and to the extent that the training documents show that a task was intended to be done differently from the manner in which either the JH or the respondent contended it was in fact done, then in our judgment the manner stated in the training document was the work for the purposes of section 65(6) of the EqA 2010.

83.1 C7/142: page 4, concerning safe working practices in the area of the back door of the store's warehouse; pages 5-7, concerning safe lifting and moving; pages 8-9, concerning moving and otherwise dealing with roll cages; page 10, concerning the use of green trays and dollies; page 11, concerning the moving of pallets using a pallet truck; page 12, concerning the use of a kickstool and the use of ladders; page 13 concerning (so far as relevant) slip and trip hazards; pages 14-15, concerning preventing slips and trips, including by cleaning as one went along (the "Clean As You Go Policy (CAYG)"), including by the use of absorbent socks; page 16, stating what to do in the event of a customer having an accident in the store; page 17, describing what to do in the event of a fire; pages 18-23 concerning fire safety; page 24 describing what is described as the "four point check" to be carried out when putting out stock *[***[119-123]***; we noted that the respondent's case was that it was only if a product were unknown to the JH that she would carry out a four-point check; at page 24 of C7/142, it is said that such a check must always be carried out whenever product is put on a shelf on the shop floor, and that this is "to ensure that we comply with the Consumer Protection Act"; for the purposes of section 65(6) of the EqA 2010, it was in our view an inescapable conclusion that it was part of the work of the JH to carry out a four point check every time she put stock out on display]*; page 25, relating to "Food Safety and Hygiene"; page 26, describing the "Cold Chain" and what is referred to there as the "20 minute rule", and how to monitor the temperature in chiller cabinets, which it is stated there must be "monitored carefully"; page 27, describing what cleaning products must be used when cleaning within any department; page 28, concerning "use by" dates, rotation of stock (which it is there said should "always" be done *[see also e.g. C7/249, C7/454/3, and C7/823/45-46 concerning rotation, as a result of which we accepted the claimants' proposed words for paragraphs* ***[199], [201], [204] and [206]****; we note here that* ***[94-95] and [200-208]*** *described in detail what was obviously*

required when rotating as required by the training documents to which we refer here] and pest control (which is mentioned, with the three key points of "Zero Tolerance to Pests" and a reference to a DVD chapter with that title); and page 29, describing what to do in the event of an emergency product withdrawal, and how to keep what are there called "Safe and Legal Records".

83.2 C7/823, pages 9-18 of which were both descriptive and prescriptive about manual handling, lifting, twisting or over-reaching, and related matters, pages 19-25 of which were helpful in describing how to use equipment including roll cages, dollies and kickstools, pages 27-36 of which described how to keep the store clear of trip hazards and how to deal with fire risks, or actual fires, and page 56 of which stated more clearly than most of the documents before us what was required by way of being alert to the risk of pests. In addition in regard to pests, C7/214/2 was highly informative about pest control. The fact that it applied to Express stores did not in any way detract from its content or the applicability of its content to the JH and all other customer assistants of the respondent.

83.3 C7/697, pages 16-17 of which described the overall policy of the respondent in relation to the cleaning of stores and by implication the duties of the JH in that regard, pages 24-26 of which stated the overall position relating to rotation of stock and wasting of out of date stock, and pages 35-37 of which gave more detailed information about the requirements of the respondent of the JH in regard to the monitoring of temperatures in chiller cabinets and pest control.

83.4 C7/234, which expanded on cleaning "as you go" (and was in the same terms as C7/267; we refer in this document only to C7/234). Pages 1-4 were all relevant to the JH's work for the purposes of section 65(6) of the EqA 2010.

83.5 C7/660, which contained a number of statements about safe working practices in the warehouse.

83.6 C7/232, which reinforced the importance of the Cold Chain policy when helping to unload a delivery and when replenishing. Pages 1-4 were all relevant to the JH's work.

83.7 **[306-323]** C7/187, especially at page 2, which expanded on what was involved in applying the respondent's Cold Chain policy. It also required staff to be "vigilant when working on the shopfloor [to ensure] that [the respondent's] display cabinets are maintained and in good working order". One way to do that was to "look for evidence of cabinets not working correctly including condensation, cabinets leaking or dripping, an ice build up at the back of the cabinet or stock not feeling the correct temperature". Another was to "check the temperature indicators, placed in the stripping of each cabinet. A number showing may mean that the cabinet is working at the wrong

temperature or is on a defrost cycle. Inform a manager." (We saw too that at C7/240/7, as part of the "Welcome To Meat And Poultry" training, the trainer was required to "Explain the importance of being vigilant when working on the department; looking out for Chillers not working properly. [This was because] Spotting them early can save us a lot of waste and prevents us from selling unsafe food.") Whether the JH was required to feel stock to see whether it felt too warm was the subject of disagreement in **[320]**. It should not have been, given C7/187/2. In the light of that page, we accepted the claimants' proposed words for **[320]**. We noted that the content of **[313]** was, however, agreed, and that referred to the JH being "attentive" to signs that products were not being kept at the right temperature, including by reference to the possibility of "products not feeling cold to the touch". The respondent's proposed additional words for **[321]** were immaterial, since the issue here was what the JH's work was for the purposes of section 65(6) of the EqA 2010, not whether or not it could be done by another employee. As noted by the claimants, this was an editorial dispute in any event. The dispute about frequency in **[318]** was also immaterial given C7/187, which showed that there was a need to be aware all the time of the indications of the temperature of the chiller cabinets.

83.8 C7/262, "Know Your Stuff for Fresh Food Replenishment - Filling Equipment And Retail Ready Packaging": *[the whole of the document was relevant, but we record here those things to which the document related and where in the document they were dealt with]*; page 2, concerning equipment provided by the respondent "to help [the JH] when filling", including a safety knife and a kickstool, where to find them (as stated on page 7 of that document, that is "the designated location in the warehouse"), and the requirement to put equipment back to the place from which it was taken (since, as stated on page 7 of that document, "(Everything has its place.)"); pages 2-5 describing how to put out, keep tidy and replenish "Retail Ready Packaging", and stating the effect of paragraphs **[138-148]**, since what was said in paragraph **[146]** seemed to us to add nothing material, given that what was said in C7/262 covered the times when RRP could be removed; pages 4-6 describing what to do with materials that can be recycled, what to do with waste materials that could not be recycled [*stating as far as we can see all that needs to be stated to capture what is said in paragraphs **[104-111]**, which, to the extent that they say anything more, state the obvious]*, and (on page 6) what to do with "equipment that stock is delivered and/or displayed in", such as "Milk Cages", "Empty Roll Cages", and "Dollies and Merchandisable Units".

83.9 C7/248, "Know Your Stuff For ... Fresh Food Replenishment – How To Fill". The whole of the document was relevant. It showed (on page 7) how the respondent created and used a Merchandising Plan and that the respondent's management had to "ensure 100% conformance to the plans at all times", so that the JH was required to "not move products around or change the number of facings a product has", which was because "stock sent in is based on the Merchandise Plan". We did not see that what was said in paragraphs **[149-**

150] added anything material to what was said at C7/248/7 about the respondent's merchandising plan. At C7/248/8, out of stock products are dealt with, stating what is said in paragraphs **[159-160]**. We noted that this was said on that page (C7/248/8): "It is really important that every product goes out with an accurate label so that we trade legally."

83.10 C7/349, entitled "Know Your Stuff Refresher for Grocery Replenishment": page 1, requiring the JH to carry out "Would I Buy It" checks "All the time" and saying that "'Would I Buy It' should be a way of life." The manner in which the "Would I Buy It" policy (referred to for short as the "WIBI" policy) had to be applied was fully explained in document C7/188. That document showed that for the purposes of section 65(6) of the EqA 2010, (1) the words proposed by the claimants at the end of the trial for paragraph **[211]** of the EVJD for Mrs Worthington were correct in that whenever she "[tidied, replenished or went] about [her] daily activities", she was obliged to "always think to [herself] 'Would I Buy It?'", and (2) the content of paragraph **[213]** was also correct. In our judgment what the parties said by way of oral evidence about the WIBI policy had to be assessed in the light of (1) what was said in the respondent's training materials, such as C7/188, and (2) the obvious requirement (both for the respondent's commercial purposes and the need to comply with such laws as applied) to keep an eye out for damaged or substandard products, including those which were newly-delivered. The document at C7/188 was in our judgment determinative for the purposes of section 65(6) of the EqA 2010. The respondent's contentions about the content of paragraphs **[211-212]** in so far as they related to the application of the WIBI policy, and the cross-examination on them, were therefore inapt. As a result, the claimants' proposed words in those paragraphs were apt and we accepted them.

83.11 C7/352; entitled "Know Your Stuff on Grocery Replenishment – Backdoor, Warehouse and Sorting Stock". That emphasised (on page 2) among other things "the importance of having a robust plan for every part of the warehouse that everybody works to."

83.12 C7/240, entitled "Know Your Stuff For ... Fresh Food Replenishment – Welcome to Meat and Poultry"; it contained the best statement of the approach which the respondent required customer assistants including the JH to take to a customer query. The answers to the questions "what if?" (the question was asked at the bottom of page 5) at the top of page 6 showed precisely what was required if (1) a customer asked whether the respondent sold a particular product but the JH could not find it "on the shelf", (2) a customer had picked up a damaged package which had leaked onto the shop floor, and (3) the JH "notice[d] a customer who [was] obviously looking for something or look[ed] like they need[ed] some help".

<u>Milk replenishment</u>

84 **[185-186]** as now agreed fit here.

Flowers

85 We saw that it was the JH's evidence that she replenished flowers only if a colleague was ill or on annual leave or she did so as an overtime shift. We could not understand that: if the colleague who was responsible for replenishing flowers was not on annual leave or ill then there would be no need for an overtime shift from the JH to do that colleague's work. So, we concluded that the JH must have done that work only as an overtime shift when the colleague was absent. We therefore concluded that if the JH did that work then it was done on an occasional basis only. We found it hard to believe that Mr Richardson's memory of whether or not the JH did it was more reliable than that of the JH, given that it was unlikely to be important to Mr Richardson who did the job of replenishing flowers, as long as it was in fact done by someone at Woolton as and when required. However, if the work was done by the JH only as an overtime shift, then (as we say in paragraph 5 above and paragraphs 79-81 of our second reserved judgment, at page 28 above) we could not see how it was relevant to the value of the work of the JH as such.

86 The respondent disputed the content of paragraphs **[189-194]** of the EVJD in so far as that content related to the manner in which flowers were replenished and plants were cared for and replenished if and to the extent that that content did not "reflect the JH's witness evidence". We found that the work for the purposes of section 65(6) of the EqA 2010 (of any customer assistant who did that work) was best described in C7/469, except that we accepted the JH's evidence about what was said in paragraph **[193]** about the manner in which outdoor and indoor plants arrived at Woolton and how she prepared them for display on the shop floor.

SEL printing

87 **[124-128], [154-156]** fit here.

Big sellers

88 **[130]** as contended for by the claimants fits here.

> [We saw no reason to include the respondent's proposed additional words, since the issue was what the JH's work was, not who else might have done it. That is universally so. We make no further mention of that conclusion, but simply apply it in what follows.]

Point of sale ("POS")

89 **[131-133]** The respondent used images or messages in printed form and put them in a plastic wallet called a "talker", which was suspended from the shelf, to alert customers to new products and special offers. Those were called by the respondent

POSs, i.e. Points of Sale. The JH was required by the respondent to ensure that POSs in the areas which she replenished were (1) still in place and, if so (2) easy to read and, if they were either not there or present but not easy to read, for example because they were crumpled or damp, to print out a new POS in the same way that she would print out an SEL.

[C7/248/9 stated that the JH needed only to request the printing of a new POS or SEL "from the Price Integrity office", but plainly C7/248 had been superseded by improvements in the technology used by the respondent, if only at Woolton. Pages 7-9 of that document were otherwise a determinative statement of how POSs and SELs applied.]

Facing up

90 Facing up is described better at C7/248/11 than in paragraphs **[134-137]**. Those paragraphs were agreed, so C7/248/11 is relevant only in the event of any doubt about what is said in them.

Use of cages and blue top trolleys

91 **[77], [257]** The JH took cages to the shop floor in order to replenish and occasionally used blue top trolleys in the course of her replenishment work.

[We accepted the JH's evidence in paragraphs 59-61 of her first witness statement about what she did during the relevant period, which was not to use a "blue top" trolley as asserted by the respondent at all times when replenishing, although the JH said that she used a blue top trolley at some points (as stated in paragraph 116(e) of her first witness statement and via **[257]**). We could not, without assistance from the independent experts, see how it could be material whether the JH used a blue top trolley or simply replenished from a cage, but we accepted that she almost always did the latter, preferring her evidence on this to that of Mr Richardson. We saw that the only places in the training documents before us where there were references to the use of a "blue top trolley" in the course of replenishment were C7/694 and the apparently similar C7/864, both of which merely said so far as relevant (at pages 24 and 21 respectively) that "Blue top trolleys can be used to support replenishment at the shelf". At C7/713/2 (page 2 of "Information Card 1 – Grocery Replenishment – The Aisles Are Clear – Days") it was said that "A filling trolley [which was shown in a picture with a blue top] can be used to make filling easier to enable you to keep the aisles clear." At C7/248/4, it was said that "Stock must be filled directly onto the shelf from the cage, or a filling Trolley can be used to make filling easier. At no point should any stock be spotted on the floor before being filled." A similar thing was said on the next page of that document. It was therefore clear that the JH was not required to use a blue top trolley but could do so if she found it helpful. We record here that what was said in **[258]** was obvious: "JH pushes the trolley to move it." That was the complete content of **[258]**.]

92 The place where the JH put the cage depended on the weight of the products being replenished and the congestion in the aisle. For example, if the aisle was congested and the items being replenished were light, then the JH might leave the cage in the respondent's designated cage location at the top or bottom of the aisle *[as stated for example in the final part of page 4 of C7/248]* and carry a box (or multiple light boxes) of items from there to the relevant shelf. If the items were heavy and the aisle was clear, the JH would put the cage in the middle of the aisle, with room on either side, in front of the shelf to be replenished. The JH would balance the two factors of product weight and aisle congestion, taking into account the health and safety of herself and customers and replenishment efficiency.

93 **[78]** In a perfect world, as the JH moved down an aisle and worked down the cage, the next accessible product to be replenished from the cage would match up with the next Facing in the chiller but that rarely happened. In order to work most efficiently, the JH would therefore usually move boxes of product as she went in order to access the next product displayed in a Facing which was to be replenished from the cage as the JH travelled down an aisle, and then replenish that product from the cage.

> [By the time of closing submissions, the parties were only a small margin apart on this issue. We concluded that the words which we use in the paragraph above this indented paragraph were apt to capture the relevant facts.]

94 **[79], [149], [150]** The JH would work out which product to replenish next by looking at the contents of the cage, looking at the chillers, and assessing the stability of the stacking in the cage the JH was replenishing from. If a product was not already on the shelf, then there would be a gap with a shelf-edge label ("SEL") showing where the product needed to be put out.

> [As can be seen, in large part we accepted the respondent's contentions in this regard.]

95 **[80]** When, as was regularly the case, customers were standing in front of a Facing which needed replenishing, the JH would decide whether it was quicker to wait for them to finish, or to return to the Facing when it was free.

<u>Order of replenishment</u>

96 **[81] [174-175]** Until at the latest the end of 2012 the JH replenished from a "critical cage", the use of which was the result of a decision of the dairy department manager.

> [The precise period when a critical cage was used was disputed. It was agreed that there was one in July 2012, but the JH's initial evidence was that there was one until some point in 2014, and Mr Richardson's evidence in paragraphs 136-138 of his witness statement was that there was one after 2014. At C7/451, headed "Know Your Stuff For Produce – Backrooms and Warehouse", dated

"12/12", on page 1 there was a statement to the effect that there was a need for a place for a "Critical cage for short date codes and new lines". At pages 58-59 of the transcript for day 2, the JH's evidence was that the use of a critical cage had "definitely stopped" by 2012 and not 2015. We saw no reason to disbelieve that evidence. Mr Richardson's evidence was that one was still in use when he was manager of Woolton, but he did not say that he himself replenished from one. In those circumstances, we preferred the JH's evidence and concluded that by at the latest 2013 a critical cage was no longer used at Woolton. However, the dispute did not seem to us to be material, since the JH was required to look out for products with short date codes at all times. That was shown by the largely agreed text of paragraphs 82 and 83 of the EVJD but it was also obviously inherently part of the JH's job, as recorded in paragraph 83.1 above.

As for the dispute in relation to paragraph 175 of the EVJD, we did not find it to be about a relevant factual matter. That is because the precise order in which the JH obtained stock to put on the shop floor was in our judgment irrelevant to the value of her work for the purposes of section 65(6) of the EqA 2010.]

97 **[82], [83], [85]** When there was no critical cage, the JH would look carefully at the contents of the cages in the warehouse chiller and first replenish products which needed to be replenished as a priority, for example cakes on Saturday mornings. When examining the content of the cages in the chiller, the JH would move the cages around the chiller to see what was on them. *[We came to this conclusion in part because of the things said by Mr Richardson in cross-examination as recorded at pages 81-83 of the transcript for day 4 about how one should describe what the JH did in this regard. We found it difficult to see why a dispute was maintained about the use of the word "manoeuvre".]* She would use a blue top trolley to do that, by putting the products with short date codes on a blue top trolley and take it onto the shop floor.

[151-157] "Free cages" and products which are no longer on the merchandising plan

98 The differences between the parties in paragraphs **[151-157]** (which related only to free cages) were immaterial. What happened in practice did not alter the role of the JH and her work for the purposes of section 65(6) of the EqA 2010. What was important was who decided whether to accept a free cage, and it was the JH's manager, not the JH. That much was agreed, and was what we would have expected in any event.

Promotion ends ("PEs") [162-171]

99 The manner in which the JH's work related to what the respondent called "promotion ends" was stated in (1) C7/159, which was nominally relevant only to Express stores but informative and likely to be accurate for all stores if only in principle, and (2) C7/350, which was relevant nominally to grocery only, but stated the principles

clearly. It was clear to us from those documents (in so far as it was not explicit in the disputed part of the EVJD for Mrs Worthington), and we concluded as a finding of fact, that PEs were created by the respondent's head office merchandising team. C7/248/7 showed that the merchandising plans had to be adhered to strictly.

100 The differences between the parties on the content of paragraphs **[162-171]** were material only if, and if so only to the extent that, the respondent's proposed words implied a difference in the work done by the JH. The respondent proposed the use of the words "looks at" rather than "reads" in paragraph **[164]**. The implied assertion that there was a difference in practice between the two could not be accepted, and we rejected it. That is because one cannot apply a print-out without paying attention to its content, and whether one referred to that task as "looking at" or "reading" was immaterial, because in our judgment the same amount of attention was required to be paid no matter how one described the mental process.

101 As for the dispute about paragraph **[169]**, even the evidence of Mr Richardson on this, in paragraph 228 of his first witness statement, was no more than that the JH "would have obtained manager approval before" rearranging PEs and that "The weights of products were considered by the Merchandising team when they created the plans for the PEs." In this regard, we accepted the JH's evidence given on day 2, as recorded in the claimants' closing submissions, which was that the JH was trusted to rearrange products on a PE if in her judgment it was necessary for ease of access for customers, but we also accepted that if she was in doubt then she would ask her manager for guidance or a decision, and that ultimately responsibility for the layout on a PE rested not with the JH but with the respondent's line manager (subject to being overruled in the unlikely event that the JH's line manager's line manager disagreed with the line manager's judgment). In addition, we concluded from C7/248/7 that the JH was required to adhere to the respondent's current merchandising plans. We also accepted the evidence of Mr Richardson that the respondent's head office merchandising team created the PEs and that that team would normally have heavier items at or towards the bottom of a PE. As for what was the work for the purposes of section 65(6), in the light of those findings, we concluded that, since (1) it was in the respondent's interests for its shop floor staff to use their own judgment in at least some ways, including for example in regard to the best way to resolve customer disputes, and (2) it was clearly in the respondent's interests for the JH to exercise her judgment on the layout of a PE, especially when there was an obvious need to rearrange it, the work of the JH included applying her judgment in deciding whether to rearrange a PE, subject to the qualifications that (a) if she was in doubt then she would ask her line manager for a decision on the matter so that she could use her judgment only if there was an obvious problem, and (b) the number of times when there would be a need to rearrange a PE in the way claimed by the JH was on the balance of probabilities very small so that the frequency with which it occurred was minimal. That number was very small because we accepted that it was unlikely that the respondent's merchandising team would, except on very rare occasions, have put a markedly heavier product at the top of a PE.

102 We found the respondent's objection to the claimants' version of paragraph **[171]** to be mistaken. The respondent did not, it appeared, dispute the factual assertion that "the aisle Facings ha[d] no explicit indication that a product [might] also be found on a PE". Indeed, we inferred from paragraph 230 of Mr Richardson's first witness statement that he agreed that that was so. So, the JH either had to remember, or check to see, what was on a PE. We could not see a difference between those two things for the purposes of section 65(6) of the EqA 2010. It appeared to us that the effort required was probably the same, although whether it was the same was subject to the view of the IEs. In addition, if the JH remembered what was on a PE then that helped the respondent. In any event, in our view the work for the JH for the purposes of section 65(6) of the EqA 2010 included being aware of what was on the PEs, which meant that she would have to (1) pay attention to what was on the PEs, and (2) restock them at the same time as restocking a Facing.

Out of stock product queries

103 **[161]** fits here.

Distance over which, and doors through which, cages and blue top trolleys were pulled to the shop floor by the JH

104 **[84-85]** The JH would pull cages filled with products and blue top trolleys loaded with products onto the shop floor. The shortest distance in that regard was about 40 metres, and the maximum distance required to be covered was about 60m. The JH would in doing so pull the cage/blue top trolley through a thick plastic curtain on the inside of the dairy chiller door and then through three doors, two of which were swing doors.

> [We have amended the words of paragraphs **[85-85]** to cater for our conclusion on the occasional use by the JH of blue top trolleys, assuming, which as we say in explanation of paragraph 91 above we doubted, that it was material for the purposes of section 65(6) of the EqA 2010.]

Returning stock to the chiller

105 **[112-116]** fit here.

Repairing packaging

106 **Paragraphs [214-217]** fit here.

Storing and recording waste

107 **Paragraphs [265-285]** fit here. Our conclusions on the issues in dispute in those paragraphs are as follows.

108 We accepted the words contended for by the respondent in relation to paragraph **[269]**, except that we accepted the oral evidence of the JH recorded on page 161 of day 2 that she found items which were not "hers" about once a month. However, the key here was what was her job, and it was in this respect to be alert for items which were not "hers" and needed to be wasted. The number of times when she found them was on that basis irrelevant. If that is wrong, then we have made the necessary finding of fact here.

109 In regard to paragraph **[271]**, given that the issue here was what was the value of the work of a dairy replenisher, we concluded that the task to which that paragraph related could sufficiently be described without reference to the precise placement of the drain down which waste milk needed to be poured. Having said that, at C7/119/6 it was stated that liquid waste had to be disposed of only in a "foul drain", which meant the "cleaner's room", or a "sink or toilet". As a result, disposal of liquid waste was required to be done in that way, and that was the proper way to record the JH's work in this respect.

110 As for the content of paragraph **[272]**, we accepted the respondent's proposed additional words. If the JH was not required to be in the chiller to do the work of recording dairy waste, then the fact that she chose to do it there was irrelevant for the purposes of section 65(6) of the EqA 2010. However, the time spent on the task was best recorded in accordance with the oral evidence of the JH, i.e. usually 20 minutes to half an hour but it could take up to 40 minutes. So, the latter figure of 40, and not 30, was apt.

111 The words of paragraph **[285]** had to be seen in the light of C7/119, on page 2 of which it was said that "Out of code, damaged and Emergency Product Withdrawals must be separated to ensure accurate waste recording (check signage for correct location)." On the next page there was a diagram of a waste cage showing that "Out of Code Products" and "Damaged Products" were required by the respondent to be kept separately.

Milk returns

112 **Paragraphs [286-289]** fit here. The dispute in regard to paragraph **[286]** was about the frequency with which the JH did the task of recording milk returns, on the substance of which we accepted the evidence of Mr Richardson in paragraphs 328-329 of his first witness statement. That supported the conclusion that the task was done whenever it was most convenient, which was, on the oral evidence of the JH (given on day 2, recorded on page 167 that day's transcript), which we accepted, on most Sundays and every other Tuesday.

Waste disposal [290-292]

113 The first dispute in regard to paragraph **[290]** as contested by closing submissions (which was whether or not wasted items were always placed in a plastic bag before

being put in a waste cage) was probably unnecessary. Assuming that it was material, we resolved it by agreeing with the respondent's version, which in our judgment best reflected the position as shown by C7/119/2, which showed that some, but not all, products to be thrown away had to be put into bags. This matter was in fact stated by the claimants to be merely an editorial difference.

114 The evidence of Mr Richardson in regard to the disputed element of paragraph **[291]** did not relate to the issue of the height of the waste cage, nor how best to describe the way in which the JH put waste in it. We therefore concluded that the height of the cage was 6ft, which meant that if it was a four-sided cage then the JH would have to get the waste over its side, and whether the effort was correctly described as "lifting" or "throwing" must have depended on what was being put in the cage, which was as shown by C7/119/2. However, the next page of that document showed a two-sided cage being used as a waste cage. As a result, assuming that the dispute was material, we resolved it by concluding that the JH "lifted or threw the items, as necessary".

Animal product waste disposal [[293-295]

115 The dispute in regard to paragraph **[293]** was resolved by us by reference to C7/119/7, which showed that there was a legal requirement to remove animal by-product waste "from the store using a controlled process", as recorded on that page. Thus, the disputed words should be "legal requirements". We concluded that the words "within Dairy" added nothing to the existing words proposed by the claimants and should not be included in paragraph **[293]**.

Immediate waste disposal [296-298]

116 Paragraph **[298**] was the subject of paragraph 148 of the JH's first witness statement. She there referred to having to take "a hazardous or leaky product, like a jar of casserole mix a customer has dropped on the floor, straight to the bin cage". That went beyond the content of paragraph **[298]**, which was about damaged glass items only. Given paragraph 148 of the JH's first witness statement, it was not surprising that Mr Richardson's response in paragraph 326 of his first witness statement dealt with "products such as leaking packets of raw chicken" as well as broken glass. We saw no good reason to reject the claimants' proposed words for paragraph **[298]**, which made sense from a practical point of view, so we accepted them on the balance of probabilities, but we concluded that the words of paragraph **[296]** should be amended to cater for the possibility of product being "hazardous or leaky". So, the words of paragraph **[296]** should be these instead:

> "When the JH identified or was called to any hazardous or leaky product, such as damaged or broken glass or a leaking packet of raw meat, which was around every three months, the JH immediately disposed of it. JH took the product and all broken glass off the shop floor immediately and put it straight into the bin cage."

"Safe and legal" checks

117 Paragraphs [**324-330]** fit here. The only initially disputed aspect of those paragraphs related to the frequency with which the JH checked to see whether any "items which went out of code the day before remain[ed] in the reductions chiller cabinet", but it appeared that the parties had agreed that frequency by the time of closing submissions. For the avoidance of doubt, since such checks were vital for the respondent, we concluded that the JH's work for the purposes of section 65(6) of the EqA 2010 included carrying out such checks every day unless a colleague had done that or was going to do it.

Determining and processing reductions

118 Paragraphs **[331-365]** apply here. The disputes in those paragraphs as they stood by closing submissions were resolved by us in the following manner.

119 **[332]**: we agreed with the claimants that the respondent's proposed words were superfluous.

120 **[335]**: we agreed with the respondent that this was a duplication.

121 **[337]**: since Mr Richardson did not do the reductions at the material times himself, his estimate of the minimum time it would take to do first reductions was less likely to be accurate than that of the JH. However, we could not see why the precise amount of time it took was material. If it was material, however, then the fact that the JH herself said that it could take up to 90 minutes had to be incorporated in the final words of **[337]**. In those circumstances, we accepted the claimants' proposed words for that paragraph, with the substitution of 90 minutes for "an hour" in the first sentence. As for the second sentence, given the third sentence we found it hard to believe that the potential length of time that it would take the JH to do second reductions was material, but we saw that even the JH said in paragraph 162 of her first witness statement that they might take 2 hours, but that that was rare. In those circumstances, and given the content of paragraphs 161-169 of the JH's first witness statement, we concluded that the use of the word "around" sufficiently captured the position, so we accepted the claimants' proposed words for the second sentence. The third sentence was in substance agreed, so we accepted it as proposed by the claimants.

122 **[344]** The respondent's proposed words and its case in regard to them were inconsistent with these words of C7/249/2 (which was part of the document entitled "Know Your Stuff For... Fresh Food Replenishment – Rotation"): "As you are working you should at all times be aware of and check the date codes on products". It was also much more likely than not that the respondent required the JH and others in her position to check date codes, given the importance to the respondent of not having out of date stock on display. We add that we found nothing in any of the training

materials before us (including documents in the bundle before us to which we were not referred specifically by the parties but to which we referred ourselves: see paragraph 83.1 above) which contradicted that instruction. Given that Mr Richardson's evidence in paragraph 198 of his first witness statement was that rotation did not have to be carried out thoroughly, but that it was plainly inconsistent with the respondent's own training materials, as shown for example at C7/249, we concluded that his evidence in regard to **[344]** was unreliable so that the JH's should be preferred. For the avoidance of doubt, to the extent that what Mr Richardson said in paragraph 198 of that witness statement contradicted the respondent's training materials, we rejected it.

123 **[356]** The words proposed by the claimants made no sense if they were read in isolation. The subject-matter of **[356]** was in any event to an extent catered for by **[357]**, which was agreed. We understood that customers might get too close to the JH when she was carrying out reductions, or reach across her to pick up a newly-reduced product. If that occurred then it was a material matter. If in practice the JH could instead have carried out the reductions in the warehouse then that was also material, and the JH accepted that she could do that, but we accepted her evidence in paragraph 170 of her first witness statement that she did not normally do that because it was "much quicker to do it on the shop floor". Accordingly, we concluded that the words in **[356]** should be these.

> "When the JH carried out reductions on the shop floor, customers might gather close to where she was working, making the process difficult. The JH would then be required to exercise tact and politeness in ensuring that customers gave her the space needed to carry out the task."

124 **[361]**: C7/289/3 included these words: "When reducing products you should follow the department/store guidelines on how much to reduce products by if carrying out final reductions, manual reductions or percentage reductions." We understood that that was what the respondent's proposed additional words for **[361]** were intended to convey. We concluded therefore that the claimants' contested proposed words at the end of **[361]** ("independently and without reference to a manager") should be replaced by these:

> "in accordance with the current store (i.e. Woolton) guidelines and in the knowledge that the reduction would be reviewed on the following day by a manager".

125 **[362]** In the light of that change, we concluded that the claimants' proposed additional words in **[362]** were superfluous and should not be included. Similarly, the respondent's proposed additional words in **[362 and 364]** were superfluous and should not be included.

Serving customers on the checkouts [387-555]

126 **[387]** The frequency with which the JH worked on checkouts was disputed. The respondent's position was based on a spreadsheet which was proved by Mr Black. He gave no direct evidence on that spreadsheet, and there was no other evidence relating to the figures in it. We were in that circumstance unable to accept that spreadsheet as evidence of the frequency with which the JH assisted on checkouts. In addition, the one document in which anything was said about the manner in which the JH worked on checkouts was the page of the JH's personnel file consisting of an annual appraisal for a year which we could not discern where (at C6/5/121, in the "Manager's Summary") it was said that she was "Multi skilled and one who definitely responds first time and promptly on checkouts". That suggested rather more frequent assistance on the checkouts at some point during the relevant period than was contended for by the respondent. In those circumstances, we accepted the words proposed by the claimants for **[387]**.

127 We resolved the other disputes in **[387-555]**, which we have not already resolved above, in the following manner.

128 **[404] and [421]**: the claimants' proposed words were in our view apt, especially given the reference to a "Carry Out Service" at C7/143/11.

129 **[411]**: the respondent had no direct evidence to give in response to the JH's evidence that she had to deal with price inconsistencies "at least a few times a year", as stated in paragraphs 219 and 220 of her first witness statement and there was no reason to doubt what was said in those paragraphs. Accordingly, we accepted the claimants' proposed word "Occasionally".

130 **[418]**: the same was true in relation to the frequency with which the JH used the handheld scanner to scan heavy or bulky items. The current words of **[418]** do not refer to frequency. We concluded that the words "This occurred occasionally." should be added at the end of **[418]**.

131 **[430] and [432]**: the word "occasionally" aptly reflected the JH's evidence in paragraph 217 of her first witness statement, which we accepted.

132 **[435]**: the word "occasionally" aptly reflected the JH's evidence in paragraph 213 of her first witness statement, which we accepted.

133 **[437]**: the words "around once a week" aptly reflected the JH's evidence in paragraph 215 of her first witness statement, which we accepted.

134 **[440]**: the respondent's contentions about this paragraph were correct, in our view. The paragraph had to reflect paragraph 216 of the JH's first witness statement.

135 **[441]**: the frequency of the JH's work on checkouts is determined by us above. The claimants' proposed additional word of "occasionally" was therefore apt, and we rejected the respondent's proposed formulation.

136 **[454]**: the respondent led no evidence about the application of its Bulk Purchase Policy. Instead, it based its contention that **[454]** should be deleted on the JH's evidence in paragraph 218 of her first witness statement. That contention was in our judgment wrong. That paragraph was about a material aspect of the JH's work for the purposes of section 65(6) of the EqA 2010, as it was about something which involved a need to interact with a customer in a potentially difficult situation. Its aptness was in our view confirmed by C7/70/5. No frequency was stated in **[454]**, however, but we concluded that the words of that paragraph were sufficient and apt.

Age-restricted sales [455-466]

137 Legal responsibility for age-restricted sales was (given the passage in the judgment of Lavender J in *Beal v Avery Homes* set out in paragraph 20 of our judgment of 12 July 2023) immaterial at this stage. In addition, there were in **[455-466]** many words about age-restricted sales, when few words would have been far better, with cross-references to the applicable training materials. The JH's responsibilities (and those of all other checkout operators employed by the respondent) in this regard were stated apparently comprehensively in the training documents at C7/13, C7/15 and (to the extent, if at all, it added anything) C7/190. For the avoidance of doubt, we concluded that if and to the extent that the parties have disagreed about the job facts relating to age-restricted sales and any of those documents contains a statement relating to that disagreed matter, that statement is determinative.

138 Indeed, we could see nothing in **[455-466]** which added anything to the content of those training documents. Accordingly, the words to replace those paragraphs should be these: "The JH's responsibilities when working on checkouts in regard to age-restricted sales are stated in C7/13, C7/15 and C7/190." If the independent experts need any further finding of fact in regard to age-restricted sales, then they can ask us for it, and we will consider their request.

Bag-packing

139 **[467]**: we doubted that there was any material difference between packing a bag "carefully", and packing it "carefully, stably and securely". We assumed that it was never the intention of the JH, nor that of the respondent, for a bag to be packed otherwise than stably and securely, as that would be problematic for the customer. We thought that the word "carefully" added nothing material in any event, so that the addition of the words "stably and securely" also added nothing material. The respondent's document C7/124/9 referred only to the service of packing a customer's bag, not to the manner in which it should be packed (i.e. with what care). The same was true of C7/184/2. However, C7/84 referred to when a customer should be offered the service of bag packing, and how it should be done. We saw from C7/84 that there was no need to be trained in order to be able to provide a bag-packing service, but that it was necessary to consider the need to make sure that heavy products were at the bottom and lighter or more delicate ones were at the top of a bag.

Mobile telephone top-up

140 **[472]**: the respondent had no direct evidence to give in response to the JH's evidence that she topped up customers' mobile telephones "at least a few times a year", as stated in paragraphs 219 and 220 of her first witness statement. Accordingly, we accepted the claimants' proposed word "Occasionally".

Gift cards

141 **[483]**: the respondent had no direct evidence to give in response to the JH's evidence that customers left activated gift cards at the checkout "at least a few times a year", but probably "pretty rare[ly]" as stated in paragraphs 219 and 220 of her first witness statement. Accordingly, we accepted the claimants' proposed words, which did not state a frequency. We doubted that what was said in **[483]** was material here.

Paying with cash

142 **[489-491]**: C7/96, headed "Know Your Stuff For Checkouts – Accepted Methods Of Payment" showed at pages 1-11 what checkout operators, including the JH, needed to know about bank notes. The only reference there to referring to a manager was on page 1, where it was said that "When you are presented with notes that are not the currency you normally deal with you should contact your Team Leader for advice if you are unsure." That was reflected in the words proposed by the claimants for **[489-490]** to the extent that they referred to seeking assistance. What the JH was recorded to have said in her interview recorded at C6/4/33 (internal pages 129-130) was not, as contended for by the respondent, that "she would refer the note to the person running the back". Rather, it was that "most of us would call whoever was on the back: can you just check this with me?" There was in fact no evidential basis that we could see, and certainly none identified by the respondent, for its contention that £50 notes were "always referred to the Team Leader for scrutiny". As a result, we rejected that contention and the words proposed by the respondent for **[489]** and accepted the words proposed by the claimants.

143 As for **[490]**, the respondent led no direct evidence and there was no documentary evidence that we could see to contradict the content of paragraph 241 of the JH's first witness statement. We could see no justification for rejecting that paragraph, which was credible in itself. What the JH said in cross-examination in relation the matter did not in our judgment detract from the words proposed by the claimants for **[490]** or suggest that they were inapt. For the reasons stated in this paragraph and the preceding paragraph above, we accepted the claimants' proposed words for **[490]**.

144 **[491]**: given our conclusion in paragraph 68 of our reasons for our judgment of 12 July 2023, we saw no reason to reject the words proposed by the claimants or to accept those proposed by the respondent. We therefore accepted the claimants'

proposed words, but on the basis that they were in our view not material for present purposes.

Cashback

145 **[502]**: we saw no justification for including the respondent's proposed words, since our determination stated above on the issue of the frequency of the JH's helping out on the checkouts was sufficient. However, the claimants' proposed words did not reflect the part of the JH's evidence on which they were based. Those proposed words were therefore inaccurate and had to be rejected if only for that reason. However, in addition, the respondent's training materials (at C7/70/3 and C7/169/4) made it clear that the offer of "cashback" had to be made only when a customer used a debit card and only if the customer had spent at least £1. In addition, both at C7/70/3 and at C7/169/4, there was a reference to giving cash back only if the customer asked for it. In order to reflect those documents and in the light of the lack of a clear recollection of the JH in paragraph 244 of her first witness statement, the words of **[502]** needed to be:

> "Whenever a customer using a debit card asked for cash back, the JH was required to comply up to a maximum of £50 as long as the customer had spent a minimum of £1 and the customer's credit limit on the card was not exceeded."

Tesco Clubcard

146 **[520]**: we accepted the respondent's proposed text in preference to that of the claimants, given that the issue was what was expected of the JH. That it was the expectation was shown by C7/167/5.

Saving stamps [523]

147 The respondent had no direct evidence to give in response to the JH's evidence that she dealt with saving stamps "at least a few times a year", as stated in paragraphs 219 and 220 of her first witness statement. The contention of the respondent about the unreliability of that passage in regard to savings stamps did not persuade us that the text, similar to that of **[521] and [522]**, which was (by the time of closing submissions now) agreed, should be rejected. Accordingly, we accepted the claimants' proposed word "Occasionally" in **[523]**.

Promotions

148 **[529-530]**: we accepted the respondent's submissions on these paragraphs: the claimants' proposed words for **[529]** having now been agreed, **[530]** is a duplication and should be deleted.

Till roll replacement [531]

149 We accepted the respondent's submission that the frequence of the need for the JH to change the till roll was not stated in paragraph 247 of her first witness statement. The claimants did not identify any other evidence in support of the proposition that it was about every two months. The task was described at C7/163/93, although naturally the tills will have changed over time. It was in our view sufficient therefore for the independent experts to know simply that it was part of the JH's job when working on a checkout to be alert to a warning that the till roll needed to be replaced and to replace it as shown by for example C7/163/93.

Assisted service checkouts

150 **[541]**: we could see nothing in the training materials which directly assisted our resolution of the dispute about the words of **[541]**, so we determined it on the balance of probabilities and by reference to pages 2 and 3 of C7/39. We concluded, notwithstanding the respondent's extensive submissions on the point, that the claimants' proposed words best reflected the reality of what was required, both as shown by C7/39 and the JH's evidence as referred to by the claimants in their closing submissions.

151 **[547]**: the respondent's proposed words were inconsistent with that which we regarded as a requirement recorded at C7/39/2 to "[explain] interventions at the checkout in a friendly manner". That was what the JH's job was when there was a problem, and therefore we accepted the claimants' proposed words for **[547]**.

152 **[554-555]**: we could not see that it was material whether or not ASCs were thieves' tills of choice. Rather, the issue was whether or not there was a high risk of theft, for which the JH had to be on the lookout, i.e. to the risk of which she had to be alert. Common sense suggested that an ASC was indeed an area where intending thieves were most likely to be able to steal, and C7/34/1 bore that out, with its reference to nine separate ways in which theft could occur there. That page also bore out the detail of **[554]**, although in our judgment C7/34/1 was better and more apt in that regard. In addition, the relevant pages of C7/147 (pages 3, 4 and 6) were the best evidence of what was required of the JH in this context. As a result, **[554]** and **[555]** in our judgment needed to be replaced by these words.

> "There was a high risk of thefts at ASCs, as shown by C7/34. It was the JH's job when working at an ASC to be alert to the risk of thefts as shown on the first page of that document and to deal with it in the manner shown at pages 3, 4 and 6 of C7/147."

Cleaning and related issues [556-598]

153 We agreed with the respondent that the role of the JH in regard to cleaning and keeping the warehouse safe was best regarded as an incidental (albeit vital) part of her work. That was said (although the precise description of the work of cleaning and

keeping the warehouse safe was that it was "integral and not separate" rather than "incidental") in response to section J of the EVJD for the JH, which was **[556-598]**.

154 The tasks which the JH had to carry out in the course of her work as a replenisher or otherwise as a customer assistant in relation to cleaning and otherwise helping to look after the physical environment in which she worked were stated in the documents referred to in paragraphs 83.1 and 83.2 above, namely pages 13-16 of C7/142 and C7/234. We saw all of those things which were the subject of dispute in **[556-598]** as being catered for by what was said in those documents.

155 For the avoidance of doubt, we accepted that the substance of **[556]** as contended for by the claimants accurately reflected the first box on the right hand side of C7/142/13 read with C7/234/3, part of which we have set out in paragraph 159 below, and therefore we accepted the claimants' proposed words for **[556]**, substituting up to "requires" these words:

> "As shown by the first box on the right hand side of C7/142/13, the JH was required".

156 The claimants' proposed content of **[559]** was disputed because of the reference in it to smelling a spillage. In our judgment, the key thing was to be alert to the risk of a spillage, not the manner in which one came across it. If it were not immediately apparent to the eye, then it might become apparent only through the nose, but that was irrelevant, as was shown by the words on the right hand side of C7/142/13.

157 Similarly, the disputes in regard to **[567-568]** concerned the frequency with which the JH might need to use absorbent powder or cat litter. If (which we doubt) it is material, then we accepted that the JH said in cross-examination that she used absorbent powder up to twice a year. We also accepted that the equipment referred to at C7/142/14 was intended by the respondent to be kept replenished, as shown by the text on the left hand side of that page. However, if the JH had instead to use cardboard from the recycling cage and cat litter, then that was probably no different in terms of demand for the purposes of section 65(6) of the EqA 2010.

158 The assertion of rarity made by the respondent in regard to **[569]** was in our judgment not justified. Mr Richardson's evidence differed on this from that of the JH, but (1) he was on the shop floor in the dairy area less than the JH, (2) he accepted (as recorded on page 169 of the transcript for day 4) that his evidence on this (as, we think, was the JH's) was a matter of impression, but (3) Mr Richardson's evidence sought to diminish the impact of the "clean as you go" policy. That was shown by the following words in paragraph 332 of his first witness statement:

> 'I disagree that colleagues "*kept an eye out*" for mess, spillages or trip hazards. To me, this language suggests a requirement to look out for something proactively and with particular attention. Instead, colleagues dealt with them, as and when they came across them.'

159 Those words had to be read in the light of these words on C7/234/3:

> "Slips, trips and falls are the biggest cause of accidents.
>
> This is why we adopt the principle of 'Clean As You Go' whenever we are working on the shopfloor or in the Chiller or Warehouse.
>
> You should remember from your 'Working Safely' training in Bronze For Everyone that keeping the store safe for customers and staff is everybody's responsibility and you should clear and clean any potential hazards you see, even if you think its 'not your mess' or on 'someone else's department'.
>
> At all times you should be vigilant of any packaging or products that have fallen onto the floor. Whenever you see any packaging on the floor, you should remove it immediately. ... If a product has fallen from the shelf and spilt over the floor, you must stay with the spillage and get someone to call for a contract cleaner. You must never leave the spillage unattended."

160 Mr Richardson demonstrated by the evidence that we have set out in paragraph 158 above in our view either (1) that he had tailored his evidence to suit the respondent's opposition to the claimants' case, or (2) a surprising lack of awareness of his own responsibilities as a manager, which in our judgment had to include reminding staff of the need to be vigilant to the risk of the causes of slips, trips and falls. In any event, we saw no reason to doubt the JH's evidence in cross-examination on this (recorded at line 22 of page 39 to the first line of page 41 of the transcript for day 3), which we saw was reflected in the claimants' proposed words for **[569]**, and concluded that the right frequency for **[569]** was as stated by claimants, namely "around three times a month".

161 As for **[570]**, the respondent led no evidence about the frequency with which a leaky bottle was carried around the store, and we thought (given our own experience of shopping in supermarkets) that it was likely to be a regular rather than an occasional occurrence. In any event, while frequency was probably material here, what was most material was the fact that the JH had to be alert to the possibility of leaks from bottles as opposed to large spills, so that she had to be particularly alert to spot them and, if she did, to clean them up immediately, albeit that if there was only a "trail of spillage" rather than a large spillage, it would on the balance of probabilities have been acceptable to the respondent for the JH to go and get a mop to clean it up. In any event, we accepted the claimants' proposed words for **[570]**.

162 The dispute in regard to **[573]** was resolved in our judgment by reference to these words at C7/234/3:

> "If you see any damaged products that have spilled onto the shelf, you should carefully remove it, clean the shelf and any affected products before taking the damaged product to the Waste and Damages location for your department."

163 In the light of those words and the fact that, as we agreed with the respondent, cleaning as one went was done in the JH's case when replenishing, we accepted the respondent's proposed words for **[573]** up to "as necessary to do so", but not the rest of those proposed words.

164 We resolved the dispute in regard to **[575]** in part by reference to C7/234/2, which in our judgment showed that customer assistants such as the JH were expected to "clean all shelves, the sides of the cabinet, and any glass or mirrors visible to the customer" in the process called on that page "case cleaning". However, that process was stated in that document to take place four times a year, which was rather less than what the claimants referred to in **[575]**, which was two to three times a month. In addition, the claimants' proposed words in **[575]** went further than the content of C7/234/2, but they were in no way inconsistent with that content, and made sense to us. In addition, we did not see what Mr Richardson said in paragraphs 353-354 of his first witness statement as covering the whole of the situation, since there was plainly the possibility of the JH being asked by her line manager to completely clean a mod, which it was in the respondent's interests for her to do. As a result, we accepted the claimants' proposed words for **[575]**.

165 We could also see no reason to reject the claimants' proposed words for **[576]**, especially since Mr Richardson accepted (in paragraph 354 of his first witness statement) that the JH "cleaned mould at the back of a chiller cabinet, from time to time" and that she used soap and water to do so, as described in paragraph **[576]**. We accepted, too, what the JH said in paragraph 270 of her first witness statement about always finding black mould at the back of a mod after 2011.

166 The contested words in **[578]** were in our judgment apt. That was for the following reasons.

166.1 C6/6/80 showed that the back of the chiller cabinet was 3ft from its front, and we rejected the respondent's assertion that the picture made "the bottom shelf look deeper than it is in reality". Undoctored pictures do not tell lies, and this picture was in our view plainly in no way a distortion. It supported the words "which is 3ft deep".

166.2 There was no reason to conclude that the JH only cleaned mould off the bottom shelf of chiller cabinets.

167 The respondent's contentions in relation to the words of **[581]** were not borne out by C7/142/13. We therefore saw no reason to reject the claimants' proposed words for **[581]**, and accepted them.

168 As for the contested words of **[584]**, it was in our judgment, on the balance of probabilities in the light of our experience of what happens when a pot of yoghurt leaks, likely that multiple items would often be affected. The word "multiple" read in the light of the word "usually" was therefore in our judgment apt. We therefore accepted the claimants' proposed words for **[584]**.

169 The words of **[586]** were, we agreed with the respondent, repetitious and needed to be deleted.

170 We agreed with the respondent that **[587-588]** were a repetition of **[556]**.

171 The claimants' proposed words for **[590]** were an accurate reflection of the third bullet/tick point on the right hand side of C7/142/13, and therefore we accepted those words.

172 The claimants' proposed words in **[595]** depended on the JH's evidence about what she did in practice. If and to the extent that it was necessary for the purposes of section 65(6) of the EqA 2010 to do so, we agreed with the respondent that it was not a part of the JH's job to make announcements over the store's tannoy in the sense that that was not something which she was specifically required to do in the course of her employment. However, we also accepted the JH's evidence that she did in fact do that, having previously worked on the Customer Service Desk. In the circumstances, we concluded that we had to accept the words of **[595]** as contended for by the claimants. We record here that there was no evidence that the JH was told that she should not make announcements over the store's tannoy in the circumstances to which **[595]** related.

173 The JH's duty in regard to pests was succinctly stated at C7/142/28 and C7/823/56, and supported the claimants' proposed words in **[597]**. We therefore accepted those words and rejected the respondent's submissions to the contrary, which were merely about the frequency with which pests were reported, including by the JH, and did not affect the JH's responsibility to be alert for, and report, pests.

Additional elements of the job

Personal hygiene

174 **[599]** stated the obvious, but if it was material, it was supported by C7/142/25, so we accepted the words of **[599]** on the basis that they described the JH's responsibilities.

Shoplifting

175 As for the JH's responsibilities in regard to shoplifting incidents, given the content of pages 3-4 of C7/147 and what the JH said in paragraph 285 of her first witness statement, we accepted the content of **[605-606]**, including the word "regularly" at the end of **[606]**. As for the content of **[607]**, it was accepted by the respondent to be

factually correct, and in our view it was capable of being relevant as one of the aspects of the conditions in which the JH worked. Accordingly, we accepted that **[607]** should be included.

Advice and assistance given to colleagues, and on-the-job training of new starters

176 In part, we accepted the respondent's contentions in regard to **[614]**. However, we concluded that the best way to capture the way in which the JH worked as far as that paragraph was concerned was simply to substitute the word "assistance" for "guidance" (thus retaining the word "advice").

177 However, we accepted on the evidence of the JH in paragraphs 293-297 of her first witness statement and on the basis of what we would ourselves have expected of a "permanent" customer assistant, especially a senior one such as the JH, that the content of **[615]** was accurate. In addition, we did not believe that the respondent would say that it was not the JH's role to assist more junior colleagues. Thus, we accepted **[615]** as proposed by the claimants.

178 We did not see the words proposed to be added to **[616]** and **[618]** as adding anything material to those proposed by the claimants, so we rejected the respondent's proposed additional words. However, we agreed with the respondent's proposed words for **[617]**, which in our judgment were more apt than those of the claimants. In contrast, though, we concluded that the content of **[619]** was apt, if read as relating to what the JH was required to do in relation to the use of PDAs by new starters. We also concluded that there was no good reason to reject the content of **[620-621]**. Nor was there any good reason to delete the headings above paragraphs **[616] and [620]**.

Supervision of students on work experience

179 Similarly, we concluded that the claimants' proposed words for the heading to **[622]** were apt, so we accepted them, notwithstanding the respondent's contentions in that regard.

<u>Working conditions</u>

180 **[637]**: we accepted the respondent's additional words, which did indeed help to give a fair picture of the split in the time spent by the JH in the three locations at Woolton.

181 **[638]**: given what we said in paragraph 61 of our reasons for our judgment of 12 July 2023, there were no reliable statistics put before us, and we accepted statistics only if they were agreed or there was something in the evidence which justified that acceptance. The statistics in **[638]** were apparently provided by the respondent and accepted by the claimants. However, it seemed to us that the statistics provided almost irrelevant detail, since it was unlikely (as it seemed to us, in any event, before hearing from the independent experts on the matter) that the precise number of

dangerous incidents which occurred at the workplace was material. What was material was whether or not there was a realistic risk of danger. In that regard, in our judgment pages 6, 8 and 12-15 of C7/147 showed that there was, since those pages were there for a reason. In addition, we accepted the JH's evidence in paragraphs 318-328 of her first witness statement, which in our judgment spoke for themselves so that they should be read by the independent experts when coming to a view on the risks to the JH (and others in her position of customer assistant) of working on the shop floor. We did not see the content of **[643]-[645]** as adding anything material by way of facts to what we say in this paragraph.

182 **[639-640]**: we saw nothing added by those paragraphs, which were a summary of other parts of the EVJD and should therefore be omitted.

183 **[641-642]**: we concluded that there was some repetition here too. What was new and needed to be included in the statement of the JH's working conditions (as with those of other customer assistants in any of the respondent's stores) was that, as claimed in those paragraphs:

183.1 the risk to the JH of slips and trips was increased when the shop floor was busy, and

183.2 that risk arose from customers using baskets, wheel shoppers or trolleys, and from small children running around.

184 **[646]**: we did not accept the respondent's proposed additional words, which were evaluative. We accepted that the noises stated in the claimants' proposed words for **[646]** were in the background for the JH. Their impact is a matter of evaluation. We therefore accepted the claimants' proposed words for **[646]**.

185 The content of **[647-649]** was sufficiently catered for by our reference above in paragraph 83.1 to pages 5-7 of C7/142 and pages 9-25 of C7/823, to which we refer in paragraph 83.2 above.

186 **[650]**: subparagraph (a) was a repeat of what was said elsewhere (see paragraph 62 above). Subparagraph (b) was covered by C7/142/7, to which we refer in the preceding paragraph above. We preferred the respondent's proposed words for subparagraph (c), as they better reflected the reality in our judgment. We accepted the claimants' proposed words for subparagraph (d) given our acceptance (stated in paragraph 166.1 above) that the distance from the front to the back of the bottom of a chiller was 3ft. The respondent's proposed word "standing" was more apt in subparagraph (e). The claimants' proposed words for subparagraph (f) were plainly apt, if only as a matter of common sense, given our observations from our own experience, so that we concluded that what was in paragraph (f) was an apt description of what was required of the JH and any other checkout operator so far as relevant.

187 **[651]**. We saw no reason to reject the JH's evidence in paragraph 337 of her first witness statement, and in any event as a matter of common sense there will be a risk of scratching oneself on a plastic edge strip, not least because one can cut oneself on paper. The reliability of Mr Richardson's evidence in response (in paragraph 459(e) of his first witness statement), which was in conflict with that of the JH in paragraph 337 of her first witness statement, was in our judgment diminished by what we saw as his willingness to say things which were inconsistent with both our understanding of common sense and the respondent's own training documents. We refer to one concrete example of that in paragraph 160 above. However, this particular conflict of evidence was in our judgment not material. In our judgment, subject to any request from the independent experts for more precision, it was sufficient to conclude that there was a real risk to the JH of being scratched or cut by shelf edge plastic when she was replenishing.

188 **[652]**: assuming (which we doubted, given that the conditions of the respondent's stores will have differed from place to place and that the issue here was what was the value of the work of a customer assistant, so that it was sufficient to conclude that it was likely that the respondent's stores universally had much glass at their front) that the precise amount of light at Woolton was a material factor, we could not accept the respondent's proposed amendments to the claimants' proposed words, which words in our judgment were apt, given the evidence of both the JH and Mr Richardson.

189 **[653]**: we doubted very much that the respondent would have caused any of its stores to be so badly lit that staff could not read shelf edge labels. That was because it would be counter-productive and possibly a breach of the Health and Safety at Work etc Act 1974. What the JH said in paragraph 339 of her first witness statement was that she and her colleagues "often" found it difficult to read the dates on products before the lights were turned on fully. Mr Richardson's evidence was that the issue had not been raised with him, and the claimants put no evidence before us of any written complaint that the lighting was too low. The respondent proposed the use of an estimate that the lighting was at only 60-70% of its full brightness. We were not aware of any evidence given to that effect, but Mr Richardson acknowledged that the lighting was dimmer when the store was not open to the public. In all of the circumstances, we concluded that the claimants' proposed words should be used for **[653]** with the addition of the word "more" before "difficult".

190 **[654]**: we accepted the respondent's evidence, which was consistent with that of the JH, that the shop floor's temperature was capable of being affected by (1) a central heating boiler which the JH said (in paragraph 340 of her first witness statement) "would regularly be acting up", and (as also stated there) (2) air conditioning, which "either wasn't strong enough or wasn't turned on enough". The JH accepted too (in paragraph 34 of her second witness statement) that she could use a "fleece" when on the shop floor. As a result, the main problem for the JH and her colleagues when operating a checkout was heat in the summer. We saw that in paragraph 31 of her second witness statement, the JH said that there was no air conditioning at the store. That was contrary to what we have recorded above as being said in paragraph 340 of

the JH's first witness statement. That self-contradiction was, however, we concluded, only apparent at first sight. That was because the JH at first thought that there might have been air conditioning but then came to the firm view that there was not, and that firm view was consistent with the failure by Mr Richardson to refer in his evidence (to which we refer in paragraph 194 below) to the existence of air conditioning at the store. In any event, we accepted what the JH said in paragraph 340 of her first witness statement about one occasion when the staff at checkouts were given iced lollies by the respondent, presumably because of the heat at the time. We also concluded on the balance of probabilities that what the JH said in that paragraph about being permitted to take a hot or cold drink to the checkout was temperature-related, and that what Mr Richardson said in that regard in paragraph 480 of his first witness statement (which was that he did not "consider that the reason colleagues took hot or cold drinks to the checkouts related to the Store's temperature being uncontrolled") was not a good guide to the reason why taking drinks to the checkouts was permitted. His words there were careful: he referred there to the temperature being "uncontrolled", when the issue was whether drinks were permitted to be taken by staff to checkouts when they were operating them was temperature-related. What the JH said in cross-examination on day 3, recorded at pages 150-151, about taking a drink to the checkout related (and related only) to her taking of a bottle of water, "because of one of the conditions" which she had. The respondent's submission that the JH had "conceded during XX that the reason why colleagues were allowed to take drinks to the checkouts had nothing to do with the temperature of the Store" was therefore not well-founded: it was true only that on the occasion in question, the JH had taken a bottle of water with her because of one of her own conditions. In those circumstances, we concluded that **[654]** as contended for by the claimants was apt, with the word "at" deleted before "to take".

191 **[656]**: we concluded on the evidence before us that the JH did not regularly handle meat animal by-products when on the shop floor, as that was what the JH herself indicated in paragraph 341 of her first witness statement. However, the parties agreed that she handled fish and seafood products when they arrived in a delivery on which she was working, and that on occasion she handled sausages and bacon. Those would not be rancid. However, given the fact that the photographs at C6/6/86-87 and 89 showed meat products in the dairy waste cage, we accepted that the JH did have to deal with such products when working on the contents of that cage. If there was a leak, the leaked material was likely to smell. However, the JH was able to use gloves when handling the product. In those circumstances, we concluded that the claimants' proposed words for **[656]** overstated the impact on the JH of handling meat and fish by-products. In our judgment that paragraph was best framed in the following manner.

> The JH was required to handle fresh raw meat and fish by-products in packaging from time to time. She was able to use gloves when doing so. When dealing with waste products in the dairy department waste cage, she regularly had to deal with meat products, the packaging of which might be broken and which might be smelly.

192 **[657]**: factually, what the claimants proposed for the content of **[657]** appeared to be agreed and in any event in our view was correct. The impact of the factors recorded there was a matter of evaluation. At the risk of stating the obvious, the factors referred to in **[657]** applied to all checkout operators.

193 **[658]**: the word "industrial" was evaluative and added nothing. We therefore agreed with the respondent that it should be omitted from the opening words of **[658]**. However, we accepted (1) the claimants' proposed words for subparagraphs (a)-(d) with the exception of the reference to a forklift horn, for which there was no evidential basis, and (2) the respondent's proposed words for subparagraph (e), all on the basis of the balance of probabilities and in the light of paragraphs 344, 345, and 350 of the JH's first witness statement and paragraphs 473 and 487(a)-(c) of Mr Richardson's first witness statement.

194 **[659]**: both parties agreed that the warehouse was heated and Mr Richardson accepted (in paragraph 57 of his first witness statement) that such heating merely (our word) "reduced the fluctuation of the temperature". Given the evidence of both Mr Richardson (in paragraphs 57-59 of his first witness statement) and the JH (in paragraph 346 of her first witness statement), we accepted the claimants' proposed words for **[659]**.

195 **[660]**. However, we concluded that the respondent's proposed words for **[660]** better reflected the factual position, which was not, we saw, in substance disputed.

196 **[661(a)]** stated the obvious as far as what the JH did was concerned, ignoring the reference to "moving product in bulk", which as stated below the heading to paragraph 26 above added nothing relevant. The fact that the JH was able to use gloves was, however, relevant. What needed to be recorded in **[661(a)]** therefore was that the JH was provided with protective clothing.

197 **[661(b), (c) and (e)] and [662]** as proposed by the claimants were apt: the risk of injury existed. Its significance is an evaluative matter.

198 **[661(d)]** was unnecessary given C7/142/7, which we have incorporated by reference in paragraph 185 above.

199 **[663]** seemed to us to be too general to be of any use, and in any event to the extent that it was capable of being regarded as a statement of material fact (which we doubted: it was rather more in the nature of an evaluation) a repetition of what was said elsewhere. We therefore rejected it.

200 **[665]**: the subject-matter of this paragraph was the fact that the JH had to move between areas with different temperatures. We did not understand that the words "timed work" added anything, assuming that they related to the Cold Chain policy. It was self-evident that the warehouse chiller might be colder than the rest of the

warehouse (but not necessarily, given the JH's evidence) and the warehouse freezer would be colder than the rest of the workplace. **[669]** was a submission, but if it was more than that then it was a repeat of **[665]**.

201 **[666]** was a repeat of **[272**], with which we deal in paragraph 110 above.

202 **[667]**: we concluded that the second sentence of the claimants' proposed words for that paragraph stated the obvious and should not be included. The respondent's proposed words with the word "very" omitted (in both places) best captured the factual situation.

203 As for the claimants' proposed words for **[668-670**] which were not agreed:

203.1 The JH did not frequently go into the freezer, as far as we could see. We concluded that, as Mr Richardson said in paragraph 459(k) of his first witness statement, she did so only "when wasting meat products that had been stored on the dairy cage and when replenishing frozen products". However, the frequency with which she did that seemed to us on the evidence which we had heard to be higher than, as Mr Richardson asserted, "only a couple of times a year". We saw that the JH herself said only that she did so "regularly", and that was said in paragraph 35 of her second witness statement. We accepted that paragraph, in which she said that she went into the freezer "twice a week to store the animal by-product waste". We accepted therefore that the words of **[668(b)]** should be as proposed by the claimants.

203.2 We saw no evidence before us to support the claimants' proposed words relating to a temperature range of 10-25 degrees Celsius for **[668(d)].** The fact that the respondent was likely to want its stores' usual, ambient, temperature to be acceptable to the public, albeit that in winter the public would be likely to be in warm clothing, suggested to us that those figures were too extreme. In the absence of evidence of the temperature range, and given our finding about the chiller aisles stated in paragraph 16 above, we concluded that we neither could, nor needed, to make any additional finding of fact about the temperature at Woolton.

203.3 Given our finding in paragraph 16 above about the chiller aisles, and the agreed wording of **[637]**, we saw no need for **[670]**, which we therefore concluded should be omitted.

204 **[671-672]** Given our findings in paragraphs 60-65 above about **[234-240] and [243]**, **[671-672]** were repetitious and unnecessary with two exceptions, concerning things not dealt with above. **[671-672]** should therefore be deleted except that

204.1 we accepted the JH's oral evidence on day 3 at pages 88-90 about being scratched or cut, so that the claimants' proposed opening words of **[672]** and their additional proposed words for **[672(a)]** should be included, and

204.2 we saw nothing in the evidence of Mr Richardson in paragraph 459(j)(ii) or his oral evidence on day 4, at pages 216-219, to justify rejecting the JH's evidence in paragraphs 123-126 of her first witness statement about damaged wheels on a cage and their impact on her work (which we accepted), so that the words of **[672(b)]** should also be included but with the words "at least" replaced by "about".

The yard [673]

205 The risks to the JH incurred when going into the yard were recognised at C7/142/4, as noted in paragraph 83.1 above. We concluded that both parties were seeking to argue their cases in the words about which there was disagreement in **[673]**. We concluded that the words should be these.

> The JH regularly went into the yard, where she was at risk of being struck by a moving vehicle. In order to mitigate that risk, she was required to follow the instructions stated in the box on the left hand side of C7/142/4.

Monitoring

206 **[674]** was a repeat of **[23]**, to which we refer in paragraph 19 above.

207 [**[675]**: there were CCTV cameras at Woolton, as shown by C6/6/24, C6/6/27, C6/6/30, C6/20/53, and C7/784. Plainly, the JH was aware that her actions were capable of being monitored via that CCTV in accordance with the policies referred to in C7/784, at least in 2018. Mr Richardson's own evidence, in paragraph 489 of his first witness statement, was that "there was CCTV in the Store and it was zoomable". The claimants' proposed words of **[675]** were therefore apt, and those proposed by the respondent were not.

208 **[676]**: we accepted what the JH said in paragraph 356 of her first witness statement. We therefore concluded that the claimants' proposed words were apt, and that they were to be preferred to those proposed by the respondent.

209 **[678]**: if and to the extent that it was necessary to refer to monitoring of the legal requirements relating to age-restricted purchases (which, given our finding stated in paragraph 13 above, we doubted, since the burden of the knowledge of the possibility of being found to have broken the law was probably sufficient for present purposes), we accepted the respondent's proposed words for **[678]**, which in our judgment, based on the evidence which we heard, best reflected what happened in practice.

210 **[680]**: we agreed with the respondent that being in a public-facing role in which one is vulnerable to the possibility of a complaint is not the same as being monitored. If and to the extent that the issue was material (and we thought that it was, but not on the

basis that it amounted to monitoring), the evidence of the JH in paragraphs 197-198 of her first witness statement (which we accepted) showed that she worked in the knowledge that customers might complain about her, and thereby cause her anxiety. However, the risk of a justified complaint was probably very low, and therefore the effect of such knowledge might not be capable of being measured for the purposes of section 65(6) of the EqA 2010. That, though, is a matter of evaluation. The appropriate words for **[680]** should therefore be:

> The JH worked in the knowledge that any customer might complain to the respondent about her conduct towards them.

211 **[681]**: the claimants put no evidence before us to show that the use by the JH of a PDA was capable of enabling the respondent to monitor the JH's work in carrying out reductions. The words about monitoring in **[681]** were therefore speculative. The respondent, on the other hand, led direct evidence from Mr Richardson (on day 4; it was recorded on pages 17-20 of the transcript for that day) to the effect that during the relevant period, the PDAs were not capable of being used to monitor the JH's work, despite the fact that she had to log in individually when using one. In the absence of any evidence to undermine Mr Richardson's evidence in that regard, we accepted it. Accordingly, **[681]** must be omitted.

212 **[682]**: The JH worked in the knowledge that she might be searched as shown on pages 10-11 of C7/147, with the possible consequences shown on those pages. The JH's evidence in paragraph 358 of her first witness statement was not contradicted, so we accepted that such searches happened in the manner shown by what the JH said in that paragraph. We saw no reason in those circumstances to reject the claimants' proposed words for **[682]**, which we therefore accepted in preference to those of the respondent, which we thought wrongly sought to diminish the impact of the searches.

Appendix 2

Siobhan Williams (to whom we refer below in this appendix for the most part as "the JH")

TRIBUNAL'S DETERMINATIONS OF THE RELEVANT FACTUAL DISPUTES

Introduction and overview

1 Having completed one set of determinations for a replenisher (Mrs Worthington), with a revised and completed framework, for the sake of simplicity, brevity and speed, we have in relation to the work of Ms Williams merely stated (a) what disputed factual issues we concluded were irrelevant (and there were only a few which we could say were positively irrelevant, although we doubted the relevance of the factual basis for a number of the disputes), and (b) our resolutions of, and our reasons for those resolutions, of the disputes which we concluded might be, or were, relevant. Here, as with our determinations relating to the work of Mrs Worthington, a number in bold font is a reference to a numbered paragraph of the EVJD for the JH, Ms Williams. Here, though, we have not put square brackets around the bold paragraph numbers.

Paragraph 1; "employment information": the context in which the JH worked

2 **1.1** concerned disputed matters which in our judgment were wrongly disputed. The JH's precise working hours were not relevant. Having said that, as far as we could see, what the claimants proposed in relation to the JH's working hours was broadly correct and as far as we could see was sufficient for the purposes of evaluation. We therefore made no determination of the disputes in **1.1** but on the basis that if the independent experts ("IEs") needed a determination of any of those issues, then they should ask us for it.

3 **1.2.2; The presence or otherwise of a security guard at the store at which the JH worked during the relevant period ("the store")**. We could not see how the precise manner in which the security guard worked when there was one present, could affect the IEs' assessment of the value of the JH's work. If and to the extent that it was relevant in that it was part of the conditions in which the JH worked, then we accepted the respondent's proposed additional words.

4 **1.2.3; Monitoring by CCTV**. The documents on which the claimants relied (C5/10/13 and C7/783) were in our view determinative and sufficient. We noted that the respondent agreed that there was CCTV at least on the shop floor. For the avoidance of doubt, we concluded that the words up to and including "CCTV" were all that was required for this paragraph.

5 **1.2.5; The claim that the environment in which the JH worked was "dynamic" and in part "uncontrollable"**. The position here was in part obvious and self-evident and in part best evidenced by pages 2-3 and 5-6 of C7/147. The words "dynamic"

and “uncontrollable” added nothing material in our judgment. If there was a need for a determination, then we accepted the claimants’ proposed third to fifth bullet points on the basis that they were self-evidently apt and supported by C7/705.

6 **1.2.6; Risks on the shopfloor**. We could not see a need to determine whether or not the respondent’s proposed additional words should be included. What we say in paragraph 181 of our determinations of Mrs Worthington’s work (i.e. paragraph 181 of Appendix 1, at page [ ]) applied here. Given what was said in **17.2.2** of the EVJD for the JH, we add here a reference to mobility scooters and zimmer frames. Accordingly, for the avoidance of doubt,

6.1 the risk to the JH of slips and trips was increased when the shop floor was busy, and

6.2 that risk arose from (1) customers using baskets, wheel shoppers or trolleys, mobility scooters or zimmer frames, and (2) small children running around.

7 **1.2.7; Reported incidents at the store during the relevant period**. The question whether or not the JH was on shift at the time of the various incidents was in our judgment not relevant. What was relevant was the size of the risk of an incident, and that was shown by the agreed figures in this paragraph, as shown more helpfully by the claimants’ proposed words for it.

8 **1.2.8; USDAW survey results and stated results of causes of abuse**. Given that (1) the statistics in this paragraph were supported by the documents from which they were drawn (C7/862, C7/908, C7/894 and C7/910), (2) the respondent did not dispute those statistics, and (3) they were in our judgment relevant to show the conditions in which the JH worked, we accepted the claimants’ proposed words for this paragraph.

9 **1.2.11; Warehouse layout changes**. The parties agreed that the locations of items changed from time to time. Whether it was relevant that they did so was not at all clear to us, but assuming that it was relevant, we preferred the claimants’ proposed words, not least because the respondent’s proposed additional words were in our view evaluative.

10 **1.2.13; Effect of external temperature**. We concluded that the claimants’ proposed words for this paragraph were more apt; they were succinct, but sufficient.

11 **1.2.15; Receipt of deliveries**. It was an inescapable conclusion (and it was a conclusion which was plainly to be expected of a customer assistant employed by the respondent) that the JH did at some points during the relevant period assist with moving units of delivery (“UoDs”) from the lorry in which they were delivered to (1) the warehouse of the store, and (2) the shop floor of that store. That was evidenced by what Mr Woolley said in paragraph 206 of his witness statement, which was this:

> "I did not instruct Siobhan to assist me with tipping lorries in the service alley and I only asked her to manoeuvre cages into the warehouse from the cargo lift very infrequently."

12 In paragraph 205 of his witness statement, Mr Woolley said that he recalled the JH "manoeuvring cages out of the cargo lift at shopfloor level and into the warehouse ... less than ten times in the three years that I worked in the Store".

13 It was also evidenced by what Mr Gleiwitz said in paragraph 200 of his witness statement, where he said this:

> 'Siobhan did do some replenishment and colleagues tend to refer to this as "*working the deliveries*" but she did not do the deliveries themselves in terms of overseeing the delivery drivers, accepting and taking goods into the Store and carrying out any necessary paperwork, which is what colleagues call "*tipping the lorries*". The way I describe it is, once items were in the warehouse, the delivery tasks have ended and they became replenishment tasks.'

14 What Ms Jemmett said in this regard was primarily in paragraph 237b of her witness statement and was that the JH did not assist with even one delivery to the back door of the store while she, Ms Jemmett, was the store's manager (i.e. from 1 May 2017 until the end of the relevant period). That evidence was forcefully repeated by Ms Jemmett orally, as recorded on page 31 of the transcript of day 13 (that is to say, the page numbered internally as 31; it was at pdf page 9, but unless otherwise stated, we refer in this document to the internal numbering of transcript pages). However, Ms Jemmett did say that on one occasion, as she described it in paragraph 61 of her witness statement, the JH helped (as did all other available members of staff because of the "need to get the delivery in quickly", it being a case of "all hands to the deck") to move cages from the pavement at the front of the store to the store's warehouse.

15 Against that, we had the claimant's evidence in paragraphs 191 and 192 of her first witness statement, which was clearly to the effect that she assisted with moving newly-delivered stock from the tailgate of the delivery lorry into the store. She affirmed that evidence orally, despite being pressed hard on it in cross-examination, and she put before us several photographs (C5/81 and C5/82) which were taken on Ms Jemmett's birthday, which she (Ms Jemmett) took as annual leave, and which the JH acknowledged (on page 110 of the transcript of day 11) were taken by her cousin, who was also a shift leader. That was Mr Scott Carrington.

16 Having (1) considered what the parties said in their closing submissions on this issue (including, for the avoidance of doubt, those made by the respondent in relation to paragraph 13 of the EVJD for the JH), (2) heard and seen the claimant, Ms Jemmett, Mr Woolley and Mr Gleiwitz give evidence, and (3) taken into account the fact that the JH's role in practice was mainly to operate checkouts and replenish, we preferred the respondent's evidence to that of the JH about the extent to which she assisted

with moving stock on UoDs when deliveries were received at the store. So, we accepted that the JH occasionally (that is to say, using that term as defined at H31) did what Mr Gleiwitz and Mr Woolley described her as having done as set out by us in paragraphs 11-13 above, and we accepted that the JH did not do that to any extent while Ms Jemmett was present at the store except once, as described paragraph 61 of Ms Jemmett's witness statement.

17 **1.2.16; Working in the alley at the back of the store**. Having preferred the respondent's evidence to that of the JH, we agreed with the respondent that **1.2.16** should be omitted. Consistent changes needed to be made to the rest of the EVJD for the JH, namely to **1.5.1**, **1.5.2** and the whole of paragraph **13**.

18 **1.2.17; Risk of injury from moving cages**. Pages 4-12 of C7/142 were a very good guide to the risk of injury which the JH faced when doing her job of replenishment, and the manner in which the JH was required to work when moving cages (and other UoDs) on the shop floor or in the warehouse.

19 **1.3.1; Number and type of staff with whom the JH worked**. We accepted the claimants' proposed words for **1.3.1**. That was because they were borne out by the document at C5/53, which showed that towards the end of the relevant period the rota for the store was such that only one assistant was present at the end of the day, and the JH was that lone assistant on two of the days of the week to which that document related (it was the rota for the week commencing on Monday 1 October 2018). We noted in this regard that Mr Woolley said in paragraph 47 of his first witness statement that he worked alongside between one and four customer assistants, which corroborated the JH's evidence in this regard and the document at C5/53, as did what he said in paragraph 43 of his witness statement.

20 **1.3.3; Presence of a managerial member of staff**. That which divided the parties on this paragraph was the respondent's proposed additional words, for which we could see no concrete evidence in support. What Ms Jemmett said about the issue in paragraph 30 of her witness statement, for example, was general only and did not support the proposition that she would typically work for between one and three hours over and above her contracted hours, so that she was available to the JH for such additional hours. In any event, we concluded that the possibility of Ms Jemmett or any other manager being present was irrelevant for present purposes. That was because the JH did not assert that she was ever present at the store without a manager to whom she could turn for advice or assistance.

21 **1.4.1; Cigarette packaging**. We accepted the additional words proposed by the claimants on the basis that they were almost agreed and because we could not see that the respondent's proposed additional words ("it became straightforward") added anything to those proposed by the claimants. The words "it became straightforward" were in our judgment evaluative and in any event superfluous given the claimants' proposed words.

22 **1.4.2; Single-use carrier bag charge**. The dispute here was about whether or not the JH was required to, or did, after the requirement to charge customers for plastic bags, ask customers how many plastic bags they wanted. Neither party referred to C7/689, which was in our view determinative. That stated what was required: to "Assess whether the customer has their own bags, offer help or ask if they need carrier bags, reminding them there is now a 5p charge if they are not aware." Whether or not the JH actually did that, it was part of her work to do it.

23 **1.5.6; The training that the JH received**. It was not in our view helpful to have an overview and as part of that overview refer to other parts of the EVJD (here, paragraph **31**).

Paragraph 2; checkout work

24 The JH's responsibilities when she worked on the checkout in regard to cleaning are stated in C7/155 at page 1. That which the respondent proposed as the words for paragraph 2 in regard to cleaning was in our judgment mostly apt, not only because of what was on that page but also because it accorded with common sense. However, if and to the extent that C7/155/1 went further than those words, then C7/155/1 was determinative of the JH's work in this regard.

25 The parties' dispute about whether or not the JH in fact, without being asked by a manager to do so, replenished items stored behind the mainbank checkout area fell in our judgment to be determined in the light of what Lavender J said in paragraph 30 of his judgment in *Beal*. That is because we concluded that it was impossible to dispute that there was a need to replenish those items and that the person to do it would have to be the checkout operator whenever an opportunity to do it arose. So, it was in our judgment part of the job of the JH to do that. Whether or not she did it without being prompted to do so seemed to us in the light of paragraph 30 of *Beal*, or alternatively obviously, irrelevant. Accordingly, we accepted the claimants' proposed words for the final sentence of paragraph **2**.

26 **2.1.3; Replenishment of the healthy food display**. Similarly, the dispute about whether or not the JH replenished the health food display at the entrance to the checkout area was in our judgment mistaken. In our judgment, the JH's job consisted principally of replenishment and working on the checkouts. If the healthy food display needed to be replenished and she was either asked by a manager of the respondent to replenish it or she did it on her own initiative, then it was part of her work for the purposes of section 65(6) of the EqA 2010. Accordingly, we accepted the claimants' proposed words for **2.1.3**.

27 **2.3.2; Signing onto the mainbank checkout and the Assistant Station for the Assisted Service Checkouts ("ASCs")**. There were two disputes about the words proposed for this paragraph. One was whether or not the JH always had to sign onto the Assistant Station or only if she was the first person to sign in at the start of the day. The second was about how a check, which would be done by either one or two

other people, including the duty manager, of the content of the till would be carried out before the JH could take over a till: the dispute was about whether or not the person coming off the till would participate in that check. The latter was in our judgment not relevant to the JH's work for the purposes of section 65(6) of the EqA 2010, so we did not resolve it, unless the dispute was in reality about whether or not the JH herself participated in till checks when she herself was coming off a till.

28 The first of those two disputes was resolved in part by looking at the respondent's witness statement evidence on the point, which was (in paragraph 44 of Mr Gleiwitz's first witness statement and paragraph 169 of Mr Woolley's witness statement) that someone had to log onto the Assistant Station at the start of the day, and that it was done by using a photocopied barcode to do so. Given that the document at C7/62/3 showed that in order to do anything on an ASC, it was necessary (at least by September 2013) to scan one's individual barcode to log in and do anything on the checkout, we concluded that the issue of who started off the ASCs at the start of the day was probably immaterial, but if it was material, then we accepted the respondent's evidence on it, given that it was on the balance of probabilities more likely to be correct than the claimant's, since we could see (on the evidence before us) no practical reason why the JH would have needed to log onto the Assistant Station every time she took over as the person responsible for monitoring the ASCs.

29 C7/62, together with C7/68 showed the principal duties of the JH in regard to ASCs. C7/39 showed the amount of training required to be undertaken to operate the ASCs, and the things on which the JH should have been trained. C7/163 was also highly material. None of them said anything about carrying out a till check. However, nor did they refer to a "till lift", but after some research of the documents on Opus, we found references in question 6 in the documents at C7/69/2 and C7/86/2 to a "till pickup" which, we could see, would be required if the "till prompt 'Assistance' [was shown]". That process was described and therefore prescribed in detail at pages 37-38 of C7/165 and pages 95-96 of C7/163. On page C7/165/37, this was said.

> "To protect you whilst working at your tills it is important that our tills do not hold too much money. There is an automated till prompt that will appear when there is over £600 in your till drawer. You must then perform a till clearance. However, as soon as £200 in notes is available to lift then this should be lifted.
>
> Till pickups can only be performed by a Manager or appointed person. The person on the till is accountable for the money in the till. Therefore, that person must be party to the 'dual control' when cash is lifted." [Original underlining.]

30 The full process was described on C7/165/38 and pages 95-96 of C7/163. What is said on those pages serves therefore as an accurate and sufficient statement of what was required of the JH when carrying out a till pickup (or lift).

31 The fact that it was said at C7/165/37 that "Till pickups [could] only be performed by a Manager or appointed person" but that the "person on the till" had to be "party to the

'dual control' when cash [was] lifted" supported the respondent's evidence that the JH would not herself carry out a till check. The fact that all that the respondent's training documents to which we refer in the above two paragraphs merely required the JH to log onto a till and then log off again when she had finished operating it, coupled with the fact that the respondent's evidence (which the claimants accepted) was that a till check had to be carried out before the JH took over a till which had immediately before then been operated by a colleague, suggested very strongly that the JH would not have been required by the respondent to participate in a till check at any time. That was the claimants' own case, as far as we could see, as it was said at the end of **2.3.2** that "Till checks were not required to be carried out under dual control." That was inconsistent with the proposition that the person coming off the till would be required to participate under the "dual control" system. Yet the parties agreed this sentence: "If JH is taking over a Mainbank Checkout from a colleague, and that colleague was not expected to return to the till during the same shift, JH's colleague and Manager would perform a till check on Mainbank Checkout 1 before JH can take over." Given that that sentence had nothing to do with the JH's work for the purposes of section 65(6) of the EqA 2010, we were able to ignore it, unless it was said that the JH herself would participate in a till check. Overall, the content of **2.3.2** was internally inconsistent, therefore, as far as both parties' uncontested assertions were concerned. Alternatively, its effect was not clear.

32 Ms Jemmett's evidence on this aspect of the matter was stated in part in paragraphs 214-215 of her witness statement, which were in these terms.

> "214. I disagree that Siobhan did till checks. In the Store, these were either done by me or by Diane, the Store's Cash Admin [Paragraph 12.2.1 EVJD]. They were also not done under dual-control in the Store as the EVJD suggests – only till lifts were required to be done under dual-control and as far as I can remember, there was no Tesco policy that till checks should be carried out under dual-control. As such, Siobhan did not have to use the coin counting machine for these purposes, as is suggested [Paragraph 12.2.2 EVJD]. We do not need to carry out till checks in the Store now, in the same way that we did during the Evaluation Period, as Smart Tills were introduced into the Store in late November / early December 2018 {C5/57}.
>
> 215. The till slip process described was not carried out by Siobhan. This was done by our Cash Admin, Diane [Paragraph 12.2.3 EVJD]. I confirm that inputting the cash amount recorded on the till slip into the computer at my desk is my job rather than Siobhan's job [Paragraph 12.2.4 EVJD]."

33 Paragraph 197 of Mr Gleiwitz's first witness statement was to the same effect, as was paragraph 155 of Mr Woolley's first witness statement.

34 It seemed to us that the respondent probably had in its possession documents showing or consisting of the training which managers were given about the carrying

out of a till check, and that those would show definitively how a till check had to be carried out. In the absence of such documents before us (and we saw that such document might well have been one or more of those referred to at C7/39/5), we concluded on the basis that there was nothing at all in any of the documents relating to the training of a checkout operator to the effect that the operator was to participate in a till check, and in the light of paragraphs 214-215 of Ms Jemmett's witness statement, paragraph 197 of Mr Gleiwitz's first witness statement and paragraph 155 of Mr Woolley's witness statement, that the operator did not do so. However, all three of those witnesses confirmed that the JH would be involved as part of the dual control process, albeit not to the extent stated by the JH, in the carrying out of a till lift and the documents to which we refer in paragraphs 29-31 above were consistent with that. As a result, we concluded that participating in a till check was not part of the JH's work, but participating in a till lift was, in the way described at C7/165/38, which included "[b]oth parties [completing] and [signing] the takings deposit summary ensuring the date and till number is written at the top."

35 We saw that paragraph 12 of the EVJD referred to "cash handling" and in the course of doing so referred to "Till Lifts on the Mainbank Checkout". If that was because it was asserted that there was a difference between working on a mainbank checkout and monitoring the ASCs, then it was in our view mistaken. That was because as far as we could see, the work of assisting (or merely observing as an interested observer) a till lift was the same whether it was done at the ASC or a mainbank checkout. In any event, the JH's evidence in paragraph 113 of her first witness statement was that no prompt would be displayed on the till when a till lift was required. That was said by reference to C7/165/37, to which we refer above. The JH's evidence in paragraph 113 was this:

> "I do not recall this and question whether our store's tills were an older model."

36 However, C7/165 was issued in July 2010. Paragraph 1.1.1 of the EVJD for the JH, which was agreed, was in these terms.

> 'The job holder (JH) commenced employment with Tesco Stores Limited ("Tesco") on 7 September 2009 as an Express Customer Assistant. JH worked at another Birmingham Express Store until the Kingstanding Birmingham Express (236) (the "store") opened on 25 September 2009.'

37 The tills at the store at which the JH worked were therefore probably new in 2009. The relevant period, to which the EVJD relates, started three years later. Bearing those things in mind, the JH's evidence in this regard was not cogent. In addition, having concluded that the training materials were the best evidence of what was required of the JH, we concluded that the JH's recollection that she was not prompted by the till itself to call for a lift was mistaken, and that she was so prompted.

38 **2.4.2; Aspects of working on a mainbank checkout**. what the JH in fact did about the replenishment of bags at the checkout was relevant only if the respondent's

training materials were silent in regard to such replenishment. They were not. C7/168 stated on page 2 stated this: "You need to make sure you have enough carrier bags available." It then stated the kinds of bags of which there needed to be enough at the till. That that document applied to Express stores was evident from the reference on the next page to chairs not being supplied as standard in "Express". C7/74/5 referred further to the kinds of bags of which there needed to be enough at the checkout. C7/152/2 applied specifically to Express stores and said the same things as C7/168 so far as relevant. So, the claimants' proposed words for **2.4.2** were apt and should be used.

39 Paragraph **2.4.2** referred also to what the JH did in the event of a fault with the checkout. C7/38 and C7/41 specifically referred to rebooting an ASC, and in any event it was obvious that the JH would be required to consider rebooting the mainbank checkout if (as suggested in **2.4.2**) its screen was blank.

40 As for whether or not the JH would in that situation check to see whether a cable was loose, this was so obvious that it did not need to be the subject of training materials: if a checkout has a blank screen then it may be because the power or signal cable is disconnected, and the respondent accepted that the JH "may check whether any cables are loose, calling a Manager if that does not resolve the issue". We took that to be agreement that it was part of the JH's job to check the power supply and any cable supplying a signal to a blank screen and in doing so to check to see whether a cable to the screen was loose. Accordingly, we accepted the claimants' proposed words for **2.4.2**.

41 **2.5.3; What the JH did when replenishing carrier bags at the ASC before a charge for them was required to be made**. We preferred the respondent's evidence and submissions on the issue of whether the claimants' proposed additional words were included. We could see no practical or factual justification for the proposition that the ASC (which was the respondent's main term for a self-service checkout) needed to be taken out of shopping mode "to prevent weight interventions occurring".

42 **2.6.1; Scratchcard replenishment**. C7/162 said nothing about the extent to which there was a need to restrict the filling of a scratchcard display to a "Cash Controller" or a manager. However, that was far from being determinative. We could see no justification for the JH doing the job of replenishing the scratchcards if that was a task which was assigned to the Cash Controller and there was a need for access to the safe in which the scratchcards were kept. It was the respondent's clear evidence that it was so assigned, and the JH's own evidence (in paragraph 44 of her first witness statement) was that she would almost always tell the Cash Controller or in the absence of that person, the relevant manager, that scratchcards needed to be replaced, but that, rarely, she had been "asked to get the scratchcards from the safe upon the request of the Manager/Cash Controller who had left the safe open and passed me the office door keys". So, the JH accepted that she did not have access to the safe unless she was specifically given it. In fact, we doubted that the safe would

be left open. In any event, given the high value of scratchards and the cogency of the respondent's evidence on this issue, we preferred the respondent's evidence. Accordingly, we concluded that the respondent's proposed words for **2.6.1** should be included, and not those of the claimants.

43 **2.6.2; Scratchcard activation**. For similar reasons, we preferred the respondent's evidence in relation to and its case on **2.6.2** (including by way of example what Ms Jemmett said in cross-examination, as recorded at pages 68-70 of the transcript for day 13, which we preferred to the JH's evidence on this issue) and concluded that it should be omitted from the EVJD.

44 **2.7.2; Cigarette replenishment**. we were unable to see how the matters in dispute in regard to **2.7.2** could affect the determination of the JH's work in regard to the replenishment of cigarettes in the cigarette "gantry". By the time of closing submissions, the parties were agreed that the JH did such replenishment, "on average once a week, for approximately one to two hours in between serving customers on the Mainbank Checkout". The main difference between the parties related to the extent to which the JH wrote a list of brands of cigarettes which were missing from the gantry, or of which there was only a low level of stock in the gantry (once a week or twice a year), and the extent to which the box in which the cigarettes would be brought from the safe impeded movement behind the mainbank checkout. The size of the box was stated by Ms Jemmett in paragraph 68 of her witness statement to be "not particularly small", but, she said, that did not matter because "it was generally only brought out when the checkouts were quiet and when there were not multiple colleagues serving on the tills". We found that compelling evidence, and accepted it. As for the other factual dispute, about the manner in which cigarettes were replenished, the evidence of the three managers of the store who gave evidence differed. It was Ms Jemmett's evidence, in paragraph 79 of her witness statement, that it happened only about twice a year and that for the rest of the time she just brought out to the shop floor the box in which all of the cigarettes in the safe were kept, and left it to the JH to fill up the gantry. That seemed to us to be likely to be true, as it made sense to us. We saw that (1) Mr Gleiwitz gave no direct evidence about the JH's involvement in the task, but that he said (in paragraph 55 of his first witness statement) that it was done by a customer assistant, and (2) Mr Woolley's evidence (in paragraph 176 of his first witness statement) was that the task was always done by the store's manager or the Cash Controller by the name of Diane asking the person who was at the mainbank checkout to do a list of the brands which needed to be replenished. We accepted that evidence of Mr Gleiwitz and Mr Woolley. However, we rejected Mr Woolley's evidence that the person at the checkout who replenished the cigarettes was usually Mr Phil Walls, as that was inherently improbable and inconsistent with his evidence (also in paragraph 176 of his first witness statement) that "The daily replenishment of cigarettes was done by a colleague working on the Mainbank Checkout between serving customers." We saw that the JH's evidence on this (in paragraph 47 of her witness statement) did not distinguish between the different periods in the relevant period, but we accepted the evidence of the respondent's witnesses that the practice differed during that period,

and in any event doubted that there was a substantial difference between (1) listing the brands of which more boxes were needed and replenishing those which were brought out to the shop floor from the safe as a result, and (2) taking packets of cigarettes from a box without such a list having been made and putting those packets in the gantry. In any event, we concluded as a matter of fact that the manner in which the replenishment occurred varied over the relevant period. Mr Woolley was the store's deputy manager from 5 August 2013 to 8 August 2016, so during the relevant period up to 8 August 2016, the JH would, we concluded, whenever she was working on the mainbank checkout, be asked to do a list of the brands of cigarette which were low or out of stock in the gantry unless that task had been done already by someone else. Ms Jemmett started working at the store on 1 May 2017, and we accepted her evidence on this issue. Therefore during the period from then onwards to the end of the relevant period the JH did a list only about twice a year. At the start of the relevant period and between 8 August 2016 and 1 May 2017, the JH would replenish the gantry in one way or the other. If the IEs need more findings of fact on this then they can ask us to make them, stating in what respect they need a further finding of fact.

45 **2.7.3; What happened if a brand ran out in the gantry**. We preferred the respondent's proposed words, which seemed to us to be more apt than those of the JH. If the frequency with which brands of cigarettes ran out in the gantry is relevant, then we saw that the JH's own evidence on such frequency was in paragraph 47 of her first witness statement and was that "cigarettes do sell out every few weeks", and that it was Ms Jemmett's evidence (in paragraph 80 of her witness statement) that it was "unusual" for that to happen and that it occurred "only ... if a particular brand had been forgotten and not included in a particular delivery". We could not accept that cigarettes would never run out unless they had not been re-ordered, and we concluded that the JH's evidence on this was therefore more likely to be right. We therefore preferred her evidence on this to that of Ms Jemmett. As a result, we accepted the claimants' proposed words for **2.7.3** but with the word "couple" replaced by "few".

Paragraph 3; customer service at the checkout

46 The opening words of paragraph 3, namely the first sentence, stated what was in our judgment obvious and therefore we accepted them, with the doubt that they were in fact required. The bullet points below those words were in our judgment, with the one exception to which we refer at the end of this paragraph, unnecessary as they amounted to a repetition of something dealt with somewhere else in the EVJD. Generally, the relevant training materials were capable of giving the best picture of the overall demands of the role. The most relevant one here was C7/75, and that document in our judgment best showed what was required in general terms of a checkout operator to which there was no cross-reference in the opening part of paragraph 3, except for the second bullet point concerning competing demands: the parties' dispute on this was either of no relevance at all, or of very little relevance, but

in fact we found the claimants' proposed words to be more accurate and therefore accepted them.

47 **3.1.3; Attending to a customer at an ASC rather than dealing with a problem from the Assistant Station**. That which the JH was required to do as part of her work in regard to ASCs was best described in the training materials which the claimants identified in their closing submissions, and, for the following reasons, we accepted that the claimants' proposed words for **3.1.3** were apt. Ms Jemmett's evidence in paragraph 85 of her witness statement was about how she saw the JH doing her job, and was to the effect that the JH did not "proactively" approach customers "to demonstrate and coach them in how to use the Self-Service Checkout and its various functions". Mr Gleiwitz in paragraph 57 of his first witness statement said that he did not encourage that "unless they had to". The evidence of Mr Woolley in paragraph 77 of his first witness statement was helpful by way of background and we accepted it, but it did not detract from the fact that the JH's work in this regard was best determined by reference to the parts of the documents at C7/29, C7/50, C7/61 and C7/65 to which the claimants referred in their closing submissions. None of the respondent's witness statements contained any justification for the figure of 20% proposed by the respondent, as far as we could see: there was no such justification in the paragraphs to which the respondent referred in its closing submissions, and we could find none when we searched the respondent's evidence digitally for references to 20% (whether using the words "per cent" or the percentage sign).

48 **3.1.5; Rebooting of an ASC**. Rebooting an ASC or the Assistant Station was plainly part of the JH's job, if only because of (1) C7/38 read with C7/27, (2) C7/36/2, and (3) C7/41/18. Given that there was no reference there to a silver key of the sort to which Mr Gleiwitz referred in paragraph 58 of his first witness statement, but noting that those documents were all issued in September 2013, shortly after he had left his post at the store, we concluded that his evidence about the need for such a key was applicable only to the period before September 2013. The JH said nothing in that regard, referring in her evidence only in general terms to what happened during the relevant period. That reference was made in paragraph 145 of her witness statement and was in the present tense. However, Mr Woolley said, in paragraph 106 of his first witness statement, that the ASCs were upgraded in August 2016. In the circumstances, both parties' evidence on the frequency with which the need to reboot arose was (inevitably) highly impressionistic, but in this regard we preferred that of the JH, who was in the best position to know that frequency and in the circumstance that it did not differ very much from that of the respondent. The JH would have had to call for assistance unless she was at that moment able to go to the ASC or the Assistant Station. In those circumstances, we concluded that the JH would, if she was in practice able to do so, reboot the relevant ASC or the Assistant Station by following the processes referred to in the training materials referred to at the start of this paragraph, and that that was likely to occur once every one to two months.

49 **3.1.6-3.1.10; Working on the mainbank checkout**. The JH's role, and therefore her work for the purposes of section 65(6) of the EqA 2010, in regard to the things which are the subject of **3.1.6-3.1.10**, was best shown by C7/75 and C7/151. Those documents contained most of what needed to be said in that regard. To the extent that the subject-matter of **3.1.6-3.1.10** provided an illustrative picture of what C7/75 and C7/151 required of the JH, we made the following findings of fact.

49.1 The claimants' final proposed bullet point of **3.1.7** was apt if a customer had an unusual difficulty in using the card machine. We saw that all of the respondent's witnesses who gave relevant evidence on this said that they did not see the JH doing what was stated in that bullet point. She herself said that it was done only rarely. We could see that it might well have happened, but only rarely, and that if it was rare then the respondent's managers may well have seen it only very rarely. In those circumstances we accepted the proposed bullet point, although we thought that these additional words at the end should be included: "whose disability made accessing it difficult".

49.2 The respondent's proposed additional words for **3.1.9** were not helpful and that to which they related was what was described by Ms Jemmett in paragraph 91 of her witness statement, with which (because we accepted that paragraph) we concluded the words of **3.1.9** as contended for by the claimants should be read.

49.3 **3.1.10; The carrying of shopping to a customer's car**. We concluded that it was unlikely that the JH would regularly have taken shopping to customers' cars. That was because of the respondent's evidence on this issue (principally in paragraph 92 of Ms Jemmett's witness statement, paragraph 61 of Mr Gleiwitz's first witness statement and paragraph 236 of Mr Woolley's first witness statement), which we accepted. However, it was definitely part of the JH's job to be willing to offer the "Carry Out Service" referred to on C7/143/11, but in our judgment only if it was going to be feasible for the service to be provided. That was borne out by what was said about what to do when a customer asked for help to carry shopping at C7/69/4 in answer to question 21, which was this: "Ask your team leader for assistance as you may not be able to leave your checkout immediately." It was therefore part of the JH's job, wherever it was feasible and she judged it appropriate, to offer that service, whether to be done by her or (if she was unable to leave the checkout), a colleague. Given the fact that we accepted the respondent's evidence on the fact that the JH did not do it, we accepted that the JH offered this service only rarely. In the circumstances, we concluded that the appropriate words for **3.1.10** were these:

> "It was part of the JH's work to be aware of the possibility that a customer might benefit from the respondent offering its Carry Out Service as described on C7/143/11, and to offer that service (to be provided by her or a colleague, depending on the circumstances) if it was feasible in the

circumstances prevailing at the time, for it to be offered. It was so feasible only rarely."

50 **3.2; Mystery shopper**. The role of a mystery shopper was in our judgment sufficiently described in C7/184 and C7/785, and the parties' disputes in respect of **3.2.2 and 3.2.3** were resolved by saying that the role was as described in C7/184 and C7/785. Page 3 of the latter showed that, as Mr Gleiwitz said in paragraph 65 of his first witness statement, a bonus was paid to Express staff if the survey outcome was good (at page 3 there was this text: "Express bonus is 15%"). We concluded that the removal of that bonus would have been obvious to the JH when it occurred, and we therefore concluded that if it did indeed end in June or July 2013 as Mr Gleiwitz said in that paragraph, then the JH would have known about it. There were in the bundle no documents relating to the mystery shopper which were produced after December 2012, although we saw that at C7/143/6, dated 04/13, there was (in the wheel) a reference to the possibility of a mystery shopper visit. There was no later version of that document. Those things tended to support Mr Gleiwitz's evidence about the mystery shopper, but in any event, given the absence of a reference to bonuses based on mystery shopper visit results during at least the latter part of the relevant period, we accepted it. Therefore, in our judgment the JH was affected by the existence of the mystery shopper programme only until June or July 2013.

51 **3.3.2; What the JH was required to do by way of handing out cards containing something like a questionnaire**. The evidence of Ms Jemmett in paragraph 96 of her first witness statement was that the JH would not have handed out a "viewpoint" card (as alleged in **3.3.2**) or questionnaire but that she would, if she had given customers anything, have given them something under the heading "Every Comment Helps". The only substantial documentary evidence relating to those words before us was in the respondent's handbook from 2010 at C7/863/28, where it was said that the words referred to "a feedback tool that lets our customers share their shopping experiences with us", which included "a comments card" as well as a website with the address "www.tescocomments.com". At page 31 of C7/863, "Viewpoint" was described as being applicable to the respondent's staff only. We concluded therefore that Ms Jemmett's evidence in this regard was correct. The fact that the JH did not remember the correct name of the cards which she said she occasionally gave out cast doubt on the reliability of her evidence about her practice on this, and the respondent's closing submissions were in our view persuasive about the cogency of that evidence. However, the extent to which the JH in fact handed out comments cards was not determinative here. The issue here was whether it was part of her job to do so, and even on the respondent's evidence, as referred to in paragraph 61 of Mr Woolley's first witness statement, it was: "Customer Assistants were supposed to hand out a feedback card to each customer and request that they complete it." We therefore concluded that the JH's job was to hand out comments cards to customers, and that the fact that she did not in practice do that unless she was prompted to do it, was not relevant.

52 Given what we say in our judgment of 12 July 2023 and our second reserved judgment, it will be apparent that we thought that the use in the EVJDs of the present tense was wrong. That was because the issue was what was required of the employee in question by the respondent, and not how well or otherwise the employee did what was so required. Where there was a need to distinguish between different periods, the past tense could have been used and if necessary the relevant periods could have been referred to. Here, the words should be as follows.

> "It was part of the JH's work to hand out comments cards to customers for the customer to complete if the customer so wished."

53 **3.4.1 and 3.4.2; Dealing with difficult customers**. While we accepted that the JH would, as a checkout operator, face aggression and abuse from customers more frequently than Mrs Worthington did in the course of her work, we concluded that that which was required of the JH in her work for the purposes of section 65(6) of the EqA 2010 in this regard was best described in the documents to which we refer in paragraphs 10 and 11 of our determinations in regard to Mrs Worthington's work (i.e. in Appendix 1, at pages 34-35 above), namely C7/147/6, C7/683, C7/145/11 and C7/705. We also found what Ms Jemmett said in paragraph 394 of her first witness statement and what Mr Gleiwitz said in paragraphs 68 and 69 of his first witness statement, to be cogent about the frequency with which the JH in fact encountered adverse behaviour from customers. We saw that the JH said in paragraph 162 of her first witness statement that she would encounter aggressive customers when working on the main tills "about once a month at least". That was the basis for the claimants' proposed words for **3.4.1**. We could not see that the precise number of times when the JH encountered aggressive customers was determinative of the demands of her work for the purposes of section 65(6) of the EqA 2010, since the fact that a customer might be aggressive was a constant factor, albeit that if the occurrence was rare then the demand for that purpose might be less. However, we doubted that the JH was faced with all of the comments stated in **3.4.2** once a month. Nevertheless, we accepted fully that customers did on occasion abuse her, not least because of the training materials to which we refer in this paragraph and the documents referred to in paragraph 8 above. In our judgment the evidence of both parties on this issue was a little tendentious, which meant that we concluded that the respondent's evidence was the minimum which we should accept but that the reality lay probably somewhere between the positions of the parties. The respondent accepted that the JH would encounter "customers who became difficult or rude at the checkout, on average once or twice a week" and that verbal aggression from shoplifters (only) occurred "on average, less than once a month across the whole of the store and all shifts". In the circumstances, we concluded that the appropriate words for **3.4.1** were those for which the JH contended, but with the words "approximately once a month" substituted for the words "at least monthly". As for **3.4.2**, we concluded that the respondent's proposed words should be accepted, as we thought that they were the best reflection of the reality as far as verbal abuse was concerned.

54 As for **3.4.3 (concerning physical attacks)**, we found the JH's proposed words to be the most helpful but without the final three sentences. That is because the parties agreed on the frequency with which physical attacks occurred during the relevant period, and we thought that the JH's proposed words best set the scene for the assessment by the IEs of the demands placed on the JH in the course of her work at the store except to the extent that the JH suggested that she was herself present when Ms Jemmett was attacked. In that regard, we preferred the evidence of Ms Jemmett, for the reasons stated by the respondent in paragraph 2(d) of its closing submissions on **3.4.3**.

55 **3.4.4; Inappropriate conduct by customers**. We preferred the respondent's proposed words for this paragraph, which were in our view justified by the submissions made in support of them.

56 We regarded the proposed words of the respondent for **3.5.1 (concerning customer complaints)** with the exception of the word "encounters" to be less apt than those proposed by the claimants and we therefore accepted the claimants' proposed words except that we concluded that the word "encountered" should be substituted for the words "deals with". That is because we concluded that the word "encountered" best described what occurred. We also concluded that **3.5.2** (concerning how the JH dealt with a customer complaint made in person) was unnecessary given the documents to which we refer in the first sentence of paragraph 53 above.

57 **3.6.1; What to do when a customer left shopping on the basis that he/she would return for it later that day**. There was very little difference between the parties here. It was impossible to say how many times the agreed scenario occurred. For the sake of simplicity, we concluded that the claimants' words should be used, with the addition of the word "approximately" before "once a week".

58 **3.6.2; What to ask the customer in that situation**. Technically, what happened to shopping which a customer decided after all not to buy had nothing to do with the JH's work. What was required of her in relation to that shopping was, however, part of her work for the purposes of section 65(6) of the EqA 2010. That was made clear by C7/64, pages 4 and 5 of which in our judgment stated what was required of the JH: by implication that she should "explain to [a customer] that [the JH could] suspend their transaction so that they [could] pay for their items at another checkout or [the JH could] have them looked after until later that day." It is also said there that "If the customer does not return within 15 minutes, chilled and frozen products must be returned to their department. If the customer has not returned within a few hours, all items must be returned." In our view, it was implicit in those words that the JH would be required to say something about the potential need to return chilled or frozen items to a chiller or freezer. The JH's cross-examination on this showed that she would say something to that effect, which supported that conclusion, and we accepted what she said in that cross-examination (on day 11 at pages 154-155). In the circumstances, we concluded that the claimants' proposed words for **3.6.2** were correct and should be included in full.

59 **3.6.4; What to do if the customer does not return**. Given the documents referred to in paragraph 24 of our conclusions on the work of Mrs Worthington (paragraph 24 of Appendix 1, at page [ ]), we concluded that irrespective of the Food Standards Agency's guidance, the respondent required the application of the 20-minute "rule" referred to in that paragraph. The "15 minute window" in the claimants' proposed wording is referred to in the document to which we refer in the preceding paragraph above. Accordingly, the claimants' proposed words for **3.6.4** were apt, and we preferred them to those of the respondent.

60 **3.7.1, 3.7.2 and 3.7.3; Helping customers use the ASCs**. Reading the additional words proposed by the claimants for **3.7.1** as describing what the JH was required to do as part of her work for the purposes of section 65(6) of the EqA 2010 and in the light of C7/46 and C7/64, we accepted those words, adapted so that they read more coherently, namely as follows:

> "the JH was required to keep an eye on the Assistant Station" and "The JH was required whenever possible to interact with customers at the ASC to see whether they needed any help".

61 In the light of that finding, and in any event, we concluded that

61.1 what was required of the JH in regard to the Assistant Station and helping customers use the ASCs was shown most effectively by C7/29, C7/46 C7/50, C7/61, C7/62, C7/64, and C7/65 (four of which were specifically referred to by Ms Jemmett in paragraph 85 of her witness statement) and

61.2 while the claimants' proposed words for **3.7.2** were not all correct, the thrust of those words was correct, but only if it was understood that the JH was not required to stand around watching customers use the ASCs, but, rather, to keep an eye on them while herself doing something productive such as replenishing around the mainbank checkouts when she was not required to serve a customer there. We concluded that the words should be these.

> "The JH was required (as shown by C7/29, C7/46 C7/50, C7/61, C7/62, C7/64, and C7/65) whenever it was practicable to do so to see from a distance whether customers using the ASCs needed help and, if they did, to approach and offer to help them. If they did need help, the JH would be required to show the customers how to do what they were trying to do with a view to increasing their confidence in the system and avoiding the customer having the same problem in the future."

62 Similarly, reading **3.7.3** as a statement of what was required of the JH in her work, it was in substance correct. However, it was not literally correct as one cannot serve two customers at the same time. We concluded that that paragraph was unnecessary

in the light of the words which we have just stated should be used for **3.7.2**. Accordingly, **3.7.3** should be omitted.

63 **3.8.3; Damaged items at the checkout;** This subparagraph was, as the respondent contended, a duplication of **3.8.1** and **29.6**.

64 The dispute about **3.9.1 (concerning customer price inquiries)** was narrow: it was about frequency. Neither side had anything concrete with which to back up their estimates. However, the JH's first witness statement referred (in paragraph 57) to a number of items as having been the subject of a customer's price query, and we found it hard to believe that there would have been a need for the queries given that it was our experience that the price of most items was discernible from the shelf label or the item itself. We doubted that the precise number of times that a customer asked for the price of an item to be ascertained was material if it was a frequent occurrence in any event, and we also doubted that the task of checking the price was onerous, given that the respondent's till systems merely required the JH to scan the item's barcode and only if the barcode was faulty put in the numbers below the barcode. In the circumstances, we concluded on the evidence before us that both parties had overstated their cases and that somewhere in the middle between them was apt. We concluded that the opening words of **3.9.1** should be these: "Usually daily, and more frequently when the store was busy, including during seasonal periods".

65 **3.9.2 (concerning customers leaving an item at the checkout at which the JH was working)**. The respondent proposed that a specific cross-reference was made here to the part of the EVJD dealing with the Cold Chain. For the avoidance of doubt, the cross-reference here should be to paragraph 24 of our factual determinations in regard to Mrs Worthington's work, i.e. Appendix 1 (on page 38 above).

66 **3.10.1, 3.10.2, and 3.10.4; What to do in the event of a queue of three or more customers**. The dispute here was about the extent to which the JH was required when there was a queue of three or more customers to take positive steps to reduce the queue, including by seeking to persuade customers to use the ASCs. This was, we concluded, a dispute which related to the "I don't queue" policy of the respondent, and was best resolved by saying that C7/200 showed what was required of the JH, and that the first sentence of **3.10.1** should be amended so that, after "(of three or more customers)", there were these words instead: "the JH would be required to take the steps referred to at C7/200/2 and might also seek to persuade customers who were queuing at the mainbank checkout to use an ASC". The dispute about frequency did not need to be resolved given H31 and the fact that even the respondent agreed that the issue would be likely to have arisen every shift, which was consistent with our own experience, so that the event was best described as happening "frequently".

67 In the light of what we say in the preceding paragraph above, **3.10.2** was superfluous.

68 **3.10.4**: the JH was required by e.g. C7/132/2 to be the first to acknowledge that a customer has had to wait, and the implication of that was that the JH would have been required to apologise for the fact that a customer had had to wait. That was borne out by what was said at the bottom of C7/75/1 ("Staff would acknowledge me and apologise if I have had to wait"). Whether or not the JH would then also thank them for their patience seemed to us to be immaterial. What was required was shown by e.g. C7/132/2 and C7/75/1, i.e. a courteous and helpful approach and an acknowledgement of, with an apology for, the need for the customer to wait.

69 **3.11.2; Customer leaving items mid-transaction**. There was here a dispute about frequency. It was in our view likely that on average once per shift a customer would leave a till mid-transaction to get items which he/she had forgotten, and the parties were only marginally apart on that issue of frequency. Reading **3.11.2** as a description of what was required of the JH, and the opening words as "On average once a shift", we preferred the claimants' proposed words, but whichever words were more accurate, H31 showed that the correct description for the purposes of the IEs was "frequently".

70 **3.12.1; Dealing with lost property**. There was a middle way here too. Common sense suggested that high value lost property would be put away safely, and that low value lost property which could be accommodated behind the checkouts would be put there initially but then be put away to see if it was claimed at a later date. Ms Jemmett's evidence in cross-examination, as referred to by the respondent in its submissions on this paragraph, was consistent with that. The work of the JH in any event included dealing with lost property and taking steps to ensure that it was capable of being returned to its owner, including by taking reasonable steps to ensure that it was not mislaid or stolen while it was in the respondent's possession. Given (1) the respondent's own proposed words concerning frequency and (2) H31, we accepted the claimants' first proposed word for **3.12.1** ("Regularly"). Otherwise, the factual situation was best described by what we say in this paragraph. Nevertheless, the obligation of the JH in regard to lost property was stated at the bottom of the right hand side of C7/135/5, which was to "hand it to a manager or a member of the Tesco Security team." Thus, **3.12.1** should be in these terms.

> "The JH regularly had to deal with customers' property which they had inadvertently left behind. The JH was required (see C7/135/5) to hand it to a manager or a member of the respondent's security team."

71 **3.12.2; How to check that high value lost property belongs to the person claiming it**. We accepted the respondent's evidence on the subject-matter of this paragraph, as it most accorded with our understanding (on the balance of probabilities) of what occurred in practice in regard to items of high value. Thus, we accepted the respondent's proposed words for **3.12.2**.

72 **3.12.4; Customers leaving shopping at the till**. The dispute here was about what the JH would do if a customer left something at the till: make a decision herself about

what to do with it or ring for assistance from a manager or shift leader. It was obvious that the JH would have had to do something in regard to shopping which had been but left behind: either deal with it herself or seek the assistance of a manager, and on the balance of probabilities we concluded that the claimants' proposed words best reflected the reality of the situation. Thus, we preferred those words to those proposed by the respondent.

Paragraph 4; Scanning items

73 **4.1.3; Using the hand-held scanner**. Given H31, the parties were in our view best regarded as being in substantial agreement about the correct description of the frequency with which the JH would use a hand-held scanner: "frequently". The respondent in our view wrongly asserted that a customer would be expected to move an item to locate the barcode for scanning: that was not consistent with the respondent's Making Moments Matter policy, evidenced for example at C7/140. The documentary evidence on the use of a hand-held scanner was sparse, but we concluded that question and answer 3 on C7/90 read with C7/79/1 were sufficient to show that the hand-held scanner had to be used whenever possible when a heavy item was put through the checkout, and that a customer had no obligation to (but of course might voluntarily) assist by manoeuvring a heavy item so that the barcode could be read by the scanner. In the circumstances, we accepted the claimants' proposed words for **4.1.3**.

74 **4.1.5; Scanning an item the price of which has been reduced**. The parties disagreed about the frequency with which the JH encountered what appeared to her to be a dishonest attempt to use a price reduction label, but what they both proposed fitted the IEs' classification at H31 of "occasionally". However, the claimants' proposed words in regard to the checking by the JH of the "best before" date was contrary to what the JH said in paragraph 63 of her first witness statement, which was that the JH was in the habit of "checking that the best before date is that day as we would not usually reduce items which still had time left on the best before date". Nevertheless, the true position was shown by the "Key Point!" at the bottom of C7/163/18, which was this: "Always check the sell by date on the reduced items to ensure the product is still in date." As a result, we accepted the claimants' proposed words at the end of the third sentence of **4.1.5**. While we saw no reason to doubt the accuracy of the claimants' proposed final sentence for **4.1.5**, we doubted the relevance of that sentence. That was because what was important was what the JH was required by the respondent to do for the purposes of section 65(6) of the EqA 2010, and that was, we concluded, to be to be on the lookout for a dishonest attempt to buy an item below its proper price. That conclusion was fully borne out by the question and answer 5 at C7/112, which was this:

> "[Question] Tell me the four common ways people steal from Tesco.
>
> [Answer] Nesting, Box Swaps, Push Through, and Swapping Reduction Labels."

75 The claimants' proposed additional paragraph, which would be the second indent of **4.1.5**, did not seem to us to be realistic. The JH's work in regard to the proposed new words was best discerned from C7/135/5, which showed that the JH was required to be vigilant at all times. She could not, it seemed to us, realistically be expected to check all of the reduced price items which were shown by the Assistant Station to have been put through an ASC. She could be vigilant only to the extent that the other demands of her work permitted. In the circumstances, we rejected the proposed additional paragraph.

76 The duty of vigilance, however, bore out and justified the claimants' proposed additional words in the next indent of **4.1.5** (i.e. adapted slightly by us to "by being watchful of customers using the ASCs or") and we accepted those proposed additional words.

77 As for the words in **4.1.6** concerning observing customers for potential theft by checking that the items scanned were the ones put in the bagging area, but only when the store was quiet, we agreed with the claimants that C7/34 ("Know Your Stuff for Assisted Service Checkouts; Security – Shrinkage") was relevant. It showed that "spotting and deterring thieves" (which was in the second sentence of the document) was part of the JH's work, as it was for all of the respondent's employees, we thought, but the fact that those words were used in a document entitled "Know Your Stuff for Assisted Service Checkouts; Security – Shrinkage" in addition showed that the duty was particularly applicable to any employee such as the JH when monitoring the Assistant Station. We concluded that the words proposed by the claimants were not quite apt, however, and they should instead be these.

> "The JH was required to be alert to the possibility of theft at the ASCs, so that if the store was quiet then she was required to be particularly vigilant to the possibility of theft by customers at those checkouts in the ways described at C7/34/1."

78 **4.2; Soft keys**. We doubted that the description of soft keys in **4.2.1** was relevant to the JH's work for the purposes of section 65(6) of the EqA 2010. The better way to refer to soft keys was to refer to the training materials in which their use was described. In that regard, we saw that at C7/163 there was a comprehensive guide to the use of a checkout, and that it included descriptions of the various soft keys. We saw that the words of **4.2.2** were in part drawn from either page 6 of that document or another of the respondent's documents containing the same words. We saw no purpose in those circumstances in the additional words proposed by the claimants for **4.2.1**.

79 We could not see why the parties disputed the content of **4.2.4**, as they appeared to us to be in substantial agreement on the words of that paragraph. For the avoidance of doubt, we thought that the respondent's proposed words were better than those proposed by the claimants, and we therefore accepted the respondent's proposed words for **4.2.4**.

80 **4.3.7; Customers at an ASC wanting to cancel their entire transaction**. Given the schematic at H31, we concluded that the word "regularly" should be used instead of either party's proposed words for the disputed part of **4.3.7**.

81 **4.4.1; What to do if the "not on file" prompt appeared**. Given the schematic at H31, we concluded that the word "occasionally" was apt, since it covered both parties' proposed conclusions concerning the frequency with which the "not on file" prompt arose. As for the rest of the disputed words, (1) question and answer 3 on C7/93, (2) C7/62/4, (3) C7/160/2, (4) C7/163/19-20 and (5) C7/384/94 showed what was possible and what the JH was required to do where an item scanned was "not on file". Although those documents were in part inconsistent, taken together they supported the claimants' proposed words for **4.4.1** and showed that the respondent's proposed words were not apt. We therefore accepted the claimants' proposed words.

82 **4.6; Tags or security stickers?** The heading plainly had to be changed to "Items with Security Stickers".

Paragraph 5; Till prompts

83 **5.1.2; Prompts for tobacco, solvents and lottery**. The claimants proposed words showing that till prompts for those things did not appear. At C7/13/5 and C7/14/3 this was said: "In the United Kingdom and Northern Ireland there is not a prompt for tobacco, petrol, solvents or lottery". The reason why the respondent contended that those words did not apply was the unequivocal evidence to the contrary in paragraph 112 of Mr Gleiwitz's first witness statement and the less confidence evidence in paragraph 131 of Ms Jemmett's witness statement. However, when the words at C7/13/5 and C7/14/3 were put to Mr Gleiwitz in cross-examination as recorded in the transcript of day 19 at pages 83-84, he said that "sometimes stores could add on their own prompts to the till that weren't necessarily corporate, so put their own messages out", so that "it could be potentially that we had our own kind of bespoke message on there", but that he did not know whether that was done. That evidence was far from unequivocal, and in any event we preferred the content of the contemporaneous documents. We therefore accepted the claimants' proposed words for **5.1.2**.

84 **5.2.3; engaging with a customer who needs assistance at an ASC**. This paragraph deals with that which is dealt with in **3.1.3** (about which we make findings in paragraph 47 above) and so should be omitted.

85 Paragraphs **5.5, 5.6, and 5.8-5.10** concerned **age-restricted sales**. Paragraph **5.9.1** was a repeat of **1.4.1** (about which we make findings in paragraph 21 above) and therefore, we concluded, it should be omitted. For the reasons given in paragraphs 137-138 of our determinations in relation to Mrs Worthington's work (i.e. in Appendix 1, at page 67 above), the following words should be substituted for the rest of the words of those subparagraphs.

> "The JH's responsibilities when working on checkouts in regard to age-restricted sales are stated in C7/13, C7/15 and C7/190."

86 If the IEs need any further finding of fact in regard to age-restricted sales, then they can ask us for it under rule 6(3) of the EV Rules, and we will consider their request.

Paragraph 6; "Other Checkout Services"

87 **6.1.2; Frequency of E top-ups**. Given H31, the parties were in our view best regarded as being in substantial agreement about the correct description of the frequency with which customers asked the JH for a mobile telephone top-up: "regularly".

88 **6.2.8; Voiding a gift card sale**. We could see nothing in the evidence before us to justify the conclusion that the JH would (as claimed by the claimants) habitually tell customers who had bought a gift card "the gift card call centre number, details of which are located on the back of the gift card, who can advise on issues and refunds." The JH's own witness statement evidence on this was in paragraph 89 of her first witness statement and was merely that she would "explain to the customer how they can get a refund directly from the retailer whose gift card they have bought" only where the customer had bought a card and changed his or her mind about the purchase. In addition, it made no sense to do more than Ms Jemmett said that the JH would do, which was in paragraph 158 of Ms Jemmett's witness statement and was to say 'something along the lines of "these are non-refundable, please keep your receipt".' The fact that, as Ms Jemmett said there, there is now a till prompt to say that supported the proposition that that was what the JH said. There was no sense in calling a manager, either, as suggested by the claimants at the end of their proposed words of **6.2.8**, unless the customer had asked for a refund, and that was consistent with the JH's own evidence. Accordingly, the words objected to by the respondent should be changed to these:

> "At the end of each gift card purchase, the JH would say to the customer this, or something similar: 'These are non-refundable; please keep your receipt.'"

89 In addition, however, C7/94/3 showed that if a customer requested a refund or to exchange a gift card, then the JH was required to inform the customer that the respondent was unable to give refunds on gift cards and, if the customer objected, refer him or her to the card provider's call centre number given on the back of the receipt for the gift card and if the customer continued to object, "offer them a good will gesture". However, we suspected that the latter was something which only a manager would be authorised to do, so we concluded that these additional words should be added at the end of **6.2.8** as amended as stated in the preceding paragraph above.

> "If the customer asked for a refund or to exchange the card, then the JH would be required to refer the customer to the card provider's call centre number given on the back of the receipt for the gift card."

Paragraph 7; Lottery ticket sales

90 We agreed with the respondent that there was no warrant for a reference (in the opening part of paragraph **7**) to the JH being required to retain any paperwork. We could see no reference to that in the relevant training materials, which included C7/150, C7/172 and C7/173. As a result, we preferred the respondent's proposed words for the opening part of paragraph **7**.

91 **7.1.3 bullet point concerning activating a pack of scratch cards**. This was a repeat of **2.6.2** (about which we make findings of fact in paragraph 43 above) and should therefore be omitted.

92 **7.2.1; Voiding a lottery ticket**. The claimants' proposed words to which the respondent objected were fully supported by the respondent's own evidence in paragraph 154 of Ms Jemmett's witness statement. Those words showed the importance of voiding the transaction within a 30-minute period, and in our judgment were material. We therefore concluded that the claimants' proposed words should be used.

93 **7.3.2; Manner of paying out a lottery win**. We could not see any justification for the respondent's opposition to the JH's proposed words, given that C7/174/3 showed that at least in August 2008 (and C7/174 was the only document before us relating specifically to paying out lottery prizes) what the claimants proposed for **7.3.2** was possible, and in line with the respondent's then-applicable policy. It also showed that Ms Jemmett's explanation for opposing the practice (which was in paragraph 156 of her witness statement; Mr Gleiwitz said words to the same effect in paragraph 146 of his first witness statement) was not supported by the only relevant document before us, although the claimants themselves accepted that the practice ceased "towards the end of the RP". In any event, we accepted the claimants' proposed words, with the addition of this sentence as an inserted new third sentence.

> "In doing so, the JH followed the process described in C7/174."

Paragraph 8; Click and Collect

94 **8.1.1; Overview of Click and Collect**. The main dispute in regard to "click and collect" related to when the JH started dealing with customers who had items which they had had delivered to the store for collection. Whenever the JH started doing it, she had, it was Ms Jemmett's tentative evidence in paragraphs 372-377 of her witness statement, started to do so at least by the time that Ms Jemmett started working there. We say "tentative" because Ms Jemmett's evidence was about what the JH would have done, not what she in fact did do. The JH was clear that she did

do it, and she gave detailed evidence about it in both her first and her second witness statements (in paragraphs 124-130 and paragraphs 15-23 respectively). In her second witness statement, the JH responded to the fact that her personal development plan dated 20 January 2015 showed (at C5/5/240) that she was going to "ask for training with team leaders on routines and click and collect" and (at C5/5/241) that her next step in that regard was to "learn how to do routines and click and collect" by "Q3". The only training document before us about how to do click and collect was at C7/211. That document (to which our attention was drawn by Mr Gleiwitz in paragraph 7 of his second witness statement) was dated "07/13". It was in our view highly persuasive that that document said that if a "Direct customer", who would be one who was calling to collect a parcel, arrived when the JH was working on "the till", then the JH was required to do the following things.

94.1 "[A]sk the customer for their order number, surname and postcode."

94.2 "Contact the Duty Manager who [would] deal with the process of getting the customer their parcel."

94.3 "Ensure [she advised] the customer of the process so they [were] informed of what [was] happening, asking them to stand to one side whilst [she continued] to serve the other customers in the queue."

94.4 "If the customer seem[ed] to be waiting for a long period of time contact the Duty Manager to get an update for the customer."

95 The second page of that document showed that the respondent expected the duty manager to collect the parcel from the secure location where it was kept (which was the store's cash office here). That made sense to us from a practical point of view, and we accepted Ms Jemmett's evidence in paragraph 374 of her witness statement that only occasionally was the JH asked by her (Ms Jemmett) or the shift leader to get a parcel herself from the cash office. In any event, we concluded that the words for **8.1.1** should be as proposed by the respondent in its closing submissions with the following words inserted after "via the Bell System":

> in accordance with C7/211.

96 **8.1.2**: The dispute in regard to this paragraph related to whether or not the JH kept a PDA in her pocket at peak periods. We doubted that she did, for the reasons stated in the respondent's submissions on this point, with which we agreed. Accordingly, we concluded that the extra words for which the claimants contended at the end of **8.1.2** (after "Mainbank Checkout") should not be included.

97 **8.1.3 and 8.1.4**: Similarly, we preferred the respondent's evidence and submissions in regard to both of these paragraphs, since the evidence was itself cogent and the submissions simply reflected that evidence. For the avoidance of doubt, we preferred the respondent's evidence as referred to in its closing submissions in "click and

collect" to that of the JH, both because the JH's evidence was inconsistent with C7/211 and because we found what the respondent's witnesses said simply to make more sense on a practical level. In any event, we accepted the respondent's proposed words for **8.1.3 and 8.1.4**.

98 **8.2.1**: There was no substantive opposition to the respondent's proposed additional words about the time it would take for the JH to use the Click and Collect book instead of a PDA, and we accepted those additional words not only for that reason but also because they were realistic.

Paragraph 9; "Taking Payment"

99 **9.1.4; Taking payment from elderly or vulnerable customers**. We accepted for the reasons given by the respondent in its closing submissions that the JH's evidence about how she served elderly or vulnerable customers was unreliable. We saw that at C7/165/23 and C7/163/58 it was said that staff operating checkouts "may wish to double check and confirm the amount of cash you have been given before your till drawer opens so that both you and the customer can confirm that amount", but we could find nothing in the documents before us about how such a double-check was to be carried out. We saw that neither Mr Gleiwitz nor Ms Jemmett recalled (as stated in paragraph 157 of Mr Gleiwitz's first witness statement and paragraph 163 of Ms Jemmett's witness statement) seeing the JH even putting notes on the till drawer while she counted out change. In those circumstances, we concluded that the claimants' proposed words for **9.1.4** should not be included. The only thing of any value in those words, unless it stated the obvious (which it probably did) was the final sentence ("Once all cash has been placed into the correct sections of the drawer, JH ensures the till drawer is closed."), but if that was to be included then it was best added to the end of **9.1.3**. We accordingly determined that that sentence should be so added and the rest of **9.1.4** should be omitted.

100 **9.1.6; Counterfeit currency**. The dispute about whether or not apparently counterfeit currency would be seized by a manager was surprising. Whether or not such currency would be seized by a manager was irrelevant to the work of the JH, except to the extent that it could cause the JH difficulty. However, since the seizure would be done by the manager, it is difficult to see why the possible aggression which might result from the seizure would be levelled at the JH. In addition, the linking of the frequency with which the question whether currency was counterfeit arose with changes in currency (by which we assume is meant changes in the notes used for the same, i.e. United Kingdom, currency) was in our view unnecessary. In any event, in the circumstances we accepted the respondent's proposed words for **9.1.6**.

101 **9.1.12; Processing card transactions**. As far as we could see, the manner in which customers used or were familiar with chip and PIN machines during the relevant period, and their familiarity with such machines, may have altered during that period. In fact, even by 2009, as could be seen from C7/83, the use of Chip and PIN machines was the norm. That document contained the best guide to what the use of

such machines involved (in case it was not already obvious to the IEs). In particular we noted that at pages 4 and 5 there was a description of how to trouble-shoot Chip and PIN machines, and that there was nothing in the text about whether or not a checkout operator should state the total for which payment was required. In our own experience by the time of the hearing before us in 2023, checkout operators had not for a long time stated the amount to be paid. However, Mr Gleiwitz said in paragraph 161 of his first witness statement that in his experience, the JH "would tell the customer how much the total was but would not remind the customer to check the amount to be taken", and that he did "not think many Customer Assistants did that." That, of course, was evidence which applied to the first part of the relevant period, as Mr Gleiwitz worked at the store during the relevant period only from August 2012 to June 2013. Ms Jemmett said in paragraph 167 of her witness statement:

> "In my experience, Siobhan did not always talk customers through every part of the payment process and customers did not expect this as they were familiar with using these card machines. If a customer's payment did not go through, due to an incorrect pin being entered, a till prompt came up on the Mainbank Checkout and Siobhan asked the customer to re-enter their pin".

102 Mr Woolley worked the store from 5 August 2013 to 8 August 2016, and his evidence on this issue was in paragraph 114 of his first witness statement, which was in these terms.

> "I do not recall Siobhan reminding each customer to check the amount on the chip and pin machine when inserting their card as described at paragraph 9.1.12 of the EVJD although this should have been the practice of all colleagues in the Store. My recollection is that Siobhan simply said the total amount owed and waited for the customer to provide a payment method. She might have then prompted the customer to remove their card from the card machine but I do not think she told customers much more about how to use the card machine because it was second nature to most of them."

103 Accordingly, the respondent's proposed words were inconsistent with all of the evidence before us, and Mr Woolley's evidence was to the effect that (1) the JH was in fact required to remind the customer to check the amount on the Chip and PIN machine and (2) the JH did in fact state the amount that was owed. In the circumstances, we accepted the claimants' proposed words for **9.1.12**.

104 **9.1.17; Rebooting the Chip and PIN machine**. The dispute about this paragraph was resolved by us by reference to C7/41, page 13 of which showed that the respondent's own documentary evidence showed how to reboot the Chip and PIN machine and stated that it might take "a few minutes for the PIN pad to restart", and page 14 of which showed that the checkout could indeed be put into "cash only mode to allow customers paying by cash to continue to use it". We saw too that at the bottom of page 14, this was said:

> "If you are unable to fix this fault yourself, you should communicate this to your Team Leader or Manager straight away so that they can assist in getting the checkout fully operational."

105 We saw too that on page 15, there was a statement of how to "disable cash only mode". However, we noted, it was the JH's evidence (in paragraph 100 of her first witness statement) that she herself did not put the till into cash only mode: that was done by a manager. So, what happened to the till itself in that regard was strictly irrelevant, as it was not the work of the JH to put the till into cash only mode.

106 As for the frequency with which a Chip and PIN machine might need to be rebooted, using the schematic at H31, we concluded that the right word on both parties' cases was "frequently", so the precise words concerning the frequency were in our judgment immaterial. However, the fact that the JH accepted (as the respondent's closing submissions reminded us) in cross-examination on day 11 as recorded on page 208 of the transcript for that day, a new card machine would not break, did not support the respondent's proposed words about what happened at the start of the relevant period, when the machines changed and were new. It was not evidence that they did in fact break less when they were new. And in our experience new technology is not necessarily less likely to need to be rebooted. In the circumstances, we concluded that the words for **9.1.17** should be these.

> "Approximately twice a week, a Chip and PIN machine at an ASC or the mainbank checkout would not work, and would need to be rebooted, which was brought about by switching the machine off and on again, or disconnecting and reconnecting the power cable as shown on C7/41/13. If the device continued to be faulty then the JH would be required to ring the bell, seeking help from a manager or a shift leader, and the JH would then either be required to move to another till or to operate the till in cash-only mode."

107 **9.1.20; Applying customer coupons**. The manner in which the JH was required to process a coupon which could not at first or second attempt be scanned was the subject of disagreement. The oral evidence of the respondent's witnesses on this included that of Mr Woolley who, as recorded on page 103 of the transcript for day 14, accepted specifically that a manager was not required to authorise the typing into the till of the numbers below the barcode on a coupon and when it was put to him that "customer assistants could and did just type in the number if it was necessary to do so", he said: "If the barcode was damaged, yes." Therefore, the respondent's submission that Mr Woolley "did not accept that the JH [manually processed a coupon by typing the coupon barcode into the till]" appeared to us to be without a proper factual foundation and therefore wrong. In addition, C7/586 contained, on page 5, this simple instruction under the heading "Key points":

> "Scan the barcode, if there is one, or try entering the barcode digits if it won't scan."

108 We therefore accepted the claimants' proposed words for **9.1.20**.

109 **9.1.25; Processing supplier coupons**. Supplier coupons were referred to at C7/96/12. That document was issued in August 2010. Such coupons were also referred to at C7/165 which, although dated at the bottom of the page "07/10" had at the top of the page a reference to "17/01/2012". Both of those documents made it clear that it was open to a checkout operator to accept supplier coupons, but with care. If it was in fact the case that (as Ms Jemmett said in paragraph 173 of her witness statement) the JH would ring the bell and call for assistance, then that was not determinative of what her job was. However, in any event, the key thing here was that the JH had to be alert to the possibility of fraud, and if she called for assistance and the transaction was then approved by a manager, then that was part of her work for the purposes of section 65(6) of the EqA 2010, but it was in our judgment relevant that she was not required to do so. We accepted what the JH said about this in paragraph 25 of her second witness statement, which was that she would ring for a manager's assistance only "if the coupon was not recognised by the till". In our judgment the second sentence of **9.1.25** should therefore be replaced by these words.

> "The JH was required to check that the correct item was being purchased. If a coupon was not recognised by the till then she would ring the bell to call for a manager's assistance."

110 **9.1.28; Misuse of coupons at an ASC coupon slot**. Given the terms of **9.2.19**, in so far as they were agreed, we agreed with the respondent's proposed words for **9.1.28**.

111 **9.1.30; Coupon barcode not scanning at an ASC**. Mr Woolley's evidence in paragraph 118 of his first witness statement that the JH did not have the authority to process a "non scan coupon" was shown to be wrong by the factors to which we refer above in relation to **9.1.20**. It was also inconsistent with the agreed position on **9.1.21 to 9.1.23**. Accordingly, we accepted the claimants' proposed words for **9.1.30**.

112 **9.2.5; Tesco Clubcard**. The correct position was shown by C7/167/5, where this was said:

> "When working at the Checkouts make sure you ask every customer whether they have a Clubcard – they can then benefit from the scheme by collecting Points which quarterly turn into Vouchers that can be put to many great uses."

113 The respondent's own position here differed from the position which it took in regard to paragraph 520 of the EVJD for Mrs Worthington, where the words "was expected to ask" were proposed by the respondent. That is different from encouragement, which was all that the respondent proposed for **9.2.5**. The opening words for **9.2.5** should therefore be: "The JH was required to ask customers who did not have a clubcard."

114 **9.2.6; Information given to customers about the Clubcard**. On C7/167/5, there was also this statement: "If a customer does not have a Clubcard, tell them the benefits of the scheme and offer them an application form." As a result, the opening words for **9.2.6** should be these: "If the customer did not have a clubcard then the JH was required to tell them the benefits of the scheme and offer them an application form."

115 **9.2.7; How often the JH helped customers to use their Clubcard**. Given that the frequency of a task will be assessed by reference to the scheme at H31, the respondent's proposed determination of once a month was consistent with that of the claimants: regularly. We therefore accepted the claimants' proposed words for this paragraph.

116 **9.2.18; Processing "Healthy Start" vouchers**. Given our conclusion on the importance of training documents and in regard to **9.1.20**, we disagreed with the respondent's position as asserted on those two points in regard to **9.2.18**. In contrast, we saw nothing in the claimants' proposed words for **9.2.18** with which we disagreed, not least because those words were borne out by the training document to which the respondent itself referred, namely C7/586/9. We saw too that C7/96/15 gave additional guidance, which showed how difficulties might arise in deciding whether or not a Healthy Start Voucher could be used. In any event, we accepted the claimants' proposed words for **9.2.18**.

117 **9.2.19; Shoppers trying to use a Healthy Start voucher for ineligible products**. We saw no reason to disagree with the respondent's additional proposed words at the end of the paragraph, concerning calling for a manager's assistance if a customer was dissatisfied, not least because that was consistent with the JH's evidence about calling for such assistance whenever a similar situation arose, including as described in the preceding paragraph, **9.2.18**.

118 **9.2.20; ASC customers trying to use Health Start vouchers for ineligible items**. C7/63/2 had at the top of the page this (the document being entitled "Know Your Stuff for Assisted Service Checkouts – Using The Checkouts – Paying"):

> "If customers exceed three scanned coupons or if their coupons exceed 30% of their total transaction, you will need to authorise this. When these limits are reached you will need to authorise any extra coupons. You should explain why this has happened. You should then check that the coupon is valid or that the correct product has been purchased. If the coupon does not meet the requirements, please explain this to the customer and ask them to continue without using the coupon."

119 On the next page, this was said:

> "If the barcode on a coupon or voucher will not scan, or if there is no barcode, you will need to process this manually. Customers can ask for help by pressing the 'Can Not Scan Coupon' key [with a big picture showing where that key was on the till's screen]. The checkout will need approval. You should assist the customer at the checkout, check that the coupon or voucher is valid or relates to a specific product and explain that you can process the coupon or voucher. If the coupon or voucher does not meet the requirements, please explain this and ask the customer to continue."

120 Those two pages were in our view the best guide to the aspect of the work which was the subject of **9.2.20**, read with the documents to which we refer in paragraph 116 above in relation to **9.2.18**. The respondent's proposed words best reflected the position intended to be dealt with by **9.2.20** and therefore we accepted those words in preference to the claimants' proposed words.

121 **9.3.4; Till receipt roll running low**. The claimants' proposed words for **9.3.4** were inconsistent with the content of C7/41/3, which showed that a "Media Low" message would "appear next to the affected checkout number on the Assistant Station" if the till roll was in danger of running out on an ASC. At C7/164/1 (and C7/209/1, which was a duplicate), this was said under the heading on the left hand side "What You Need to Know/Do": "When your till roll is running out you will get a message on your screen. This first warning allows plenty of time before your till roll runs out. At a convenient pause between customers you can easily change your existing roll for a new one." There was then below that this "key point":

> "You will still have a significant amount of till roll remaining when the warning prompt first appears. Consider the impact on the environment before changing a till roll."

122 The respondent's proposed words for **9.3.4** were in effect a repeat of the agreed words of **3.7.6** and an attempt to make sense of the claimants' proposed words for **9.3.4**. We concluded that **9.3.4** should simply be omitted.

123 **9.3.6; Till roll running low**. C7/164/1 implicitly required the JH to be alert to the need to change till rolls on the ASCs, and we concluded that the JH was required to do all that was reasonably practicable to avoid any till roll running out. What Ms Jemmett said in paragraph 191 of her witness statement read with C7/164/1 accorded with that conclusion. Assuming that it was not possible to change a till roll before it ran out, then the consequence was, logically, one of the two possibilities referred to in the penultimate sentence of **9.3.6** as proposed by the claimants (which was specifically stated at the top of C7/41/10, but without the obvious and unnecessary words "which affects the customer care they receive", which we concluded should be omitted from **9.3.6**) and the obvious remedy was the final sentence of that paragraph (which was also stated in the same place in C7/41/10). However, as it was also said on C7/41/10:

> "You should communicate what you are doing to the customer and apologise for any inconvenience caused. The customer may not need a receipt however you can reassure them that it will only take a minute to print one for them."

124 That page also showed that it was only if the customer was the last one to use the till that it was possible to print a receipt (since the relevant command was "Print Last Receipt"). Accordingly, we accepted the respondents' proposed words for **9.3.6** without the words ""which affects the customer care they receive", and with this sentence inserted after the words "or none at all.":

> "If the customer said that he or she did not want a receipt then the JH was required to say that it would take only a minute to print one."

125 In addition, this sentence should be inserted after the penultimate sentence as proposed by the respondent:

> "The JH was required to communicate what she was doing to the customer and to apologise for any inconvenience caused."

126 **9.3.9; Apologising for a till jam**. In practice, a jammed till would call for an apology from the person responding to it, and the respondent's Making Moments Matter policy was clearly engaged in the circumstances, but we thought that the claimants' proposed words "uses customer care skills" were inapt, since the key was that the JH's job was to resolve the jam and to do it pleasantly and with courtesy with the result that the words "uses customer care skills" were meaningless in the context. What was required was in our judgment best shown by the words which we have set out in the preceding paragraph above read with C7/693, on page 2 of which it was said that "35% of all service complaints are about checkouts....this is the highest number across all departments in store". So, in our judgment the words of **9.3.9** should be these.

> "When resolving a till jam, the JH was required to communicate what she was doing to the customer and to apologise for any inconvenience caused."

Paragraph 10; Bags

127 **10.1.1; Offering bags to customers**. We concluded that the most apt way of describing what was intended to be described in this paragraph was to say that the JH was required to act in accordance with C7/167, which included the need (stated at C7/167/6) to be aware of the possibility that customers wanted to keep "raw meat and fish separate from cooked meat and fish and bag on their own", or to pack "like products together for example detergents and toiletries in one bag, fruit and vegetables in another", or whether they needed a wine carrier or a flower bag. The words of **10.1.1** proposed by the claimants were therefore apt, if read as a requirement to offer rather than a statement that the JH in fact offered the various bags referred to.

128 **10.1.2; Offering to pack a customer's shopping**. C7/167/6 and the document to which the respondent itself referred here, namely C7/84, resolved the dispute about this paragraph. Editorial considerations (concerning stating a requirement to offer rather than the fact that the JH did offer, and stating that the JH would do things rather than that she did in fact do things) aside, the claimants' words were apt.

129 **10.1.4; The new requirement to charge for a bag**. C7/689 stated the respondent's requirements after the bag charge was introduced. It also co-incidentally showed the importance of the JH always asking whether a customer had a Clubcard. The obligation on the JH was to "[a]ssess whether the customer ha[d] their own bags, offer help or ask if they need carrier bags, reminding them there [was] now a 5p charge if they [were] not already aware". However, unless the customer was a regular one, it could not be known whether they knew about charge unless they were asked whether they knew. Accordingly, the words of **10.1.4** should in our judgment be these:

> The JH was required to (1) assess whether a customer had his or her own bag(s), and (2) if it appeared that they might need them, ask whether they needed one or more carrier bags, reminding them (unless it was known that they already knew this) that there was now a 5p charge.

130 **10.1.5; Bags being taken by shoppers at the ASCs**. The only dispute which could reasonably be maintained about the content of this paragraph was in relation to the period of time during which the JH was required to supply bags to customers on request and point out the barcode on the bag, to be scanned by the customer. Mr Woolley said in paragraph 136 of his first witness statement that "this was only done in the Store for a few weeks after the charge was introduced". The JH herself said in paragraph 27 of her second witness statement that the requirement to do those things reduced over time. We concluded that what the JH said in that regard was accurate if it was read on the basis that there was a requirement which diminished after about a couple of months, but continued to need to be borne in mind by the JH at all times after 5 October 2015 to the end of the relevant period.

131 **10.1.8; New ASC machines in 2016**. We accepted the respondent's submissions on this paragraph with the caveat that weight interventions were in our judgment, on the balance of probabilities, temporarily likely to arise after August 2016 and that when they did arise, they needed to be dealt with in the manner described at pages 3 and 4 of C7/61. We therefore rejected the respondent's proposed additional words "may temporarily have", and decided that after "authorisation", the words "in the manner described on pages 3 and 4 of C7/61" should be used in place of those proposed by either party.

132 **10.1.9; Resolving weight interventions at the ASCs**. The claimants' proposed words for this paragraph described the effect of those pages of C7/61, and we accepted them, noting that at the end of C7/61/4, this was said:

> "Remember you should never just scan your barcode and walk away without engaging the customer and you should be explaining what has happened in a calm and confident way. Customers will appreciate the effort and time you spend with them and it will prevent the customer from needing help for the same problem in the future."

133 **10.2.2; How to pack a customer's shopping**. For the same reason, applying this time C7/84 and C7/167, to which the respondent itself referred, we accepted what the JH said in the detailed parts of this paragraph, but on the basis that they stated what the JH was required to do as stated above in regard to **10.1.1 and 10.1.2**.

Paragraph 11; Returns and refunds

134 **11.1.2; Processing a refund**. We accepted the respondent's evidence that the JH did not have authority to give refunds, and that she would need to obtain managerial authorisation to give a refund. The only soft key of the sort to which the claimants referred in their proposed text for **11.1.2** which might be relevant which we could find was the "Void item" soft key, as referred to at C7/1/2 and C7/165/15, which was applicable if an item had mistakenly been scanned twice. C7/1/3 might have been relied on as helping to show the requirement for managerial authority for a refund and how the JH had to deal with a double scanning of an item worth (at least in 2010) more than £10, as there, this was said.

> "Any products that need to be voided over £10 will need supervisor authorisation from a Team Leader.
>
> You should let the customer know that you need assistance to remove the product and call for help.
>
> You do not need to stop scanning while you wait for assistance because you will be able to locate the product using the arrows when your Team Leader arrives to assist you."

135 At C7/163/17, it was said that "Any products that need to be removed from a customer's bill that are £10 or over (or £1 at known critical stores) in value will need supervisor authorisation from a Team Leader." The text following that was otherwise in the same terms as those of the second and third paragraphs of the passage set out immediately above from C7/1/3. However, the respondent agreed the terms of **3.6.7**, which referred to the JH voiding items without authorisation when a customer was unable to pay for shopping or wanted it to be put aside and paid for on the customer's return. We therefore concluded that that was a separate situation from that which was the subject-matter of **11.1.2**. Indeed, the claimants' proposed words for **11.1.3** were in substance consistent with the respondent's proposed words for **11.1.2**. In those circumstances, we accepted the respondent's proposed words for **11.1.2**.

136 **11.1.3**: We could see nothing inherently wrong with this paragraph, since (1) so far as material (i.e. the only controversial part of it was that) it asserted only that the JH checked a receipt to see whether or not a refund could be given, and only then asked for the authorisation of a manager for the refund, after which the JH processed it as authorised, and (2) the latter process was no different in substance from processing a payment (rather than a refund). However, we could see that what Mr Woolley said in paragraphs 148 and 149 of his first witness statement about the manager processing a refund made much practical sense, and we concluded on the balance of probabilities that the JH did not do any more than simply call for managerial assistance when a customer sought a refund. We therefore agreed with the respondent that **1.1.3** should be omitted.

137 **11.2.1; Refunding an overcharge**. For the same reasons, we accepted the respondent's proposed words for this paragraph, and rejected those proposed by the claimants, except that we concluded that the claimants' words in brackets ("a regular occurrence") were apt, given H31 and the respondent's acceptance that customers complained of being overcharged about once every three weeks.

Paragraph 12; Cash handling

138 **12.1.1; Till lifts**. Because of what was said at C7/165/37, as set out in paragraph 29 above, we agreed with the respondent's proposed words of this paragraph up to "accountable for the till lift" except that the figure of £500 needed to be £600. We record here that we thought that it was highly unlikely that a checkout operator would be required to count the cash in the till "roughly" as asserted by the claimants.

139 As for the final words of the paragraph as proposed by the claimants, we accepted the respondent's evidence that the summary would be completed by the manager, and we could see that verification of the "amount of cash removed" as referred to in both parties' words for **12.1.1** would in all probability have been evidenced by the JH merely signing the summary. Even though C7/165/38 said that "Both parties complete and sign the takings deposit summary ensuring the date and till number is written at the top", we thought that that meant that the JH would watch while the manager completed the summary, i.e. witnessed it. We therefore accepted the respondent's proposed words for **12.1.1**. Having said that, we did not see any material difference between (1) witnessing and verifying, and (2) actually completing, the summary.

140 **12.1.2; How a till lift was undertaken**. It was the respondent's case that the claimants' proposed words for this paragraph described a manager's activity and not that of the JH. However, the respondent also relied on the description of the process in paragraph 153 of Mr Woolley's first witness statement, which in fact appeared to be the basis of the claimants' proposed words for **12.1.2**. Nevertheless, we could see nothing in the claimants' proposed words for **12.1.2** which added anything material to

12.1.1, so we agreed with the respondent that **12.1.2** was superfluous and should be omitted.

141 **12.1.4; Completion of hard copy of takings deposit summary**. However, we disagreed with the respondent's contentions in regard to the content of this paragraph. That is because of the words on C7/165/38 which we have set out in paragraph 139 above, and because those words were consistent with the concept of dual control and what the respondent proposed for **12.1.4** was not. We therefore accepted the claimants' proposed words for **12.1.4**.

142 **12.1.5; The frequency of till lifts**. We thought that the dispute about frequency in regard to this paragraph was unnecessary, given the content of H31. Till lifts were not done "continuously", so it was appropriate on both parties' cases to say that they occurred "frequently".

143 **12.2; Till checks**. Given our conclusion stated in paragraph 34 above that the JH did not participate in till checks, we agreed with the respondent that the whole of paragraph **12.2** should be omitted.

Paragraphs 13 ("Arrivals of deliveries") and 15 ("Take back")

144 Given our findings of fact stated in paragraph 16 above that (a) during the period up to 30 April 2017 the JH only occasionally manoeuvred (1) freshly-delivered cages out of the cargo lift at shopfloor level and into the warehouse and (2) empty cages from the warehouse to the cargo lift, and (b) after that she did not do that at all, we concluded that it was not proportionate to address the detailed allegations of the claimants concerning the JH's work done in relation to deliveries during the relevant period. In fact, we saw no good reason to distinguish for the purposes of section 65(6) of the EqA 2010 between the work done by the JH and any other sample claimant who moved cages and other units of delivery ("UoDs") which had just been delivered to their intended first resting place in the relevant store. That was because the work was in our judgment the same for present purposes, in terms of the demands made on the job-holder for the purposes of section 65(6). We were fortified in arriving at that conclusion by the fact that like work within the meaning of section 65(2) is work which is "the same or broadly similar", and in regard to which "such differences as there are between their work are not of practical importance in relation to the terms of their work." However, irrespective of the terms of section 65(2), we concluded that here, there was no point us making any more findings than those which we had already made in regard to Mrs Worthington. That was because the UoDs were the same so that (1) the difficulties in practice of moving them were the same, and (2) the only material differences between the relevant work done in the various stores consisted in the distances from (i) the place from which the job-holder moved the UoDs to (ii) their intended first destinations, which might in each case be a staging post or it might be the intended final destination. If the IEs require us to make further findings of fact in this regard, then they must inform us pursuant to rule 6(3) of the EV Rules.

Paragraph 14 ("Unloading Deliveries", or, as the respondent proposed, "Moving Delivery Cages") and the opening section of paragraph 16 ("Delivery Breakdown (Pre-Sort)" or, as proposed by the respondent, "Replenishment (Working the Delivery)")

145 Equally, the cages in which, and the dollies on which, stock was delivered to the store were of the same kinds as the ones which were used at Woolton, and all of the other stores at which the sample claimants worked. It was therefore unnecessary to say more than that our findings of fact in regard to the cages and dollies as used at Woolton so far as relevant (made in paragraphs 41-56 of our determinations relating to Mrs Worthington's work, i.e. Appendix 1, at pages 45-47 above) applied here. However, there were some specific factual disputes concerning the UoDs which needed to be addressed, and we now turn to them.

146 **14.1.2 and 14.1.3; The UoDs**. As for the precise type and weights of the cages in which stock was delivered to the store, we saw that the parties were in substantial agreement. However, the parties differed on the extent to which blue (or flat) top trolleys were used by the JH.

147 We noted that here it was the claimants saying that blue top trolleys were used by the JH while the respondent was saying that they were not, whereas it was the respondent which was saying that blue top trolleys <u>were</u> used by Mrs Worthington and the claimants were saying that they were only rarely used by her. We saw too that the JH's own evidence on this issue, in paragraph 217 of her first witness statement, was simply that she did not recall standard-sized cages being taken to the shop floor from which to replenish, and (2) the respondent's position (stated in regard to **14.1.3**) was that the use of standard cages continued, but decreased after October 2014. This factual issue (of whether or not the JH used blue top trolleys) arose also in the opening part of paragraph **16** and paragraph **16.1.2** and **16.1.3** of the EVJD, so there was repetition of the issue. We resolve it here. Taking into account the things said in regard to those (other) parts of the EVJD as well as in relation to **14.1.2 and 14.1.3**, on the balance of probabilities, we preferred the respondent's evidence to that of the JH on the extent to which blue (or flat) top trolleys were used by the JH. The respondent's evidence included paragraphs 258 and 260 of Mr Gleiwitz's first witness statement, which was to the effect that such trolleys were used by the JH to an extent. Since Mr Gleiwitz worked at the store during the relevant period only from its start to June 2013, what he said in paragraph 260 of that witness statement about the period after then was only about the general practice of the respondent in Express stores, so it was not direct evidence about what the JH herself did. However, in that paragraph he did refer to what happened before 2014, and we saw that it was that "colleagues doing replenishment could decant items from the Standard Cages used for deliveries onto flat-top trolleys or Slim Line Cages where necessary". That was not a statement that such decanting was the norm: only that it was possible where necessary, although (he also said in paragraph 260 of his first witness statement) health and beauty items were "sometimes" broken down in the store's warehouse

and put on a blue/flat top trolley and then taken out onto the shop floor. We saw too that Ms Jemmett's evidence on this was in paragraph 261 of her witness statement and was that the JH "typically just pulled cages onto the shopfloor for replenishment, whether they were Standard Cages or Slim Line Cages". That is not a statement that the JH never put stock onto a blue/flat top trolley.

148 We doubted that there was any material difference in terms of the demands made on an employee arising from moving items from a cage to a blue top trolley and moving that trolley to the shop floor instead of simply moving a standard-sized cage to the shop floor, but we concluded that in practice, if the inconvenience of moving things to a blue top trolley could be avoided, then it was avoided, whether by Mrs Worthington, or Ms Williams, or any other sample claimant. Here, we accepted that it might have been necessary to move items to a blue top trolley only when stock was delivered on a standard cage, and that from 2014 onwards the use of such cages diminished. In the absence of any concrete evidence about the frequency with which the JH decanted stock onto a blue/flat top trolley before taking the stock onto the shop floor at the store, doing the best we could on the evidence before us, we concluded that she did that (using the terminology at H31) regularly.

149 **14.3.9; Receipt of courier deliveries**. We accepted the respondent's proposed words for this paragraph, on the basis that (1) the thing described in **14.3.8**, to which **14.3.9** related, occurred about once a week as stated by Mr Gleiwitz in paragraph 246 of his first witness statement, so that at the end of **14.3.8** the words "These deliveries arrived regularly." should be added, and (2) what Mr Gleiwitz described in that paragraph and what Ms Jemmett described in paragraph 276 of her witness statement was on the balance of probabilities more likely to have occurred than what was described in the claimants' proposed words for **14.3.9**.

The rest of paragraph 16

150 **16.1.1; Replenishment preparation**. We were of the view that it was unrealistic to think that the JH would always need to be told where to start with replenishment. However, it was also in our judgment more likely than not that the JH would usually be told by the person who was line managing her on the day in question the order in which stock was to be replenished. The wording of the respondent was therefore in our judgment apt in so far as it did not refer to frozen deliveries. Whether the JH did in fact work on frozen deliveries was the subject of dispute. We resolve that dispute below, in relation to paragraph **17.2.1**, where the dispute was repeated.

151 **16.1.2 and 16.1.3; Whether the JH used flat/blue top trolleys**. Given what we say in paragraph 148 above, we accepted the respondent's proposed words for these paragraphs.

152 **16.1.5; How the JH replenished from a shrink-wrapped cage**. For the reasons given by the respondent in its closing submissions, we accepted the respondent's proposed words for this paragraph.

153 **16.2.1; Cleaning before replenishment**. The respondent's submissions and proposed words for this paragraph ignored the respondent's requirement stated for example at C7/142/27 and in C7/234 to clean one's department as one went along, always using the correct, i.e. respondent-approved and supplied, cleaning products, including diluted Aseptopol. Pages 16-19 of C7/697 were also relevant, and they too showed the importance of using diluted Aseptopol. However, we thought that the requirement to Clean As You Go was not correctly stated in the claimants' proposed words for **16.2.1**. We found the obligation on the JH to clean best stated at pages 1-4 of C7/234, but ignoring the role of a technician in "Case Cleaning". We found what was said about cleaning gaps on shelves before filling them on both pages of C7/860 (which was, incidentally, a very helpful and detailed statement of the main tasks involved in replenishment in an Express store generally) to be applicable too. Accordingly, **16.2.1** should be in these terms.

> The JH was required to keep clean the department in which she was replenishing, in accordance with (1) pages 1 to 4 of C7/234, but ignoring for this purpose the role of the technician in the section on 'Case Cleaning', and (2) C7/860.

154 **16.2.3**: Similarly, the JH's obligations, i.e. her work for the purposes of section 65(6) of the EqA 2010, in regard to the temperature of the chiller cabinets and freezers which she replenished or by which she worked were neatly and accurately described in the right hand column of page C7/187/2. Accordingly, **16.2.3** should be in these terms.

> "The JH was required to work in accordance with the instructions in the right hand column of C7/187/2 by being vigilant in regard to the temperature of chiller and freezer cabinets in the manner described there."

155 **16.2.4**: We agreed with the respondent that the JH was unlikely to have been required to spend 55 minutes every day on cleaning and checking chiller and freezer cabinets. Rather, those things were likely to be done as part of the JH's work every day, taking less or more time as required from day to day. We therefore agreed with the respondent that **16.2.4** should be omitted.

156 **16.4.1; Damaged items and the mess they made**. The JH's obligation to clean up any spills as she went along was best described by reference to pages 1 to 4 of C7/234. We also saw no requirement in that document to inform a manager in the event of finding a spillage which needed to be cleaned up. We accepted that it might be helpful to inform the respondent's store management of a spillage, but that was another matter. The latter proposition was borne out by what the JH said in paragraph 222 of her first witness statement, which was this: "Should the wasted item be high value or if there are multiple items affected, I inform my Manager." So, the claimants' proposed words for **16.4.1** did not fully reflect the reality of the situation in that the JH would not always inform her manager, and that she did not need to do so.

In any event, the main issue here was the frequency with which the JH would clean up any mess. She said words to the effect that it was daily. The respondent said that that was not correct, and relied in response on the proposition that there was a need for someone (i.e. anyone and not just the JH) to clean up mess only "a couple of times a week across the whole store". In the circumstances, applying a balance of probabilities, we accepted that the JH would be required to clean up any mess caused by a damaged item a couple of times per month on average which, applying H31, was regularly. As a result of all of the things which we say in this paragraph, we accepted the claimants' proposed words for **16.4.1** with the first sentence omitted, the insertion of the word "regularly" before "requires" in the second and now final sentence, and the omission of the words "and inform a manager" at the end of that sentence.

157 **16.4.2; What the JH was required to do with a damaged item**. We saw that the JH said in cross-examination (as recorded on pages 81-83 of the transcript of day 12) that if a damaged item was obviously alright or obviously could not be sold, then she would either leave (or put) it out on display, or put it into the relevant waste cage, and that if there was any doubt in her mind about the matter, then she would ask her manager to decide what to do. That made sense to us, but we saw that Mr Gleiwitz's evidence was (in paragraph 266 of his first witness statement) that the "expectation was not that [the JH] or another colleague would waste damaged items straightaway" and that whether or not the item was "put in the waste cage" or reduced in price was a decision for the store's management and not the JH. Ms Jemmett said in paragraph 283 of her witness statement that in the envisaged circumstances the JH would put the item in the waste cage, and Mr Woolley said something to the same effect in paragraph 222 of his first witness statement. In those circumstances, we concluded that the claimants' proposed words for **16.4.2** best reflected the reality, with the word "can" replacing the first "is" in the second sentence. We record here that C7/197 was an informative and succinct statement of the JH's responsibilities in regard to "recording waste, storage and disposal".

Paragraph 17; Replenishment

158 We agreed with the respondent that it was necessary for it to be made clear that the JH did not decide whether or not she replenished (rather than, as it was implicitly the respondent's position, being assigned to work at a checkout): that was a decision to be made by whoever was line managing the JH on the day in question. Accordingly, we accepted the respondent's proposed words for the opening part of paragraph 17.

159 **17.1.1; the impact of the respondent's Cold Chain policy**. Neither party's proposed words for this paragraph reflected the reality. Replenishment was not a "timed activity" because of the respondent's Cold Chain policy. The effect of that policy is stated in paragraph 24 of our factual determinations regarding Mrs Worthington's work (i.e. in Appendix 1, at page 38 above), and as we have concluded in paragraph 68 of our judgment of 12 July 2023, the absence of a disciplinary

sanction for failing to comply with it was irrelevant. Therefore, the words for **17.1.1** should be these:

> The replenishment of all chilled and frozen items was subject to the respondent's Cold Chain policy, which had the objective of chilled items being at ambient temperature for no more than 20 minutes (after which they should be returned to a chilled storage area, including a chilled cabinet on the shop floor), and that policy was applicable to the JH's work when moving stock from the back door to a holding area and/or to the shop floor.

160 **17.1.3; Replenishing alone**. We mostly agreed with the respondent's proposed words for this paragraph, which best reflected what was in our judgment on the balance of probabilities the reality of the situation. We thought that the word "normally" was best inserted before "would" in the second sentence of the respondent's proposed words. That was because that better reflected what Ms Jemmett said in paragraph 294 of her witness statement and allowed for flexibility, which in our judgment was in practice required.

161 **17.2.1, bullet point 1; temperature in the warehouse chiller**. The parties' disputes in regard to the content of this paragraph appeared to us to be about things which the IEs would not take into account, given what was agreed by the parties and that a difference of 30 seconds (whether or not it was that or a minute being the dispute) in connection with a visit to a chiller was unlikely to be material. In addition, we could see no objective justification for accepting either the claimants' case that it would take up to five minutes, or the respondent's case, which was that it would take two minutes, to rotate items in the chiller. Having said that, we accepted that it was more likely in the circumstances of an Express Store to take no more than a couple of minutes. We thought in those circumstances that the claimants' proposed words for the content of **the first bullet point of 17.2.1** were the most apt, and we accepted them on the basis that if the IEs need one or more further findings of fact in that regard, then they can tell us under rule 6(3) of the EV Rules.

162 **17.2.1, bullet point 2; Did the JH go into the store's warehouse freezer?** We saw that in her first witness statement, the JH responded to the assertion that she did not replenish frozen stock by saying, in paragraph 263, that she did such replenishment on average once a week. None of the respondent's witnesses said that it was not part of the JH's work to replenish frozen items, and in our view it plainly was part of her work to do that. However, for the reasons stated below, in paragraph 204 in relation to **paragraph 19.2.28**, we accepted the evidence of the respondent's witnesses that the JH did not in practice replenish frozen foods. Nevertheless, it was in our judgment right to record that it was part of the JH's work for the purposes of section 65(6) of the EqA 2010 to replenish frozen items. Applying H31, we concluded that the JH replenished frozen foods occasionally within the meaning of H31. Thus, we accepted the claimants' proposed words for **the second bullet point of 17.2.1** with the addition of these words at the end (after the existing semi-colon);

the JH briefly entered the freezer occasionally;

163 **17.2.1, bullet point 3; The temperature in the warehouse otherwise**. This was a duplication of **1.2.13** and should therefore be omitted.

164 **17.2.1, bullet point 4; The temperature on the shop floor**. The claimants' proposed words in our judgment best reflected the reality of the shop floor temperatures. Whether the word "considerably" added anything material was not so clear, but we concluded that the fact that a chiller had to be between one and five degrees Celsius suggested that it did, so we decided that it did add something material.

165 **17.2.2; Space on the shop floor**. We thought that the claimants' proposed words stated the obvious, but the degree to which there might be congestion might well have been overstated. Whether it mattered that it had been was not clear to us. We concluded that we should leave the words as they stood and leave it to the IEs to ask us under rule 6(3) of the EV Rules if they needed us to make a specific further finding.

166 **17.2.4; Draughts and water leaks in the warehouse**. The dispute about this paragraph in our view did not need to be resolved, if only because it is inherent in the use of a warehouse that there will be a back door to it, and that when it is open there will be a considerable draught from it. Leaking roofs are also, it appeared to us, applying common sense and our own experience of life, a risk at all commercial properties. The effects of such leaks on trade, stock, or customer relations, all of which are referred to in the claimants' proposed words for **17.2.4**, were irrelevant here, as far as we could see. If the IEs need more than a finding of the obvious that the warehouse might be cold because of draughts arising from the need to have the back door open to receive deliveries and that any water leaks, of which there were some, could have made the floor slippery, then they can tell us.

167 **17.3.1; The equipment used by the JH when replenishing**. This paragraph appeared to us to be an unnecessary duplication (since the equipment used by the JH would have to be referred to when describing the various tasks undertaken by the JH and because for example one does not use a cage in the course of replenishment, one replenishes from it) and we therefore concluded that if we had had a role in referring to its contents, we would have decided that it should be excluded. However, for the most part it was agreed. What was not agreed concerned the use of a PDA. However, it was accepted by the respondent that the JH might have been instructed after 2014 to use a PDA to produce a new SEL, so the only dispute was the extent to which the JH used a PDA, which was the subject of **17.3.18**. That reinforced our view that **17.3.1** was unnecessary. The dispute concerning the use of a PDA is resolved by us below, where we refer to **17.3.18**.

168 **17.3.9; What the JH did with a kick stool if asked by a customer for assistance**. The dispute about the manner in which the JH dealt with a kick stool if she was asked

to help a customer while replenishing and using a kick stool was about things on which we suspected that the IEs would need no determination, since the parties agreed that the JH would have to decide what to do with the kick stool in that situation and might have to carry it around with her to avoid it tripping someone up. As a matter of common sense, however, the claimants' proposed words best reflected what we thought was required to keep the shop floor of an Express store safe, so that if the JH did not in fact do what was there described, then it was irrelevant for the purposes of section 65(6) of the EqA 2010. That is because what the claimants proposed for **17.3.9** was, we concluded, part of the JH's work for those purposes. We therefore accepted the claimants' proposed words for **17.3.9**.

169 **17.3.13; Standard cages and the use of blue/flat top trolleys**. This paragraph contained a repetition of the dispute which we resolve in paragraphs 146-148 above. This paragraph was in any event too general to be of any use. It should therefore be excluded.

170 **17.3.15; Moving dollies with green trays on them**. Our findings stated in paragraphs 53 and 54 of our determinations in regard to Mrs Worthington's work (in Appendix 1, at pages 46-47 above) applied here too. The JH had to move dollies in accordance with C7/142/10, which was sufficient to state what the work of moving dollies involved. The words for this paragraph there should be:

> The JH was required to move dollies in the manner stated at page 10 of C7/142, looking over her shoulder in the manner shown by page 11 of that document in relation to the pulling of trucks and page 8 of that document in relation to the pulling of roll cages.

171 **17.3.16; Dealing with a dolly with damaged wheels**. We accepted the respondent's contentions in relation to this paragraph and accepted the respondent's proposed words in their final form.

172 **17.3.18; The extent to which the JH used a PDA when replenishing**. We also accepted the respondent's proposed words for this paragraph in preference to those of the claimants. That was because they were in our judgment more apt and more helpful, and because we accepted the respondent's submissions in support of them.

173 **17.3.21; The occasions when the JH otherwise used a PDA**. We found the generality of this paragraph to be unhelpful. Equipment is best referred to when describing the manner in which it is used, and here it appeared to us that the respondent's submissions about the manner in which the JH used a PDA were apt. By way of illustration, the question of whether the JH used a PDA to do gap scanning was the subject of the dispute stated in regard to paragraph 23 of the EVJD, and therefore the reference to gap scanning here was unhelpful. In the circumstances we concluded that **17.3.21** should be excluded.

Paragraph 18; "Replenishment – Customer Service"

174 **18.1.1 and 18.1.2; Interacting with customers generally**. These paragraphs were apparently intended to be (and if they were not intended to be, they had to be seen as) a reflection of pages 2-17 of C7/145 and C7/184/2. Those were of course not the only documents where what was required of the JH by way of customer service was described, but in those pages the content of **18.1.1 and 18.1.2** was stated determinatively. We saw nothing wrong with what was stated in the claimants' proposed words for those paragraphs, as long as it was recognised that those were the requirements of the JH's job, and therefore part of her work for the purposes of section 65(6) of the EqA 2010, whether or not she complied with all of those requirements fully. In this regard we see that the respondent's submissions addressed the question whether or not the JH did the things referred to in **18.1.1 and 18.1.2**, not whether or not they were properly to be regarded as requirements of her job. The frequency with which the requirement to be ready and willing to act in the ways stated at pages 2-7 of C7/145 and C7/184/2 had to be met was best described (applying H31) as "continuously".

175 **18.1.3; The relevance of the Mystery Shopper**. This paragraph is a repeat of **3.2**, with which we deal in paragraph 50 above. Paragraph **18.1.3** should therefore be omitted.

176 **18.2.1; Being called to assist on the mainbank checkout when replenishing**. We rather doubted that some of the matters in dispute here on which we had not already made a decision (and we had already decided whether or not the JH used a blue/flat top trolley when a delivery arrived on a standard size cage and whether or not the JH replenished frozen foods) were material. We thought that the words to the effect that the JH would stay on the mainbank checkout until the busy period was over, stated the obvious, in that we concluded that that was obviously part of her work for the purposes of section 65(6) of the EqA 2010, and we thought that the precise times of the day when the store was busy with the result that the JH might be asked to go on that checkout every 5-10 minutes were immaterial. What <u>was</u> material was the frequency with which that occurred, and it seemed to us on the basis of both parties' cases that the best description using H31 as our guide was "frequently". Accordingly, we accepted the claimants' words for **18.2.1** with the words "frequently, the" inserted after the first comma. If the IEs need us to make a decision on whether or not the period when the JH was most likely to be called upon to assist at the mainbank checkout was (as asserted by the respondent without input from the claimants on the point) between 3.30pm and 6pm, then they can tell us. (We regarded it as important not to overburden the IEs and to give a clear indication to them and the parties about what appeared to us not to be material, if only so that (1) the IEs could correct us if we were wrong, and (2) if we were right then the parties would know that for future reference.)

177 **18.2.2; Replenishing high value items**. By the end of the hearing, the only dispute maintained about this paragraph was the issue of frequency. The claimants said that the event referred to in this paragraph occurred every few weeks, and the respondent

said that it happened only occasionally. Given H31, the appropriate word was "occasionally", which fitted the claimants' case.

178 **18.2.3; What happened if a customer forgot about an intended piece of shopping**. We preferred the respondent's evidence on the issue of how many times the JH would go and get an item for a customer who had got to the front of the checkout queue. We did so because their evidence was in our view, applying a common sense approach and our own experience, simply more likely to be true. We therefore accepted the respondent's proposed words for **18.2.3**.

179 **18.2.7; Customers asking whether an item contains "allergens"**. The dispute here was about the frequency with which the agreed event occurred. The respondent used the word "rare", when the JH said that at the start of the relevant period it was about once a week that she would be asked questions about allergens in products. In fact, we found the use of the word "allergens" to be unhelpful, as a customer would probably have asked only about a specific allergen, such as dairy products or gluten. In addition, in our experience during the relevant period allergens were always listed in the ingredients section of edible produce, so it would (as the respondent submitted) be likely to be rare that a customer asked whether a particular allergen was in a particular product. However, the term "rare" in the schematic at H31 was used to describe a frequency of "Annually or less", which we thought was unlikely. We also thought that the introduction of the respondent's "Free From" range was not going to reduce the number of requests for advice markedly, if only because some products might contain some allergens, such as dairy products, and be free only from a particular allergen, such as gluten. Doing the best we could on the evidence before us and our own experience of supermarket shopping, we concluded that the right term, applying H31, for the disputed frequency in **18.2.7** was "Occasionally", and that that term should be applied throughout the relevant period.

180 **18.2.8; Stock queries**. We saw from paragraphs 239-241 of Mr Woolley's first witness statement that it was not possible to tell when an item would come back into stock by taking the code for the item from the shelf-edge label ("SEL") and looking it up using a PDA. We saw too that the original paragraph **18.2.9** was agreed to be deleted, presumably on the basis that the new version of **18.2.8** incorporated the content of **18.2.9**. The parties' submissions differed on the content of **18.2.8**. Having weighed them up and taken into account (1) the parties' respective evidence on the content of that paragraph, and (2) the way that their positions shifted over time, and taking into account the references at C7/145/7 to "Colleagues helping to locate a product in store", and otherwise being "very helpful", we concluded that the claimants' proposed words (set out in their closing submissions, not as stated in the respondent's closing submissions) were apt and should therefore be used in preference to any other proposed set of words for **18.2.8**.

181 **18.2.10; Price queries**. Even on the basis of the respondent's own case in regard to **18.2.10**, which we accepted, the frequency within the meaning of H31 with which customers asked about the price of an item was "frequently". Given that factor, we

accepted the claimants' proposed words for **18.2.10** but without the words in brackets.

182 **18.2.12; What the JH was required to do if an item was out of stock**. The claimants' proposed words were inapt. It was implicit and a matter of common sense that a customer assistant would be expected by the respondent to apologise if an item that a customer wanted was out of stock. That was amply borne out by C7/145/6-11. We concluded that the right words for **18.1.12** were these:

> If a product was out of stock then the JH was expected to be apologetic to the customer about that fact.

183 **18.2.14; How to help elderly, vulnerable and disabled customers**. What the JH in fact did by way of helping elderly, vulnerable and disabled customers may not have been precisely what the respondent wanted of the JH and other customer assistants, or it may have gone further than that which the respondent wanted. The respondent agreed **18.2.13**, which referred to the JH being required about once a day to help such customers. Plainly the respondent wanted the JH to give such assistance as it was reasonable to give to such customers: that was implicit from all of the documents put before us referring to the respondent wanting its staff to give "great customer service", those words being on internally numbered page 28 of the document at C7/145, which was part of a longer document in fact, that page being page 2 of the pdf document at C7/145. On that page, we saw that this was said:

> "As you spend more time in your new role, you will find different ways to delight customers and give them fantastic service that they might not expect. From a quick conversation to a grand gesture, there are many ways that you can go the extra mile and show that you care. You have been employed by Tesco because of your personality and skills."

184 Given those words and the tenor of the rest of the document at C7/145, we could not see how the respondent could reasonably contend that if the JH did what she said she did, as described in the claimants' final version of **18.2.14**, then she was not doing her job. In that circumstance, we concluded that those words were apt to describe the part of her work to which they related, and we accepted them.

185 **18.2.15; The level of service provided to such customers**. The same was true of the claimants' proposed words for **18.2.15**. the respondent could not reasonably contend that what was said there was not an accurate description of part of the JH's work for the purposes of section 65(6) of the EqA 2010, and if only for that reason, we accepted that those words were apt and should be included.

186 **18.2.16; Talking to elderly customers**. Precisely what the JH did on a day-to-day basis was, we repeat, not the central issue. What was required here was that she be willing to engage with customers in the manner shown by pages 6-11 of C7/145, including in particular the reference on page 7 to "A friendly chat with a colleague",

and that there was therefore an inevitable tension between that requirement and the requirement to replenish as quickly as possible, in line with our finding stated in paragraph 55 of our judgment of 12 July 2023. In those circumstances, we accepted the claimants' proposed words for **18.2.16**.

187 **18.2.17; Carrying out to a customer's car**. Given

187.1 the existence of the respondent's "Carry Out Service" referred to on C7/143/11, which is "A service to help customers out to their cars if they have heavy bags of shopping", but that

187.2 on that page it is said that "Not all services are available in every store or format",

187.3 on page 3 of C7/143 the respondent's values were said to include that "No one tries harder for customers", and

187.4 that the store at which the JH worked was on a main road,

we concluded on the balance of probabilities that if it was reasonably feasible given the requirements of the operational requirements of the store, it was part of the JH's work to help an elderly or vulnerable customer by carrying out the customer's shopping to his or her vehicle, whether at the request of a colleague or a manager, or on the JH's own initiative. However, we doubted that the requirement arose very often, and concluded that the best description of the frequency was "occasionally". In those circumstances, we concluded that the words to be used for **18.2.17** were these.

> "Occasionally, the JH would be required to help elderly or vulnerable customers by carrying out their shopping to their vehicles."

188 **18.2.20 to 18.2.22; Difficult and/or aggressive customers**. The way in which the JH was required to interact with customers in general terms was as described in paragraph 7 of our determinations relating to Mrs Worthington's work (in Appendix 1, at pages 32-33 above). While some parts of that paragraph refer to things which were plainly not applicable to the store at which the JH worked, such as the RAC Breakdown Service referred to at C7/143/11, in general, the principles referred to in paragraph 7 of Appendix 1 applied to the work of the JH.

189 So did the principles referred to in paragraph 10 of Appendix 1 (at page 34 above). As for the frequency with which the JH encountered aggressive or angry customers, we concluded that both parties overstated their cases to an extent. We concluded on (1) the basis of both parties' evidence, (2) the balance of probabilities and (3) the basis of our own experience of shopping at supermarkets, that the word "occasionally" best described the frequency with which the JH had to deal with an aggressive customer, but that the frequency with which she encountered merely difficult ones was best described as "regularly". Whether those things were material

was another matter, since the agreed fact that the JH might encounter a difficult, or even an aggressive, customer, was a constant factor.

190 **18.2.24; Cleaning while replenishing**. The frequency with which the JH was required to clean up a spillage as a priority was accepted by the respondent to be "up to once a week". The claimants said that it was on average once a day and up to three times per shift. Here too we concluded that both parties overstated their cases to an extent. We concluded on the balance of probabilities that the frequency was several times a week, and not every shift, so that the right word to describe the frequency was "frequently" and that the words in brackets in the claimants' version of the paragraph should be omitted.

191 **18.2.26; Cleaning of shelves etc**. Given what was said at pages 1 to 4 of C7/234, but accepting that the JH was not "regularly involved in the Case Cleaning routines" (those words being in the "Trainer's Note" section at the top of C7/234/3), we concluded that the claimants' proposed words for **18.2.26** in substance best reflected the reality of the situation as far as the work of the JH for the purposes of section 65(6) of the EqA 2010 was concerned. We accordingly accepted the substance of those words in preference to those proposed by the respondent. The wording for **18.2.26** should, we concluded, be this.

> The JH was required to apply the requirements of pages 3 and 4 of C7/234 by cleaning shelves, racking, display cabinets and shelf edge stripping, either if she could see that it was necessary to do so, or if she was asked by a manager or shift leader to do so. When cleaning shelves, the JH would move products on the shelf as she went along, removing them if necessary to clean any spillage.

Paragraph 19; Replenishment – tagging and putting out stock

192 **19.1.2; Security stickers**. We assumed that there was a dispute between the parties about whether or not the JH applied security stickers or tags because the use of a security tag was more involved than the use of a security sticker. We saw that the evidence of the JH (in paragraph 253 of her first witness statement) was that she had to apply stickers, and not tags. We saw too that the respondent's proposed words for **19.1.2** showed that the respondent accepted that the JH had to put out stickers with electronic layers (those words were not used, but the respondent accepted that a sticker needed to be deactivated, which meant that a sticker had to have an electronic layer to be effective) and that the claimants asserted that the difference was editorial only. In those circumstances, we concluded that the correct term was "sticker" and not "tag".

193 **19.2; Putting out stock**. The respondent proposed that the word "Ambient" should be inserted before "stock" in that heading. We concluded on the evidence before us that the JH could be required by the respondent to put out any kind of stock. That was the replenishment part of her work. We therefore accepted the claimants' proposed words for **19.2**. Having said that, we could not see how the value of the

JH's work for the purposes of section 65(6) of the EqA 2010 could differ according to the stock which she replenished, unless putting out cold stock was more demanding, but even then if one wore more clothing then it would be hard to see how it could be more demanding just because the stock and storage for it was colder than the ambient temperature.

194 **19.2.6, 19.2.9, 19.2.13, 19.2.14 and 19.2.26; Did the JH use a blue/flat top trolley when replenishing stock that had arrived in a standard cage?** We failed to see why it would make any difference whether or not the JH pulled a blue (or flat) top trolley or a standard cage onto the shop floor, except that it might be marginally less easy to pull a standard cage than a blue top trolley. However, given our finding of fact stated in paragraph 148 above, we accepted the respondent's proposed additional references to standard cages (but not the words in brackets proposed by the respondent for **19.2.9 and 19.2.26**, namely asserting rarity). We record here that **19.2.6, 19.2.9 and 19.2.13** described what we thought was obvious, and, in relation to **19.2.14**, that it made no difference at all whether or not a customer took something from a standard cage, a slim line cage or a dolly. For the avoidance of doubt, we rejected the claimants' proposed limiting of references to cages to "slim line" cages in the paragraphs of the EVJD to which we refer in this paragraph.

195 **19.2.8; Replenishment of heavy items**. We also thought that this paragraph described something which was obvious, especially when the task described was seen in the light of pages 5-12 of C7/142. The things that the JH in fact moved might not have been as asserted by the claimants here. Whether or not that was material, we accepted what the respondents said about bananas, which justified the deletion of the bullet point concerning bananas. However, we saw no reason to think that the JH would never have to open up a box of frozen chips, so we concluded that the bullet point concerning those should remain. The claimants' calculation of the weight of 24 330ml cans of soft drink as 13kg was plainly wrong: if the liquid weighed the same as water then it would have been 7.92kg plus the weight of the cans, which would have been low. An internet search for the weight of 24 330 ml cans resulted in a figure of 8.6kg. We cannot, and will not, use that figure of 8.6kg unless the parties either agree to its use or fail to put before us another.

196 **19.2.10; Replenishing in an aisle**. We accepted what the respondent submitted (for the evidential reasons on which the submissions were based) about the manner in which the JH actually replenished as she went along an aisle. However, what was material here was (see paragraph 88 of Lavender J's judgment in *Beal v Avery Homes (Nelson) Limited* [2019] EWHC 1415, which we have set out in paragraph 21 of our judgment of 12 July 2023) what she was required by the respondent to do, and not whether she in fact did precisely that. In that regard, we concluded that it was the JH's work for the purposes of section 65(6) of the EqA 2010 to put items out on display as quickly and effectively as possible. It was difficult to tell whether moving things around on a cage would in practice be more effective than simply putting them out on the relevant shelves, working from the top of a stack downwards. We thought that if it was important to the respondent to have customer assistants following a

particular line in that regard, then it would have been stated somewhere in the training materials. Neither party referred us to any such statement. We ourselves could not find one. The closest that we could find to a document indicating how to replenish from a cage was C7/369, which incidentally stated on page 2 that cages should be put back into the warehouse if the replenisher was called away from replenishing, and less incidentally this: "Stock should be filled directly from the cage onto the shelf." Not even at C7/241/11 (entitled "Know Your Stuff for Fresh Food Replenishment – How to Fill") was there a statement about how a customer assistant should replenish from a cage, but that might have been because that document referred to fresh food replenishment. We saw that C7/354, which had the title "Know Your Stuff On Grocery Replenishment – Welcome to Grocery Replenishment", referred, at page 9, under the heading "6. Where You Can Get More Information/Support" to "Know Your Stuff On Filling". That document was, however, not before us. Assuming that we had to decide which of the two versions proposed for **19.2.10** was best, we preferred the respondent's proposed words, if only because they reflected what happened in reality and what was likely to be as effective as anything else, and those words are accordingly to be included in preference to those of the claimants.

197 **19.2.11; What the JH did when taking stock from e.g. cages**. Having said that, we disagreed with the respondent that the claimants' proposed words for this paragraph were superfluous. If the detail included by the parties was material, then **19.2.11** added something material, and accordingly should be included.

198 **19.2.12; What the JH was required to do when a customer was standing in front of a facing which needed to be replenished**. The content of this paragraph described what we thought was obvious, but we accepted that the paragraph should be included for the sake of completeness. The word "regularly", read in the light of H31, fitted even the respondent's proposed description of the frequency with which the practical issue referred to in **19.2.12** arose. Since it was the word used by the claimants, we accepted the claimants' proposed words for this paragraph.

199 **19.2.20; (1) How many ambient goods overstock cages were there in the warehouse? (2) Did the JH need to be told whether to replenish from those cages?**

199.1 The number of overstock cages in the warehouse was in our view highly unlikely to affect the demands on the JH of her work in relation to ambient goods, not least because replenishment from a backstock cage (which it was Mr Gleiwitz's evidence in paragraph 325 of his first witness statement) simply meant going to that cage first, and emptying it (if possible) before putting out any stock from a delivery. At least for the majority of the relevant period, the number of overstock cages of ambient goods was (the parties agreed) "up to 6-8", so for the sake of simplicity we accepted the claimants' words in that regard. If the IEs agree (as the respondent submitted) that it was relevant that it was Mr Gleiwitz's evidence (in paragraph 325 of his first witness

statement) that while he worked at the store (so up to June 2013), there were usually only one or two cages of overstock but 6-8 cages of backstock, then we will make a specific finding on that issue. In the meantime, we decline to do so.

199.2 As for the proposition that the JH's job was not herself to replenish gaps from the overstock cages in the stock room if she saw any such gaps but instead to wait to be instructed by a line manager to do so, that was plainly wrong, as shown by what the claimants pointed out in their closing submissions was said by Mr Gleitwitz in cross-examination (recorded at pages 118-119 of the transcript for day 19).

For the sake of simplicity we therefore accepted the claimants' proposed words for **19.2.20** in their entirety.

200 **19.2.21; Did the JH assist with moving overstock cage stock to backstock cages?** The respondent's contentions on this paragraph included an assertion that the JH did not assist with the activity of managers described in the paragraph. Whether or not the JH did that work, it was of the same sort as bringing items out from the warehouse to the shop floor, so we could not see why it was relevant here. If forced to make a determination, then (1) we saw that Mr Gleiwitz said in paragraph 326 of his first witness statement that the JH "would have done this very occasionally if Store Management asked her to do it and no more than once a month in my view, if that", (2) we accepted that evidence, and (3) we concluded that the JH had overstated the frequency with which she assisted. On that basis we concluded that the claimants' proposed words should be included with the word "occasionally" inserted before "assists" and the omission of the words "approximately once a week".

201 **19.2.23; How often did the JH replenish the fresh delivery?** We saw that the respondent's submissions on, and its proposed words for, the content of this paragraph, were inconsistent with what was put to JH in the cross-examination recorded at lines 1-7 of page 54 of the transcript for day 12. We also doubted that the JH would only occasionally (i.e., applying H31, only once every several weeks or months) replenish fresh produce. We thought that the likelihood was that it occurred at least regularly (once a week, or at least once a month), or possibly frequently (i.e. at least several times a week). The JH's evidence in paragraph 258 of her first witness statement was that when she did overtime she "worked fresh replenishment", but that she also "contractually worked Friday and Saturday mornings", when, even on the respondent's evidence, she might well have "worked fresh replenishment". Even the respondent's proposed words for **19.2.26** stated (albeit slightly inconsistently with other words proposed for that paragraph) that the JH "might be asked to replenish fresh deliveries once or twice a week, depending on her shifts". Ms Jemmett said in paragraph 317a of her witness statement that in her experience, the JH "replenished more Ambient stock than Fresh", not, for example, "almost all Ambient". In the circumstances, we concluded that the claimants' proposed words

should be accepted but with the words "(which occurred frequently)" inserted after the first occurrence of the words "fresh delivery".

202 **19.2.26 as it stood after the above determinations**. As for the rest of paragraph **19.2.26**, we thought that it was a repetition of other parts of the EVJD (including the parts relating to the application of the Cold Chain) and therefore it had to be omitted.

203 **19.2.27; time taken to replenish fresh deliveries**. We doubted that it was material (1) whether or not the JH put stock out alone, and (2) how long it took to put out the contents of a slim line cage containing sandwiches. However, assuming that those things were material, we preferred the respondent's proposed words for this paragraph, since they best reflected the reality as stated by the respondent's witnesses, whose evidence on the matters dealt with in this paragraph we accepted. For the avoidance of doubt, we accepted (on the basis that it was on the balance of probabilities likely to be true, given the importance of getting fresh stock out onto the shelves) the evidence of (1) Mr Gleiwitz in paragraph 331 of his first witness statement that even on Sundays the JH would in his experience have been helped to put out fresh stock, rather than being required to do it alone, and (2) Ms Jemmett in paragraph 317a of her witness statement that replenishing fresh produce was in her "experience ... done with another colleague or a Shift Leader". Those things were catered for by the use of the word "most".

204 **19.2.28; Did the JH replenish frozen foods, and if so, how did she do it?** The claimants' latest proposed words for this paragraph included an assertion that the JH had to ensure that "certain items (i.e. from suppliers who have paid a premium) are placed in a prominent position." We accepted the evidence of all of the respondent's witnesses on this paragraph (thus including what Mr Woolley said in paragraph 254 of his first witness statement about frozen foods simply being put out in accordance with the current merchandising plan). We therefore concluded that (1) the JH did not in practice replenish frozen foods, but (2) she could have been required to do so, with the result that it was part of her job but not part of the work that she actually did, and (3) in doing so she would have had to apply the respondent's merchandising plan.

205 **19.2.29; The store's shopfloor freezer cabinets and what the JH was required to do in relation to them**. Plainly, C7/142/26 applied when putting out frozen food. It was therefore better to replace the second sentence of the claimants' proposed words for **19.2.29** with these words: "In putting out frozen food stock, the JH was required to comply with the instructions stated on C7/142/26." The number and type of freezers was immaterial as far as we could see, but we saw too that the respondent did not contest the claimants' assertion in that regard, so we accepted the first sentence of the claimants' proposed words.

206 **19.2.30; Ambient delivery replenishment**. We could not see why it was asserted by either party that the number of cages of ambient goods delivered per day was relevant. That was because in our view the material issue was simply for what portion of the JH's day she was replenishing from ambient cages (assuming that there was

less pressure on her when doing so than in replenishing fresh or frozen items because of the impact of the Cold Chain policy). Also the times when the work was done were irrelevant unless at one or more points when the work was being done, customers would be kept waiting in a queue longer than was desirable from the respondent's point of view with the result that the JH might then more frequently have been called to assist at the checkouts. The parties in fact agreed on the times when the JH would normally be replenishing ambient stock. Having said those things, in case it is relevant, we determined the dispute in **19.2.30** in favour of the claimants. That was on the basis that what they proposed for that paragraph was more likely to be accurate than what the respondent proposed, if only on the balance of probabilities taking into account our assessment of the practicalities of the situation and accepting that the use of the word "maximum" in relation to the number of cages replenished per shift (the claimants claimed that the maximum was 5 and the respondent said it was 3) meant that the number of cages might well have been less than 5. In addition, assuming (which we doubted) that the issue was material, the parties were not very far apart on the maximum length of time that the JH spent on replenishing ambient stock.

207 **19.2.31; What the JH did in relation to milk deliveries**. We accepted on the balance of probabilities and taking into account the rest of the evidence before us, that the JH would not have routinely been required to "[work] the milk delivery as soon as it [had] been received". That was because she might well have been required to work on a checkout instead. As a result, we accepted the first sentence of the respondent's proposed words for this paragraph. As for the respondent's proposed second sentence, it was largely supported by the evidence of Ms Jemmett and Mr Woolley in the paragraphs of their witness statements to which the respondent referred in its closing submissions, and in part supported by the evidence of Mr Gleiwitz to which the respondent referred there. However, it was impossible to conclude from that evidence that (as claimed in the second sentence of the respondent's proposed words for **19.2.31**) milk cages were always put in the warehouse chiller and that replenishment from them took place only in the afternoon. Nevertheless, the claimants' proposed words for the second sentence of **19.2.31** did not make sense and were not supported by paragraphs 264 and 265 of the JH's first witness statement. We concluded that the second sentence should therefore be simplified and be this.

> "The JH would be required to replenish milk from existing stock in the warehouse first, and to put newly-arrived milk cages in the warehouse unless there was insufficient stock in the warehouse from which to replenish the shop floor stock, in which case the JH was required to replenish from the freshly-arrived cages. An alternative way to describe this task, with those practicalities in mind, is that it was one of replenishment as necessary."

208 **19.2.37; Flower replenishment**. As is often the case, a picture tells a story much better than words. C5/10/33 did that here. That picture supported the respondent's proposed words for **19.2.37** rather better than those proposed by the claimants. In

addition, we accepted from the other evidence before us that flowers were delivered only as part of fresh deliveries. In the circumstances, we accepted the words proposed for this paragraph by the respondent as part of its closing submissions.

Paragraph 20; "Replenishment Practices"

209 We found summary paragraphs such as the opening words of paragraph 20 unhelpful, as they were repetitious. The opening words of paragraph 20 should therefore be omitted.

210 **20.1.2, 20.1.4 20.1.6, 20.1.9, 20.1.10**: Given our findings stated in paragraphs 83.1, and 122 of our findings of fact in regard to Mrs Worthington's work, i.e. Appendix 1 (at pages [ ] and [ ] respectively above) we concluded that it was part of the JH's work to ensure that stock was rotated. Whether or not she did that was immaterial. It was her job to do it. For the avoidance of doubt, the words for **all of the paragraphs referred to at the start of this paragraph** should be these.

> The JH was required to check date codes and rotate stock as shown by C7/249, C7/142/28 and pages 24-26 of C7/697.

211 **20.2.1; Replenishing items in retail-ready packaging**. The first dispute in regard to this paragraph was a repeat of the dispute about whether or not the JH used a blue/flat top trolley when replenishing stock delivered in a standard cage. We could not see how the UoD in which retail-ready stock was delivered could be relevant here. Nevertheless, for the avoidance of doubt, we record here that we concluded that the words "unit of delivery" should be substituted for "Slim Line Cage or blue top dolly" in the claimants' proposed first sentence of this paragraph.

212 As for the second disputed part of **20.2.1**, namely whether or not it would be obvious that stock had been delivered in retail-ready packaging, we accepted the respondent's proposed words as they best reflected the reality as shown by C7/262/4, where the word "quickly" was used in the first indent.

213 **20.2.8; Did the JH put out stock that arrived in a "Merchandise Box"?** There was a clear conflict of evidence in regard to the role (or absence of a role) of the JH in regard to what the parties referred to as Merchandise Boxes. We concluded that a decision would need to be made about where the box in question was to be put on the shop floor, and that would be a strategic decision which the store management would be unlikely to leave to a customer assistant and would want to make itself. That factor supported the respondent's case. So did the evidence of both Ms Jemmett and Mr Gleiwitz. Ms Jemmett said this (in paragraph 311 of her witness statement):

> "We did not generally replenish these displays, given that the items are typically either new products, seasonal products or products on promotion (for example, Easter Eggs)".

214 That made sense. So did what Mr Gleiwitz said (in paragraph 351 of his first witness statement) about the relevant practical factors, which was this (and the words which we are about to set out were followed by the statement that "Dealing with these displays was a Store Management task"):

> "I do not agree that Siobhan replenished and set up items in a Merchandise Box and then placed the empty box in the re-usable equipment area in the warehouse or basement. As I have said, we did not use the basement during the Relevant Period and Merchandise displays came pre-assembled with their contents in them. They did not usually require replenishment as they were for new items, seasonal items or promotions."

215 Given all of those factors, we accepted the respondent's evidence and submissions on **20.2.8** and concluded that that paragraph should not be included in the EVJD for the JH.

216 **20.6.2; Point of Sale signs**. The dispute in respect of the words of this paragraph was about who did what in practice in relation to what the respondent called "Point of Sale" signs. The dispute was for present purposes resolved by C7/248/9, which showed (in the second half of the page) that it was the job of the replenisher (not the store's management as such) to "replace any Point of Sale that you can see has fallen off" and "[i]f any Point of Sale is missing" to "request new Point of Sale from the Price Integrity office", which here meant the store's management. In addition, just above those words, it was said that it was "part of our job [as opposed to that of the Price Integrity team] to ensure that the Point of Sale is maintained". Thus, in our judgment the claimants' proposed words for **20.6.2** were apt and should be included in the EVJD for the JH.

217 **20.6.4; Shelf-edge labels**. The dispute here was about whether or not the JH moved or removed a shelf-edge label ("SEL"). The resolution of that dispute was to say that (as we thought was clear) the JH was required not to move or remove SELs, so we concluded that the paragraph should contain the agreed first sentence with the insertion of these words at the end:

> ",which the JH was required to leave in place".

218 Thus, the claimants' proposed second sentence of **20.6.4** should be omitted.

219 **20.6.3 and 20.7.1; The four-point check**. As we say in paragraph 83.1 of our determinations relating to the work of Mrs Worthington (i.e. Appendix 1, at pages 52-53 above), C7/142/24 among other documents showed that it was a requirement for the JH to carry out a 4-point check every time she put out stock on display. The claimants' proposed words for paragraphs **20.6.3 and 20.7.1** (read as a requirement imposed on the JH, so that it was part of her work for the purposes of section 65(6) of the EqA 2010) were therefore apt and those proposed by the respondent were not.

220 **20.7.3; Printing a new SEL or POS**. The JH was plainly required to do something if an SEL or POS was missing. What she was required to do was shown by pages 8-9 of C7/248 and C7/159/1 but updated in the light of the evidence before us, including that of Mr Woolley in paragraph 223 of his first witness statement. Given (1) the content of C7/248 and C7/159, (2) the fact that Mrs Worthington herself printed off SELs and POSs when necessary (see paragraph 89 of our determinations relating to her work, i.e. Appendix 1, at pages 56-57 above), and (3) the evidence of Mr Woolley in paragraph 223 of his first witness statement, which we accepted, we concluded that the content of **20.7.3** should be this:

> If a SEL or POS was missing or inaccurate, before 2014 the JH was required to inform the store's management of that fact and after then she was required to use a PDA and the store's printer and print out a new SEL or POS (as the case may be).

221 For the avoidance of doubt, if the JH did not in fact without being prompted or asked to do so print out SELs or POSs, then that was irrelevant for present purposes.

222 **20.9.1; Was the JH always required to carry out a WIBI check?** The claimants' proposed words for this paragraph were apt, given the terms of C7/188 and for the reasons stated in paragraph 83.10 of our determinations relating to Mrs Worthington's work (Appendix 1; see page 55 above).

223 **20.9.2; How was a WIBI check conducted?** C7/188 stated definitively the JH's primary responsibilities in regard to the carrying out of, and the result of the application of, the WIBI check. The dispute maintained by the respondent in regard to the claimants' proposed words for **20.9.2** was about something which was minor, but in fact the respondent's proposed words were consistent with what was said in the box headed "Checking You Know Your Stuff" on C7/188/1, so we accepted the respondent's proposed words for that paragraph.

224 **20.9.3; Typical causes of quality issues**. We could not understand what was the purpose of the respondent's objection to the reference to chilled items being left out of a chiller being a possible cause of a quality issue, not least because of the reference on page 4 of C7/188 to the possibility of discolouration of meat or poultry because of it "not being kept in the Cold Chain". In fact, the whole of **20.9.3** was superfluous given C7/188, but for the sake of simplicity we decided that it should remain with the words "(see C7/188)" inserted in the introductory part (after "include").

225 **20.9.4; What is required to be done if a WIBI check results in the answer: No?** The claimants' proposed words for **20.9.4** were entirely consistent with C7/188/2. Reading those words as a relevant statement of what was required of the JH (rather than as a statement that she did it), we accepted them. For the avoidance of doubt, we concluded that the respondent's submission that it was "not within the JH's remit

to be making these judgment calls" was not borne out by the evidence of Ms Jemmett on which it relied (in paragraph 327 of her witness statement), and to the extent that Mr Gleiwitz said in paragraph 366 of his first witness statement that it was not within the JH's remit, we disagreed. That which was within the JH's remit in this regard was shown by C7/188/2, and Mr Gleiwitz's evidence was not to the effect that the JH did not on occasion repair minor damage to packaging.

Paragraph 21; Promotion changes

226 We came to the conclusion that the JH's role in regard to promotions was clear from C7/159: she had one, and the respondent's assertions that she did not were misplaced. Whether or not the JH was required by the store's management to do the things which the JH said she did was another matter. While we accepted the respondent's evidence in preference to that of the JH on many material matters, concluding that the JH had exaggerated her part in the work of the store, we concluded that the respondent's witnesses on occasion under-stated or minimised the JH's role in the work of the store. Even on the respondent's own evidence and submissions, the role of the JH included taking part in changing promotional ends. However, C7/159 and the respondent's witnesses' evidence on this (paragraphs 368-372 of Mr Gleiwitz's first witness statement, paragraphs 258-260 of Mr Woolley's first witness statement, and paragraphs 360-361 of Ms Jemmett's witness statement), which we accepted, showed that the JH's role in that regard was secondary. The JH's first witness statement contained in paragraphs 283-288 a description of tasks which went further than those which the respondent's witnesses said the JH did. We concluded that the JH would have done things in regard to promotion ends only if she was asked to do them. That was consistent with the JH's own words at the start of paragraph 287 of her first witness statement. However, we concluded that only a member of the store's management team could decide that the relevant Merchandising Plan was to be departed from, so that the rest of paragraph 287 was in our view no more than a statement of the obvious, which was that it was open to the JH to suggest deviations from that plan.

227 Otherwise, the JH's own evidence was consistent with the proposition that she assisted in giving effect to promotion changes, and did not have any autonomy in doing so. Given the size of the store and the fact that its managers, including Ms Jemmett, worked alongside the JH, we concluded that the claimants' proposed words for **paragraph 21** should be accepted, but with the addition of the words "At the request of a line manager" before "JH helps".

228 **21.1.4; New promotional labels**. This paragraph was not about the JH's work, or sufficiently relevant to her work to be included. We therefore agreed with the respondent that the paragraph should be excluded.

229 **21.1.5; New SELs and excess stock**. We preferred the respondent's proposed words, which we concluded reflected the reality of the situation as described by us in paragraph 226 above.

230 **21.1.6; Was it part of the JH's work to print and put out a new SEL?** We concluded that the JH's work did include on occasion, when asked to do so, printing and putting out SELs. That was because it was implicitly a requirement of the JH to do that, given what was said in the first half of C7/159/3, and because we concluded that the respondent's witnesses wrongly minimised the JH's role in regard to the changing of Promotion Ends ("PEs"). We therefore accepted the claimants' proposed words for **21.1.6** with the addition of the words "At the request of a line manager, the" at their start.

231 **21.1.7; Cleaning the shelves on a promotion change**. Given that C7/159 expressly referred on page 2 to changing shelf heights, and otherwise on the balance of probabilities (bearing in mind that the respondent's management were unlikely to fail to ask the JH to help change shelf heights), we accepted the claimants' proposed words for **2.1.7**.

232 **21.1.8 to 21.1.10; Merchandise promotion boxes**. These paragraphs constituted a repetition of the substance of **20.2.8**, and therefore should be omitted.

233 **21.1.11, 21.1.12, 21.2, 21.2.1, 21.2.2, 21.2.3, 21.2.4, 21.2.5; Capping shelves**. The JH asserted in one place only in her witness statements (in paragraph 289 of her first statement) that she did anything to do with capping shelves. That was a short paragraph, and contained only a brief statement about what she did, and how she did it. In contrast, the evidence of the three relevant witnesses of the respondent was to the effect that none of them asked the JH to assist with putting capping shelves up, and that what the claimants said in **21.1.12** (which was not expressly approved by the JH) about the use of such shelves was wrong, since, they said, capping shelves were used only during busy seasonal periods and not at other times at all. The description of Mr Gleiwitz about the manner in which capping shelves had to be put up was in paragraph 375 of his first witness statement. It was convincing from a practical point of view, and showed (if it was true) that it was at least unlikely that the JH could herself have put up capping shelves, whether on her own or with assistance, using just a kick stool (and not a ladder).

234 We found (1) that evidence of Mr Gleiwitz, (2) the evidence of Ms Jemmett in paragraph 306 of her witness statement and (3) that of Mr Woolley in paragraph 233 of his first witness statement, cogent and credible, and we preferred it to that of the claimant in paragraph 289 of her first statement. Accordingly, we agreed with the respondent that paragraphs **21.1.11, 21.2, 21.2.1, 21.2.2, 21.2.3, 21.2.4, and 21.2.5** should be excluded.

235 We also, on the basis of the respondent's evidence to which we refer in the preceding paragraph above, accepted the respondent's proposed words for **21.1.12** but with the word "still" before "in" deleted and the word "some" substituted for the word "most".

Paragraph 23; Gap scanning

236 While it was possible, and entirely plausible, that the JH did the gap scanning to which she referred in paragraphs 290 and 291 of her first witness statement, for the reasons stated in those paragraphs, it was also possible and entirely plausible for the reasons stated by Ms Jemmett in paragraph 366 of her witness statement and Mr Woolley in paragraph 269 of his first witness statement, that the JH did not do gap scans. What Mr Gleiwitz said in paragraph 384 of his first witness statement also made much sense from a practical point of view, and, if it was correct about the absence of a function in the PDA during the period when he was present at the store (only up to June 2013) then it undermined the evidence of the JH in paragraphs 290 and 291 of her first witness statement. Of course it was entirely possible that with the passage of time, the JH's memory was blurred and that she might have forgotten that the PDAs in use in 2012 and 2013 did not show whether or not an item was in stock. What the claimant said in cross-examination about this (which was recorded at page 112 of the transcript for day 12; it included that she had been trained to do gap scanning when she was training to become a team leader) was not borne out by her training record, which was put to her in the next passage of the transcript. In addition, the JH did indeed, as submitted by the respondent in its closing submissions, say in her interview of 28 April 2022, as noted on page 17 of the pdf document at C5/4 (internal page 65) say that she did gap scanning daily, but then in paragraph 290 of her first witness statement she said that she did it weekly. At C7/838 there was a document entitled "Gap Scan Routines". It referred to gap scanning tasks as being done by a Duty Manager, a Store Manager, or a Stock Customer Assistant, but only by persons in those posts. Those factors undermined the credibility of the JH's claim to have done gap scanning, and having weighed up the evidence, we concluded on the balance of probabilities that she did not do it. Thus, we agreed with the respondent that **paragraph 23** should be omitted.

Paragraph 24; Item recalls

237 We accepted the respondent's submissions on the question of whether the JH would ever have been asked to help with removing from sale any recalled item, with one reservation: we concluded that it could not be said with any credibility or justified confidence that the JH was <u>never</u> asked to assist with the finding and removal from sale of recalled items. However, we accepted that the respondent's store management would have checked what the JH had done if she was so asked, and would have done the task themselves whenever possible. In those circumstances, we accepted the substance of what the claimants proposed for paragraph **24**, noting that the word "rarely" meant (according to H31) "annually or less". However, we concluded that the words of **24** should be these.

> Rarely, the JH would be asked by a manager to assist with the urgent recall of an item by helping to remove it from sale and from the store's warehouse.

Paragraph 25; Store closing

238 **25.3.1; Newspaper returns**. We found what the respondent's witnesses said about the task of preparing newspaper returns in the evening compelling even though, as Ms Jemmett accepted when cross-examined on this (recorded at pages 48-49 of the transcript for day 14), the JH was "perfectly capable of doing it" and that there was "no policy that she shouldn't [do] it". Ms Jemmett said (in paragraph 409 of her witness statement) that the JH did not do the work when she (Ms Jemmett) was at the store. Mr Woolley said (in paragraph 311 of his witness statement) that the JH did it "no more than once every week to 10 days on average". Mr Gleiwitz was able say (in paragraph 388 of his first witness statement) only that he did not recall the JH doing it at all. That meant that we concluded it was part of the JH's work do to it, although she did it only as and when asked by a member of the store's management to do it, and that was only at most during the relevant period "regularly". Thus, we accepted the respondent's proposed words for **25.3.1** with the words "once every week to 10 days on average" replaced by "regularly".

239 **25.4 and 25.4.1; Bakery waste**. What Ms Jemmett said in paragraph 410 of her witness statement about the JH recording bakery waste was cogent and persuasive: as it was an activity that affected the store's "shrinkage", it was a task which was in practice done only by a member of the store's management. She was firm when cross-examined on that evidence (as recorded at pages 48-49 of the transcript for day 14). Both Mr Woolley (in paragraph 312 of his first witness statement) and Mr Gleiwitz (in paragraph 389 of his first witness statement) gave evidence to the same effect. This was yet another conflict of evidence. What the JH herself said about it was paragraphs 295 and 296 of her first witness statement. In the second of those she said this:

> "This task is not done anymore as all bakery waste is now donated to a charity."

240 However, that made no sense as the recording of the waste was still required, for accounting purposes. That was put to the JH in cross-examination (at pages 118-119 of day 12). Her explanation for that error was that "Bakery waste is still done but it's called food donations". That was not in our view a sufficient justification for the error, and we concluded that the JH had not actually done the recording of bakery waste and that what the respondent's witnesses said in that regard was correct. Thus, paragraphs **25.4 and 25.4.1** must be omitted.

Paragraph 26; Checkout closing

241 **26.1.1; Mainbank checkout till lifts at the end of the day**. We resolve above, in paragraph 34, the dispute between the parties about the extent to which the JH participated in a till lift (or pickup). What we decided as stated in that paragraph was that a till pickup or lift was required to be done under dual control. (We also decided as stated there that a till check did not involve the JH.) Given our conclusions stated in paragraph 34 above, we decided that the claimants' proposed words for **26.1.1**

were correct, but with the substitution of the word "by" for "with" in the second (and final) sentence.

242 **26.2.1; ASC closure at the end of the day**. The parties evidently agreed that the JH would at least sometimes "close" the ASC in the manner described in **26.2.1**. We accepted the respondent's evidence on this and the respondent's proposed words for this paragraph, which (1) were not markedly different from those proposed by the claimants, but (2) we thought best fitted the reality as shown by that evidence.

243 **26.2.2; ASC till lifts at the end of the day**. We accepted the respondent's submissions on the content of this paragraph. One reason for that was that whether or not the JH did overtime was in this context irrelevant. Otherwise, we accepted that the JH would not always be asked to participate in the dual control process, but that it was likely that she would do so. On that basis, the description of the frequency (applying H31) should be "frequently".

244 **26.2.3; Completion and approval of the till lift report**. For the reasons given in paragraphs 34 and 139 above, we agreed with the claimants that **26.2.3** should be included.

245 **26.2.5; Collection of coupons**. We saw that C7/53, dated "09/13", i.e. September 2013, stated on page 5 that as part of the till lift or pickup, it was necessary to "Remove Coupons From The Coupon Bin". That page followed one about the note acceptor, to which reference was made in the agreed terms of **26.2.4** (but without stating the effect of C7/53/4, which was that some notes had to be put back into the note acceptor). We therefore concluded that whoever was doing a till lift or pickup was required as part of it to remove coupons from the coupon bin, so that the dispute about **26.2.5** was mistaken, but that that was probably a result of the fact that the parties did not regard the emptying of the coupon bin as being part of the till lift process. We therefore concluded that the coupon bin was emptied by the manager doing the till lift, and witnessed by the JH. For the avoidance of doubt, we concluded that neither parties' words were apt for **26.2.5** and that the following words should instead be used.

> The procedure to be followed in carrying out a till lift was stated in C7/53, including by removing coupons from the coupon bin, and the JH was required to witness and verify (by signing) the till lift report.

246 **26.3.1 and 26.3.2; Closure of the lottery terminal**. There was another conflict of evidence here. It was capable of being resolved in part by deciding whether or not what Mr Woolley said in paragraph 161 of his first witness statement about the need or otherwise to open the scratchcard dispenser was apparently accurate. If it was apparently accurate, then that cast doubt on the credibility of the JH's evidence that (as she said in paragraph 301 of her first witness statement) she counted the scratchcards which were out on the shop floor (as opposed to being in the store's safe). That is because the JH said in paragraph 301 of her first witness statement

that she would count up the scratchcards by unlocking each scratchcard dispenser in turn, but Mr Woolley said this in paragraph 161 of his witness statement.

> "Contrary to the description given at paragraph 26.3.2 of the EVJD, there was no need to open the dispenser to do the calculation because you can see the number from the portion of the scratchcard that is sticking out of the dispenser. Even had it been necessary to open the dispensers, no Customer Assistants hold the dispenser key."

247 In addition, it was said by Ms Jemmett when she was cross-examined (as recorded at pages 52-53 of the transcript for day 14), for the first time (i.e. it was not said by her in her witness statement) that "[t]here is no code for shutting down the [lottery terminal]". That was said in response to this evidence of the JH (in paragraph 300 of her first witness statement).

> "At around 10pm, I select on the lottery machine screen the 'Draw Based Reports' and 'Scratchcard Reports'. Both reports are printed off on a pink slip {C5/61} which I place by the computer behind the tills for the following day's Cash Controller to review. Finally, I close the machine by selecting the 'sign off' option on the screen and entering the code located in the lottery logbook, which we kept at the side of the lottery machine {C5/66}."

248 We could find nothing in the documentary evidence before us about shutting down the lottery terminal. As with the position in regard to the carrying out of a till check, that suggested that it was not something which would normally be done by a customer assistant but would instead be done by a member of the store's management team.

249 The fact that Ms Jemmett did not mention the absence of a need to input a code in her witness statement might have been the result of the fact that the original EVJD for Ms Williams, at H/3/121, merely said this (in paragraph 26.2.4) about the lottery close-down:

> "JH also closes the lottery station at or around 23:00 This involves closing the Lottery terminal and locking the scratch card dispenser. JH processes and prints the Lottery terminal daily total report which is placed in the office for the following days Manager to review."

250 At G/82/51 there was a blurred picture of a scratchcard dispenser. That showed that the dispenser's sections were covered by curved rigid and apparently clear pieces of plastic. There was also a picture of a scratchcard dispenser at C7/162/2, but that was even more blurred. We could not see whether or not the scratchcard number was visible from the part of the next-to-be dispensed card which was protruding from the display. However, it was likely that it would have been. It was also likely that it was possible to calculate how many cards were in the dispenser by taking that number

and looking at the number of the one which was (for example) at the top of those which were in the safe, and next in line to be put out in the dispenser.

251 The JH said that she caused the print-outs at C5/61 to be printed out. They were apparently summaries of one day's sales of scratchcards and lottery tickets. Ms Jemmett pointed out that they related to 9 November 2022, which was long after the end of the relevant period, and said (as recorded in lines 19-20 on page 54 of the transcript of day 14) that while the reports did not show who had printed them, she had checked with the JH's "colleague on the night and he told me that he produced this". Ms Jemmett then acknowledged that the JH was present on the night when the summaries were printed out. In paragraph 224 of her witness statement, Ms Jemmett said that

251.1 she was "aware that these summaries were not printed by [the JH], but by a colleague called Jack", and

251.2 she was "not sure why these have been disclosed because, as [she had] said, this was not a task that was done by [the JH]".

252 At C5/62, there was a photograph of the screen which had been used to generate the summaries. It showed that all that was required was to press two on-screen buttons.

253 If we had been shown a scratchcard dispenser when we visited one of the respondent's stores, then we would have been able to see whether or not it was possible to see the number of the card which was next to be dispensed without opening the dispenser. Having not had the dispute drawn to our attention at that time, we had to resolve this conflict of evidence on the evidence before us and the balance of probabilities. We did so on the basis that it was rather more likely than not that the maker of scratchcard dispensers (which, we could see from G/82/51, were in the nature of displays) would permit the number on the card about to be dispensed to be seen without the need to open up the dispenser, if only to avoid the need for the dispenser to be opened up unnecessarily, since frequent opening of the dispenser would be a security risk. In addition, the photograph at G/82/51 showed that the whole of the scratchcard which was about to be dispensed was visible through the rigid plastic covering it.

254 Also, it was the clear evidence of all three of the respondent's relevant witnesses that the job of closing down the lottery terminal and recording the number of scratchcards left in the dispenser was that of the "Cash Admin" person or (if she was not present, which Mr Gleiwitz indicated in paragraph 397 of his first witness statement she would not normally be) the manager (or, as Ms Jemmett said in paragraph 225 of her witness statement, the Shift Leader) on duty at the time, not the JH. We avoided regarding the respondent's evidence as being stronger that than of the JH because it came from three witnesses rather than one witness, since the respondent's witnesses might simply have agreed to say the same untrue thing. However, the fact that there were three witnesses giving evidence on the same thing, but applicable to

different periods, meant that we had three opportunities to assess the reliability of the respondent's evidence in response to that of the JH.

255 In all of the circumstances, we came to the conclusion on the balance of probabilities, bearing in mind that there was some objective evidence which supported it, that the evidence of the respondent's witnesses on this issue of the JH's involvement in the closing down of the lottery terminal and accounting for the remaining scratchcards was accurate, and that that of the JH was not. We therefore accepted that paragraphs **26.3.1 and 26.3.2** should be omitted.

256 **26.4.1**: The parties disputed whether or not the JH locked the cigarette gantry every time that she worked until the end of the store's day, and without being asked to do so. We saw that it was Mr Gleiwitz's evidence (in paragraph 398 of his first witness statement) that it could not be done without the key, and the key was not available to the JH unless she was given it by a colleague. Ms Jemmett (in paragraph 226 of her witness statement) and Mr Woolley (in paragraph 162 of his first witness statement) said that the task would be done by whoever was on the mainbank checkout at that time, and only at the request of a manager. It was the JH's evidence (in paragraph 304 of her first witness statement) that she would "do this without being asked by the Manager/ Shift Leader as I know it must be done and it's a quick task". However, she did not say anything about the need for a key to lock the gantry, but it was self-evident that one was required, and Mr Gleiwitz's unchallenged evidence in cross-examination (recorded in lines 20-21 on page 134 of the transcript of day 19) was that there was a key locker in which the shop's keys were kept, and to which he always wanted keys to be returned when they had been used. In the end, we were driven to the conclusion that here too the respondent's evidence was to be preferred to that of the JH, and we accepted the respondent's proposed words for **26.4.1**.

Paragraph 27; "Store Closing" or "Leaving the Store"?

257 We did not see a need to delete or amend the headings to this paragraph, as they both could be read in the light of the now-agreed words for **27.1.1**. However, we agreed with the respondent that for the sake of clarity the heading should be "Leaving the Store".

258 **27.1.2; Was the JH ever asked to take home a set of the store's keys?** The JH's evidence was that she had on about four occasions during the relevant period been asked by a manager closing the store in the evening, when the JH was working, to take the store's keys home and give them to the manager on duty when she (the JH) next worked. The JH's evidence on that was not contested, but it was the respondent's position in this regard (stated in numbered paragraph 1 of its written closing submissions in relation to **27.1.2**) that because the JH was not required to take keys home, this paragraph should be deleted from the JH's EVJD. In fact, we agreed with what might have been the respondent's position here, which was that if the JH was not required by the respondent to do something as part of her work (or job), then it was irrelevant. However, the respondent's position was not sufficiently

precise for us to see whether or not it was taking that line here, and in any event, if the JH was in fact asked by a manager to do something work-related in the course of her working day, then, we concluded, that was part of her work for the purposes of section 65(6) of the EqA 2010, if only because she had just been required to do it.

259 The respondent also contested the inclusion of **27.1.2** on the basis that the JH did not work at store opening, so it made no sense to ask her to take home the keys in the evening, since "it would not be necessary for JH to take the keys out of the Store as they could be left in the Store office, for the Manager to pick up when they started their shift (at which point the Store would be already open)". That was a cogent submission, and it was borne out by what Mr Woolley said in paragraph 310 of his first witness statement, which was that he "could leave [his] keys in the Store's key cupboard before a holiday or other day off for a cover manager to use". It was also said by Mr Woolley in that paragraph that while in her interview of 28 April 2022 of which there was a transcript at C5/4, at pdf page 11 (internal page number 43), the JH "suggested that she would have taken keys home at store closing and then brought them back for store opening", that "[did] not make sense given that [the JH] did not work back to back shifts like this." At page C5/4/11, the JH was recorded (at line 19 of internal page number 43) to have said that she would then "come in in the afternoon", which showed that what Mr Woolley said in that regard was correct.

260 In addition, none of the three managers who gave evidence in relation to the JH's work recalled the JH taking the store's keys home. Ms Jemmett did, in paragraph 408 of her first witness statement, say that " if there was a cover Manager or Shift Leader in the Store, as a result of a manager absence ... it might have been necessary to give the Store keys to different managers approximately three times a year, rather than once a month", although it was "unlikely" that the colleague who was asked to do this was the JH every time. This, we noted, failed to take into account the factors that (1) the JH would not normally come to the store at its opening time the next day and (2) the keys could just be left in the store's key cupboard to be picked up the next day, as long as someone other than the person picking up the keys was intended to open the store the next day and had a set of keys in his or her possession to do so.

261 In all of the circumstances, we concluded that the JH's work did not normally involve her being a keyholder to any extent, not least because of the possibility of a manager leaving his or her keys in the key cupboard just before, for example, starting a period of holiday. Accordingly, we decided that paragraph **27.1.2** should be omitted.

Paragraph 29; "Additional aspects of the job"

262 The opening words of paragraph **29** were a repetition of what was said elsewhere. They could therefore reasonably have not been included. If they were to be included, then we agreed with the respondent's proposed changes to them, for the reasons given by the respondent in its closing submissions.

263 **29.1.1; Did the JH train new customer assistants to any extent?** The parties' dispute about the JH's role in regard to training new customer assistants was in our view mistaken. We concluded that it was obvious that a new recruit would need to learn from a long-serving colleague such as the JH, and we also concluded that it was part of the JH's work for the purposes of section 65(6) of the EqA 2010 to help any new recruit who was asked to work alongside the JH by showing the recruit what to do when necessary and answering any questions which the recruit might have. That much was implicitly accepted by the respondent in its second numbered paragraph of its closing submissions in relation to **29.1.1**. In one sense, it was also obvious. The only live issue therefore was the frequency with which it occurred. The JH said that it had happened five times during the relevant period (that is, in relation to five new employees), but the respondent pointed out that the JH had at first, in the interview transcribed at C5/4/34, page 133, at lines 13-18, been able to remember the names of only two individuals whom she had helped to "make sure they feel comfortable and knew what the're doing in their job role as a customer assistant". In the circumstances, we concluded that paragraph **29.1.1** should be in these terms.

> Rarely, the JH was required to help to train new recruits to the role of customer assistant by working alongside the new recruit for about a week, with the recruit shadowing the JH so that the JH could show the recruit how do to the tasks which the JH was doing and with the JH being available (1) to answer any questions asked by the recruit about the work and (2) otherwise to give assistance when the JH saw that it was necessary.

264 **29.2; "Health and Hygiene"**. While we accepted the respondent's submission that this paragraph was oddly placed, so that if it was right to have a section of the EVJD concerning the conditions in which the JH worked, then it was right to have this paragraph in that section, we could see nothing in the rest of the draft EVJD on matters of health and hygiene. There was a section numbered 34 at H/3/168, headed "Factor 5 – Responsibility for Health & Safety, and Hygiene", but that section was apparently not intended to be part of the EVJD by the time that of the stage 2 hearing before us, and in any event it was in our view unhelpful for it to be there. Thus, we decided that the subject-matter of **29.2** should stay where it was.

265 **29.2.5; Posture when working on the mainbank checkout**. C7/79 was the best guide to how a customer assistant needed to work from the point of view of posture and other relevant things at a mainbank checkout in a store. However, the picture at box 39 of C7/0.1/12 of the mainbank checkout at an Express store did not show a chair, and paragraph 63 of Ms Jemmett's witness statement confirmed that the JH would have to stand when working at a mainbank checkout. The issue of posture therefore had to be addressed on the basis that the JH would stand at the checkout. We concluded that it was sufficient for present purposes for the IEs to discern the demands on the JH arising from working at a mainbank checkout from C7/79 read against the background of the fact that the JH stood rather than sat at the store's mainbank checkout.

266 **29.2.6; Use of manual handling techniques to avoid injury**. The subject-matter of this paragraph was dealt with very effectively by pages 5-12 of C7/142, to which we have already referred in a number of places above. In addition, we found that pages 7-36 of C7/823 (to which we refer in paragraph 83.2 of Appendix 1, at page 53 above) were an almost comprehensive guide to the things that the JH needed to do, or be aware of, in regard to safety in the store. There was expanded guidance on manual handling techniques to be used at pages 9-18 of that document. We thought therefore that the scope of **29.2.6** should be expanded so that it was in these terms.

> The JH needed to apply the techniques for manual handling and related physical work described at pages 5-12 of C7/142 and pages 9-18 of C7/823, to minimise the risk of injury to her.

267 **29.3.1; Food safety issues**. The reference to the Cold Chain in this paragraph was superfluous, given what we say in paragraph 159 above. That reference should therefore be omitted.

268 **29.4; Cleaning**. The reference to the respondent's Clean As You Go policy in **29.4.2** was in part superfluous, given what we say in paragraph 153 above, but in order to ensure that nothing relevant about cleaning and the matters referred to in **29.4** is omitted from the EVJD for the JH, we record here that in our judgment the content of **paragraph 29.4 as a whole** was best, and sufficiently, captured by saying this.

> The JH had responsibility, as did all other members of the respondent's shop floor staff, for seeking to ensure that all parts of the store were safe for all persons on the premises, through the JH having an individual as well as a shared responsibility for keeping those parts reasonably clean and reasonably free from the risk of slips and trips. The manner in which the JH was required to comply with that responsibility was shown by pages 13-15 and 27 of C7/142.

269 Much of the content of **29.4** was, however, agreed. If and to the extent that it was not, then the dispute was resolvable by reference to those pages of C7/142. It appeared to us that the only substantial difference between the parties was the extent to which the JH herself would clean up any spillage. Whether or not she did, it was plainly her responsibility to be alert to the possibility of spillages and if she became aware of one, either to clean it up herself or to do what C7/142 said needed to be done about a spillage. Thus, neither party's proposed words for **29.4.1** were in our view correct. Similarly, **29.4.6** unnecessarily referred to the particular places on the respondent's premises at the store to which the JH went. Wherever she went, she was obliged to do what was required by the relevant pages of C7/142. Similarly she was obliged to take reasonable steps to ensure that any kick stool which she might use was not a trip hazard. That was obvious but was also the effect of what was said about "kickstools" on C7/142/12 and C7/142/13.

270 **29.5; The Cold Chain**. The description of the effect of the Cold Chain in this paragraph was superfluous, given what we say in paragraph 159 above.

271 **29.6.1; Damaged items**. Damaged items and what the JH was required to do with them are dealt with in paragraphs 156 and 157 above. What had to be done with bakery waste (and whether the JH did it) is dealt with in paragraphs 239-240 above. Thus, **29.6.1** was repetitious. However, the respondent's proposed words for it were in our view more accurate than those proposed by the claimants and, if used, would make sure that nothing material about damaged products was omitted. We therefore accepted the respondent's proposed words for **29.6.1**.

272 **29.6.2 and 29.6.4; Recycling of card and plastic**. The obligations of the JH, and therefore her work for the purposes of section 65(6) of the EqA 2010, in regard to recycling were helpfully stated at pages 4-6 of C7/262. We concluded that neither party's proposed words for **29.6.2** and **29.6.4** were correct and that those paragraphs should be replaced by these words.

> The JH was required to deal with cardboard and plastic rubbish in the manner stated in pages 4-6 of C7/262.

273 **29.7.1 and 29.7.2; Dealing with shoplifters**. We found the parties' assertions about the number of thefts per day impossible to accept because, we thought, it will be impossible to know how many thefts per day there are unless either (1) all of the thefts are seen at the time or (2) some thefts are seen at the time and the rest are recorded and seen later. We rather doubted that either of those things occurred. We have already referred (in paragraphs 5, 8 and 53 above) to the main relevant documents showing the conditions in which the JH had to work as far as theft and aggression were concerned and the number of incidents at the respondent's stores generally. We regarded the matters which were sought to be dealt with in **29.7.1 and 29.7.2** as being best discerned by the IEs from pages 2-6 of C7/147. Plainly, the JH worked in a situation in which there was always the possibility of aggression by visitors to the premises, especially if the visitors were intending to steal rather than buy the things which the respondent sold to the public. Equally plainly, the JH was required to be vigilant to the possibility of theft, and to follow the guidance at pages 3-6 of C7/147. The presence of a security guard will have reduced but not removed the threat of aggression, and despite the presence of a security guard, the JH was required to be vigilant to the possibility of theft. Accordingly, the words which should be used for **29.7.1 and 29.7.2** were in our judgment these.

> The JH was required to apply the guidance at pages 2-6 of C7/147 in relation to the risk of theft and aggression by visitors to the respondent's premises. The risk of aggression was diminished when a security guard was present at the store, which is stated in **1.2.2**.

274 **29.7.6; Three bells being rung**. For the reasons given by the respondent, we agreed that the words of this paragraph (relating to three bells being rung) should be as proposed by the respondent, which were in our judgment merely clarificatory.

275 **29.9; Pest control**. The responsibilities of the JH in regard to pest control were the same as those of all of the respondent's stores staff and were as described at pages 36 and 37 of C7/697. There, reference was made to "the Pest Control Store Support Pack". That pack was said there to be "available on MyRentokil online". We concluded that the JH's responsibilities were to be vigilant to the risk of pest infestation, and that what was said in **29.9.1 and 29.9.3** was consistent with those responsibilities. We therefore accepted them, with the caveat (which did not need to be recorded in the EVJD) that the number of times when the JH would open the store's back door was less than the JH had contended was the case.

Paragraph 30

276 We thought that paragraph 30 was largely repetitive. To the extent that it was and it had not been agreed by the parties, we concluded that it should as a result of being repetition, be excluded.

277 **30.1 to 30.10** were in part a repeat of what was said elsewhere: see paragraphs 5-8 and 161-166 above and see the agreed paragraphs concerning lighting numbered **1.2.14 and 17.2.3** (which were in the same terms as each other). We concluded that any part of **30.1 to 30.10** which was not agreed should be replaced by the following statement.

> The environment in which the JH worked and the risks to her in her workplace are further described in pages 7-36 of C7/823.

278 **30.11; Clocking in and out**. We agreed that it was part of the relevant conditions in which the JH had to work that she had to clock in and out. Thus, the claimants' proposed **30.11** must be included.

279 **30.12** was a repeat of **1.2.3** (with which we deal in paragraph 4 above) and therefore had to be excluded.

280 **30.14 and 30.15 concerning age-restricted sales** were a repeat of **5.5** (with which we deal in paragraphs 85 and 86 above) and therefore had to be excluded.

281 **30.16; The public-facing role of the JH and its implications**. We accepted the claimants' proposed words for this paragraph with the words "in effect" inserted before "monitoring". The paragraph as amended is apt here.

282 **30.19; The impact of working on the shop floor**. Much of this paragraph was a repeat of something said elsewhere in the EVJD. With one exception, the things that were not repeats were apt. The new things that were apt (for which in all cases we accepted the claimants' proposed words) were

282.1 the second bullet point, (concerning the risk of repetitive strain injury),

282.2 the fifth bullet point (on handling chilled and frozen items),

282.3 the seventh bullet point (describing the potential hazard of broken glass and spilled liquids, although the risk arising from the latter was minimal), and

282.4 the final bullet point (about the checkout being a confined space).

283 We concluded that the third bullet point (concerning the environment being an "isolated" one when working on a checkout, as one would then be "under constant gaze of customers") was a statement of the obvious, so while we agreed that it should be included, we decided that it should be included with the qualification that it might be so obvious that it did not need to be included.

284 **30.20 ("Deliveries") and 30.21 ("Replenishment")** were in our view in large part a repeat of what was dealt with elsewhere. We could see nothing new in **30.20**. We could see a material addition to what was said elsewhere only in the final bullet point of **30.21**, namely the reference to the risk of a crush injury to fingers, but that was, we thought, probably obvious. Nevertheless, we concluded that that final bullet point should be included.

Paragraph 31

285 For the reasons stated in paragraph 23 above and in paragraphs 75-88 of our judgment of 12 July 2023, we did not address the content of paragraph 31.

Appendix 3

Janice Cannon (to whom we refer below in this appendix as "the JH")

The tribunal's initial determinations of the relevant factual disputes

Introduction

1 The questions of what was Ms Cannon's work for the purposes of section 65(6) of the EqA 2010 and in what relevant conditions that work was carried out, were dealt with by us after we had gone through all of the parties' contentions on the same issues in regard to the work of (1) Mrs Carole Worthington and (2) Ms Siobhan Williams. For the reasons which we give below, we came to the view while considering the parties' contentions about the work of Ms Cannon and the conditions in which she did it, that the only just way forward was for us to determine the parties' disputes in relation to those things by ourselves going back to the beginning and drafting a completely new document stating, and stating only, what we regarded as the work of Ms Cannon for the purposes of section 65(6) of the EqA 2010 and any other facts which needed to be found by us at this stage, having now conducted a stage two hearing. Thus, rather than addressing each and every dispute raised by the parties, whether it could properly be classified as (1) a factual dispute or, instead, (2) a dispute about value, or (if different) (3) a submission, we concluded that the only just way forward was for us to read through the material and evidence before us and state, succinctly but as far as we were concerned sufficiently, the material facts. We also concluded that having done that, we would have to give the parties an opportunity to address our findings in an application for reconsideration if it was in the interests of justice to do so, which might be the case given that we were now taking an approach which involved us in looking at documents to some of which neither party had referred us. (We refer to that opportunity more fully in paragraph 55 of our second reserved judgment, at pages 21-22 above.) The rest of this document is therefore an explanation of the route by means of which we arrived at those conclusions. Our determinations of the JH's work and the relevant conditions in which she worked are set out in a separate document, which is the fourth appendix to the judgment (i.e. Appendix 4 to our second reserved judgment) to which this is Appendix 3. We have then determined the work and the relevant conditions in which it was done for the other employees whose work was in issue in the stage 2 hearing before us in the same way. Those determinations were made in that way on the basis that it was in our view the only just way to proceed in the circumstances.

Paragraph 4: The JH's working hours

Introduction

2 We refer in the heading to this paragraph to "Paragraph 4". We mean by that paragraph 4 of the EVJD for the JH as it stood after the exchange of closing submissions at the end of the stage 2 hearing which we conducted in March to May

of 2023. In this document, i.e. Appendix 3, and in the rest of the appendices to our second reserved judgment in which we state our factual determinations relating to the work of the sample claimants, i.e. Appendices 4-7, where we refer to a paragraph of an EVJD which is in dispute, we use bold font to indicate that fact, so that unless otherwise stated, a reference in bold font to a paragraph is to a paragraph of the EVJD which is the subject of the document in which the reference is made.

The JH's working hours

3 Given what we say in paragraphs 79-81 of our second reserved judgment, at pages 28-29 above, we concluded that the JH's working hours were not relevant to the determination of her work for the purposes of section 65(6) of the EqA 2010. So, in our judgment, the fact that she worked at night was not relevant at this stage. Nor was the fact that she did overtime.

4 If and to the extent that flexibility about starting and finishing times was relevant for the purpose of determining the demands on the JH for the purposes of section 65(6) of the EqA 2010 (and we could not see how it could be relevant to a determination of those demands), then we accepted the claimants' submissions on it (bearing in mind that Ms Humphreys accepted, as recorded on page 20 of the transcript for day 18, that "the flexibility was not unlimited") and accordingly that there was limited such flexibility in that the JH was not taken to task about it, but she still had to clock in and clock out.

Paragraphs 8-13: Job purpose

5 Since we needed to make findings of fact about matters in dispute, and the purpose of the JH's job was not a matter of fact but a label, we declined to resolve any dispute about the content of **paragraphs 8-13**. In fact, the content of those paragraphs consisted of a series of cross-references to other parts of the EVJD, which was unhelpful in that it involved repetition.

Paragraph 21: The warehouse at the store at which the JH worked ("the F&F warehouse")

6 The part of the warehouse at the store at which the JH worked (it was the Watford Tesco Extra store, to which we refer below as "the store") in which the merchandise which the JH was engaged to replenish was kept, was called by the parties the F&F Warehouse. It was asserted in **paragraph 21** that it was "in an industrial setting". That was a label the purpose of which escaped us, but in any event it was, if at all relevant to the claims, evaluative only, and therefore not relevant at this stage. We therefore declined to decide whether or not the F&F Warehouse was in an industrial setting.

Paragraph 24: The dispute about when deliveries of F&F clothing arrived

7 The dispute in **paragraph 24** was repeated in relation to **paragraphs 43 and 58**. We return to this dispute below, in relation to **paragraph 43**.

Paragraphs 25-27: The F&F department on the shop floor at the store

8 The content of **paragraphs 25-27** related in the main to the context in which the JH worked, i.e. the F&F department on the shop floor at the store, and the extent to which that department's layout changed from time to time. We could not see that such context (or layout) was of more than peripheral relevance, since any changes to the department were likely to be self-evident, so that even if the JH was not involved in making them, they will have been reasonably easily discernible by her. As for the claimants' proposed use (in **paragraph 27**) of the term "merchandise onto" as opposed to "make space for on" the shop floor, we initially considered that it was meaningless as (1) it appeared initially to us to be simply a label for a part of the work done by the JH and (2) the question for us was what was that work. However, given the training materials to which we refer below in this document, we concluded that the word "merchandise" was in the context of this case properly to be understood as a verb and as having a particular meaning in regard to the JH's work. For the reasons given below, we say no more here about that meaning.

Categorisation of clothing

Paragraph 30

9 The dispute in **paragraph 30** concerned the distinction between what the respondent called "Essential" or "Hanging" items. The dispute was a repeat of the dispute stated in regard to **paragraph 120**. We initially intended to deal with that dispute below, therefore.

Paragraph 31

10 The dispute maintained in regard to **paragraph 31** (concerning the proportion of deliveries of mixed clothing to the store) was a repeat of the one maintained in regard to **paragraph 70(a)**. We also therefore initially intended to deal with that dispute below.

Structure of the JH's shifts

Paragraph 32

11 The parties disagreed about the impact on the order in which things were done by the JH during her shifts of any handover note left for the JH and her colleagues by the JH's line manager. That line manager was for most of the relevant period (from June 2014 to 31 August 2018) Ms Humphreys. The parties maintained a dispute about the content of those handover notes, but not in relation to **paragraph 32**. The dispute about the content was maintained in relation to **paragraph 38**, and we refer to that

dispute below, when stating our initial conclusions on the factual matters which were disputed in relation to that paragraph.

12 The claimants proposed for **paragraph 32** words which implied that the JH decided what she would do during her shift, but in the light of the contents of the handover note left by her line manager. The respondent's proposed words for **paragraph 32** stated that such a handover note would be left for the JH for 90% of her shifts, and that there might be "other specific instructions and/or priorities provided by her manager (which were provided for 75% of the JH's shifts)." We could see no evidential basis for those precise percentages. They were necessarily estimates in the absence of any documentary record, and we could not see any such record.

13 Ms Humphreys said in paragraph 39 of her first witness statement that she introduced handover notes for the Night team of which the JH was a part, "containing instructions such as which tasks and/or areas of the floor each colleague should prioritise, and any other relevant information ... to ensure that there was a seamless continuation of the F&F team's rolling duties as between the Day and Night teams, respectively, and vice-versa." She continued (in paragraph 40 of that witness statement):

> "A typical handover note included a list of tasks and priorities for each of the individual colleagues on shift, as well as commentary on anything arising during the Day shift that might impact them. For example, I acknowledged if the floor was particularly untidy, or the delivery was larger than normal, since that could affect the time it took to process the delivery or tidy the F&F floor, respectively. ... The handover always included some instructions for the team, however brief."

14 In paragraphs 43 and 44 of her first witness statement, Ms Humphreys then said this.

> "43. When I worked until after Janice [i.e. the JH] had arrived at 8pm I was able to speak to her in person about any specific priorities for the shift. However, given that she typically stuck to a predictable routine in terms of her core tasks, subject to limited variables such as the timing of the delivery and the condition of the shop floor, the amount of instruction and direction required was generally very limited.
>
> 44. I also left a handover note covering Janice's Sunday shift, although this was often less detailed, as I generally did not work on Sundays and it was not necessarily clear to me when writing the note on a Saturday evening what exactly would be required by the Sunday afternoon, as that depended upon the condition of the floor when the store closed to the public. I was, however, able to allocate each F&F colleague an area of the shop floor to tidy."

15 The JH's evidence on this aspect of the matter was in her first witness statement and was as follows.

> "32. As set out in paragraph 39 to 40 of my EVJD, my Thursday shifts are subject to a number of variables, including whether Pre-sorted items from a previous shift require Replenishing, whether the delivery is late or missing, and whether I am asked to do ad-hoc tasks. The tasks I do on any particular Thursday, and the order in which I do them, changes depending on those variables. I don't have control over this, and no two shifts are the same, even if the tasks which make up a shift are similar. I have seen an F&F training material video saying the same thing, that there is no typical shift {C7/604}.
>
> 33. For example, Alison [Humphreys] might have asked me to start by processing the delivery in her handover note, but if the delivery has not arrived at the start of my shift, then I wouldn't be able to do so. In that event, I would think about what else needed doing in the department, and I might start on Availability, Replenishment or Recovery. I could easily have been halfway through a task when the delivery arrived and, in that situation, I would stop what I was doing to process the delivery, going back later to finish the other task. Therefore, during my Thursday shifts I would organise my time and tasks around shifting variables and talk to my colleagues about how best to do this. I stand by how this is described in my EVJD at paragraph 40."

16 At C7/605/2, this was said.

> "Working in F&F is great fun, and each day will be a little bit different. Throughout the next few sections we're going to take you through how your role in F&F relates to each phase of the replenishment cycle: Prepare, Present and Put Back."

17 On page 4 of the same document, this was said (the bold font emphasis being in the original; all text in bold in the quotations set out below is original).

> "At F&F **no two days will be the same**. There are many varied elements to the role and you could find yourself doing a range of activities."

18 On page 5, this was said.

> "All roles and activities are designed with providing **the best customer service in mind**. We aim to delight our customers and create a visual and theatrical experience for them in store."

19 On page 7, this was said.

> "**At F&F we follow a 24 hour cycle of routines and daily activities. This gives you a familiar workload schedule to follow throughout the week.**
>
> When starting your day, check the Daily Planner and the Floor Walk to understand what activities you should be completing at different times throughout the day and week.
>
> **Ask your manager** to show you the Daily Planner and Floor Walk."

20 On page 9, this was said.

> "The Prepare phase deals with products coming into the store including **deliveries, pre-sorting** products and **tagging** them.
>
> If you work in a store that uses RFID, the Prepare phase also includes **RFID portals** and **RFID counts**."

21 There was no date on C7/605. Neither party referred us to C7/605 in connection with Ms Cannon's work; it was referred to in closing submissions by the parties only in connection with the training which Ms Oz might, or might not, have received; that was at page 80 of the respondent's closing submissions relating to the training of Ms Oz.

22 We refer below in this appendix and in the next one in the series, Appendix 4, to several other documents in the series of which that document was one. They were all referred to in the index to the hearing bundle as being dated "01/07/2019". Those were documents C7/612, C7/616, and C7/619. We saw that there were in addition similar documents, which were also stated in the index to have been dated 1 July 2019, which related generally to replenishment, and not just replenishment of the F&F department. Those other, similar, documents, included C7/626, C7/632, C7/635, C7/638, C7/640, C7/641, C7/643, C7/651, C7/653, C7/654, C7/656, C7/658, C7/660, C7/664, and C7/667. All of those were part of a series of documents, which were at C7/522 to C7/667 inclusive, i.e. all of those documents were dated in the index "01/07/2019". None of those documents was dated internally. We inferred from the approach taken by the respondent in regard to an aspect of Ms Oz's EVJD that it was the respondent's position that the content of C7/605 was irrelevant for present purposes because the document post-dated the relevant period and because there was no evidence before us that Ms Oz received training in line with the content of that document during the relevant period. That inference was drawn from what the respondent said in its closing submissions in respect of paragraph 46 of the EVJD for Ms Oz. There, the respondent said this:

> "In [XX], it was put to the JH by Leading Counsel for the Respondent that this language was largely taken from page 3 of the training document at {C7/656/3} [Day 15, page 109 / 13 - 25]. This was also explained to, and acknowledged by, the Tribunal in response to the Tribunal's question [Day 15, page 110 / 18 - 25]. As the document shows, it was delivered in 2019 and there is no evidence to

> support the proposition that the JH received that training prior to that date. This wording has been deleted as it does not describe a task of the JH."

23 So, the proposition of the respondent was that unless the claimants could satisfy us on a balance of probabilities that a particular part of the training materials before us had been put before a jobholder, that part of those materials was irrelevant. That was in our judgment wrong, for the reasons which we have given in paragraphs 75-88 of our judgment of 12 July 2023.

24 As Mr Bryant said on day 16 in relation to C7/656/1, as recorded at page 138 of the transcript for that day:

> "One wonders why it has been disclosed if it isn't relevant".

25 As with C7/605, C7/612 and C7/616 were referred to by the parties in closing submissions only in connection with the training that Ms Oz either did, or did not, receive; that was at page 81 of the respondent's closing submissions in that regard, where the respondent responded to the submission of the claimants that C7/612 and C7/616 were relevant to Ms Oz's work. We refer below to other documents which it appeared to us were relevant to the work done by Ms Cannon but to which neither party referred us in any meaningful way, but for the moment we focus here only on the documents which it was the respondent's position had been created after the end of the relevant period.

26 We say that that was the respondent's position because we heard no evidence from the respondent about the dates when the documents at C7/522 to C7/667 inclusive were issued. If they were all issued on 1 July 2019 then they must have been in preparation for some time before then. In addition, we heard no evidence (probably because it was the respondent's consistent position that the documents were not relevant) about those documents, all of which were of course the respondent's documents. We therefore heard nothing about the extent to which those documents contained any information or instruction which was different from whatever was applicable to the sample claimants before 1 July 2019. We doubted that it could credibly be asserted that the content of the documents was in substance new: rather, we suspected that the content was no more than a consolidation and an updating of previous training materials. The updating would have been in the light of for example developments in technology and the increased use by staff of social media. We also thought that it was highly unlikely that the principles in the documents were different from those which had applied throughout the relevant period.

27 In all of those circumstances, we concluded that we should at this stage take into account fully the content of all of the documents at C7/522 to C7/667 so far as relevant, on the basis that if the respondent, reading these reasons and the other documents signed by us today, asserts that the documents did not in some material respect show how a jobholder's work was to be done, then the respondent can say that in an application under rule 71 of the Employment Tribunals Rules of Procedure

2013 for a reconsideration of the relevant part or parts of these and our related reasons. If the application appears to have merit, so that it cannot be said that it has no reasonable prospect of success, then we will reconsider the particular issue on the basis that it is in the interests of justice to do so.

28 Returning to the EVJD for the JH, we initially had some difficulty understanding precisely what was in dispute in relation to **paragraph 32** and why it was in dispute. We suspected that the claimants were contending that the JH's role involved significant autonomy, and that the respondent was contending that she did not have any real autonomy. That was borne out by the following closing submissions, made in relation to **paragraph 32**.

28.1 For the claimants, this was said:

> "This means that the work listed from A to K in the Index is by no means sequential, and for JH no two shifts are the same."

28.2 For the respondent, this was said:

> "The JH's tasks were routine and repetitive, and the only factors generally having any material bearing on the order in which those tasks were done was the timing of the delivery and the tidiness of the shop floor on a Thursday. JH usually focussed on Recovery and processing the delivery for the majority of the Thursday shift, and Recovery only for the majority of the Sunday shift, subject to any other priorities notified to JH by her manager."

29 The respondent's submission in that regard was unlikely to attract persons to work for the respondent, and we suspected that it would not be repeated in the respondent's recruitment literature. It was also inconsistent with some of the following statements made in the respondent's training document at C7/616.

30 On page 3 of C7/616, this was said.

> "By merchandising New Lines as they come in, we can keep our fixtures looking fresh with the latest trends.
>
> Merchandising New Lines helps to excite our loyal customers by showcasing our new products in key sightlines.
> Your layout will be planned by your Manager using their Space Matrix and Visual Merchandising Guide.
>
> New lines can be identified in the warehouse by the New Styles riser.
>
> Once you take the New Styles rail to the shop floor, you'll need to look at the new products and decide where to position them.

> You should use your Visual Merchandising Guide to help, as this will show you how the products should flow by department."

31 On page 4, this was said.

> "If the product is not featured in the VM [i.e. Visual Merchandising] guide, try to display it next to a similar style product.
>
> Top Tip! Look out for similar fabrics, necklines, sleeve lengths and colours."

32 There were then, on pages 5-7, some further indications of how a customer assistant was required to use some judgement in deciding how to put new stock out on display.

33 On page 10, as the fourth of four "Key points", this was said.

> "Be flexible and creative
>
> When flexing space, think about what stock you have, try to be flexible and creative."

34 Those statements pointed in both directions, but they were entirely reconcilable. They showed that the overall layout of an F&F department was determined by the respondent's head office and its manager, but that a customer assistant was required to exercise judgement and to think creatively in the course of putting stock out on display.

35 The respondent made a number of submissions on the factors to which the claimants referred in **paragraph 32**, taking issue with the factual foundations for those claimed factors. For example, one of those submissions was that the JH was "rarely involved in a promotion/sale". We thought that those submissions were unnecessarily made in that section of the record of dispute, not least because they were in fact dealt with elsewhere (for example, in relation to markdowns, in paragraph 444 of the EVJD, and therefore better addressed in relation to that paragraph). However, the submissions seemed in any event to us to be dubious. For example one of the factors referred to was "the number of customers on the shop floor who need assistance". In that regard, the respondent made a series of submissions about the extent to which the JH herself in fact liked interacting with customers. That was not relevant. What was relevant was what the respondent required of the JH. That was stated at C7/616/12, in this way.

> "Top tip! Remember our customers come first when tidying or putting out stock."

36 We therefore declined to resolve here at least some of the factual disputes raised by the respondent in relation to the factors in **paragraph 32** on which the claimants relied as justifying their (that is, the claimants') claim that the JH had at least an

element of autonomy in deciding what she did during the course of her shifts, and when she did it. In the meantime, however, we were able to come to the following conclusions.

36.1 We rather doubted that the precise order in which the JH did the tasks which needed to be done was important for the purposes of section 65(6) of the EqA 2010.

36.2 However, if it was important, then we determined the dispute here in favour of the claimants, whose words better fitted what we concluded was the reality of the situation, which was this: what the JH did was not to any extent "dictated" by the factors which both parties agreed were relevant, as stated in **paragraph 32**, and the JH was both able and required to determine, albeit within reason, the order in which she carried out the tasks which she needed to do in a shift. That order would be affected by practical considerations such as when a delivery was received, and the state of the department when the JH started her shift.

Paragraphs 33-36 and 48: How many customer assistants worked alongside the JH?

37 We could not see how the number of colleagues with whom the JH worked at any particular time was going to affect the demands of her work for the purposes of section 65(6) of the EqA 2010. We also could not see how such number could be a relevant condition of her work for those purposes. The respondent produced no documentary evidence to show how many colleagues the JH had working alongside her during the relevant period, and the JH understandably put no such documentary evidence before us. Thus, both parties relied on their memories, and the respondent adduced oral evidence only from Ms Humphreys about the matter, which meant that the respondent put before us no evidence about the situation before June 2014.

38 In fact, Ms Humphreys' evidence contained this passage in paragraph 34 of her first witness statement:

> "The number of colleagues working during Janice's shifts was irrelevant to the amount of work she was personally expected to complete. Janice did not need to carry out additional work to 'cover' for colleagues who were off sick. Nor did Janice's workload increase over the RP when there was a diminution in the number of colleagues present during her shift."

39 The first sentence was an assertion, but it was given meaning by the sentences which followed it. In fact, the final sentence showed that the respondent agreed that the number of colleagues with whom the JH worked on her shifts declined during the relevant period.

40 The only thing that we thought might be material was when the JH worked on her own in the department, as that might, conceivably, be a factor which was a relevant aspect of the conditions in which she worked. As far as we could see (and the evidence on this was not entirely clear), that was something which happened only

when the JH worked on both Thursday and Sunday nights from 8pm to 10pm, at least after April 2014, and on occasion after then until 12:30 am if the other night-time F&F worker was on leave. We saw in the latter regard that the respondent accepted that the JH worked alone in the department from 8pm to 10pm on Sundays and occasionally after then until 12:30am "if the other Nights colleague was on leave".

41 We decided that the fact that the JH was working in a store with other staff, even though those other staff worked in different departments, meant that it could not be said that she worked truly alone at any time. We also decided that we did not need to make any further findings of fact about the extent to which the JH worked with colleagues in the F&F team during the relevant period. That was because it seemed to us not to be relevant either to what was the JH's work for the purposes of section 65(6) of the EqA 2010 or to the conditions in which she worked for those purposes. If the IEs need us to make further findings of fact in that regard, then they must say so under rule 6(3) of the EV Rules.

Paragraph 38; the handover notes of Ms Humphreys

42 The parties maintained a dispute about the content of the handover notes left by Ms Humphreys for the JH. The latter said that she introduced their use in 2014, after she started to manage the F&F department in which the JH worked, and the JH accepted that such notes were left for her and it seemed to us that she accepted that they were at least usually, if not always, left for her by Ms Humphreys. However, the JH disputed the amount of detail in the notes and the extent to which the notes contained instructions rather than guidance. Paragraph 23 of Ms Humphreys' first witness statement showed that she last worked with the JH in September 2018, as she, Ms Humphreys, had left the store at that time and had since worked elsewhere. Thus, by the time of the trial before us, there had been no handover notes left by Ms Humphreys for the JH for well over four years. In the circumstances, if there had been no examples of the notes left by Ms Humphreys for the JH before us, then the evidence before us about the content of the notes would have been of relatively little weight. In fact, there were copies of examples of the handover notes: at C4/38.9, C4/38/10, C4/38.11, C4/38.12 and C4/38.13. The first two of those were from June 2016 and February 2017 respectively. While they were incomplete photographs of the notes, and the names of the persons referred to in them had wrongly been redacted (there being no justification for the redactions), they were in our judgment the best evidence of the kind of notes which Ms Humphreys had left for the JH. In those circumstances, we declined to describe their content, and left it to the IEs to look at them to see what kind of instructions, information or guidance was left by Ms Humphreys in them for the JH.

Paragraphs 38 and 55; **the handover notes of the JH**

43 It was the JH's evidence that she would leave handover notes for Ms Humphreys: in paragraph 50 of her first witness statement, she said that she did that after 2014 at the end of every Sunday shift. The JH said that she left such notes "as a form of

accountability and also a chance to explain why I might not have been able to finish [all the tasks for which Ms Humphreys had left specific instructions]". The JH put before us no example of one of her handover notes but did put before us one made by her colleague in 2019, which the JH said was of the same sort as she, the JH, left for Ms Humphreys. It was at C4/38.15.

44 Ms Humphreys accepted that the JH left handover notes for her. However, she said that they were left only about once a month and only if the JH's "Night shift colleague(s) were on leave". Ms Humphreys continued:

> "[A]s she left midway through the Night shift and I usually arrived at 5.50am on a Monday, before her Night shift colleague(s) left, there was rarely any need for her to do so, as I was able to receive the handover in person from one of her colleagues."

45 We rather doubted that that dispute was material. What might have been material (we also doubted its materiality, but more tentatively) was whether or not the JH's work was "reviewed based on the handover note left [by the JH for Ms Humphreys] at the end of the shift". The JH plainly felt that she was judged by reference to how much she had by the end of a night shift achieved of those things which were left for her to do by Ms Humphreys in the latter's handover note of the day before. Ms Humphreys, however, said this in paragraph 45 of her first witness statement.

> "I did not retain handover notes after reading them and they never formed the basis of any formal or informal performance review processes."

46 Ms Humphreys said this in paragraph 35 of her first witness statement about the impact of her own handover notes.

> "As any colleague in any role, Janice was expected to try during her shifts to achieve as much as she could, but any work she did not complete was picked up by colleagues in the subsequent shift. If, hypothetically, there had been a significant discrepancy between what I expected the Night team to achieve and what was in the handover note at the end of the shift (e.g., if a delivery had arrived before Janice's shift begun but had not been processed at all, contrary to the express instructions in my handover note), I would have asked for an explanation, but in practice this never happened."

47 Thus, plainly the JH was under pressure to do whatever Ms Humphreys left instructions for her to do in the latter's handover notes. If it were true that Ms Humphreys never had to "[ask] for an explanation" of why it had not been achieved, then that was the result of the quality of the JH's work. However, it appeared that there had been at least one occasion when Ms Humphreys had asked for such an explanation. Paragraphs 52 and 53 of the JH's first witness statement were about a situation which arose in 2016 "on a particularly busy Sunday shift the weekend before kids went back to school". We did not see any dispute about the content of those

paragraphs. Given that the parties were particularly disputatious, we concluded that the respondent must have accepted the truth of that passage. Indeed, it was consistent with at least the gist of paragraph 35 of Ms Humphreys' witness statement. It therefore appeared that there was at least one occasion when Ms Humphreys asked the JH for an explanation of why one or more of the things which she had left instructions to be done had not been done.

48 In any event, we concluded that the JH's work was judged by Ms Humphreys by reference to what Ms Humphreys was told (whether in a handover note from the JH or by another member of the Night F&F team orally, after the JH's shift had ended), in the way described by Ms Humphreys in paragraph 35 of her witness statement. For the sake of clarity, therefore, we concluded that the final sentence of the opening part of **paragraph 38** as contended for by the claimants should be included but with the addition of the words "(or oral report given)" after the words "note left".

49 In addition, we concluded that the appropriate word for the frequency with which Ms Humphreys' handover notes contained "specific instructions on what to achieve in that shift" was indeed, as claimed by the respondent, "frequently", and not, as claimed by the claimants, "regularly".

Paragraph 38(a): was there between 2012 and 2015 a team leader on shift for about 75% of the JH's Thursday shifts until 10pm?

50 This issue arose because of Ms Humphreys' recollection in February 2023 about something which had occurred at the latest in 2015. It was said by the respondent, on the basis of paragraph 38 of Ms Humphreys' first witness statement (which relied on no documentary support for the assertion), that the shift leader "was present on around 75% of JH's Thursday shifts until 10pm and told JH and her colleagues what tasks needed doing". There was no real dispute about that as the claimants proposed instead words that stated that the team leader gave those instructions at the start of the shift. The claimants also categorised the dispute as "editorial" and made no submissions on it. We were content to say that the words should be those proposed by the respondent with the words "at the start of the shift" inserted after the words "until 10pm and".

Paragraph 39(a); was the predictability of the JH's day affected by whether or not there was a need to replenish up to five running rails needing to be taken out onto the shop floor?

51 It seemed to us to be agreed that the JH would be unable to predict what tasks would need to be completed on any Thursday shift. What was not agreed was why that was so. We found it hard to understand why this dispute was maintained. The predictability or otherwise of the JH's day was not as far as we could see likely to be a material factor, as it was in reality evaluative. What the JH did not do as a result of unpredictable factors could not have any value. The issue for us was what she did do, not what she did not do.

52 In addition, the issue of what work needed to be done was affected by the answer to the question of the detail of the instructions given to the JH by Ms Humphreys, and those instructions appeared to us to be sufficiently detailed for it to be determinable by us that while practical factors affected what the JH was required to do during her Thursday shifts, those factors were taken into account by Ms Humphreys when planning what the JH should do during her shift. For example, at C4/38/11, there was this set of instructions for the JH (after instructions to two other employees, whose names were redacted) for Sunday 23 October 2016.

> "(1) Tidy floor – clear any fitting room rails left – (we are counting Monday & can't have 3 rails left like last week as no-one to do them).
>
> (2) Plastic hooks have come in to sort tight basket from last wk out.
>
> (3) If time – fill essentials – but if not don't worry."

53 It was then agreed that the time that the F&F delivery arrived at the store affected the JH's work during the shift. That was unsurprising. Again, though, we failed to see how the fact that a delivery might, or even regularly would, arrive during the Thursday night shift was relevant to the work that the JH did, or the conditions in which she worked, except that if one arrived then she might have to break off what she was doing and deal with the delivery. The timing of the delivery was mentioned in **paragraph 39** because of the assertion of the claimants that the JH's working day was unpredictable.

54 This issue of what the JH did at the start of her shift by way of replenishment of running rails was the subject of **paragraph 193**. **Paragraphs 192-193** were in fact specifically cross-referenced in **paragraph 39(a)** (referred to in the respondent's submissions as **paragraph 39(b)**, which was probably correct given that there was now a new subparagraph above that which was originally **paragraph 39(a)**). The other parts of **paragraph 39** also contained cross-references to other parts of the EVJD for the JH or otherwise dealt with things that were dealt with elsewhere in the EVJD. We therefore concluded that **paragraph 39** was a submission as to evaluation, and raised no factual issues itself. We therefore declined to make any factual findings in relation to **paragraph 39**.

Paragraph 40: the order of the tasks normally done in the JH's Thursday shifts and the question whether the JH had to do any planning of those tasks

55 The flavour of the dispute which the parties maintained about this paragraph of the EVJD for the JH was discernible from the fact that the claimants proposed as opening words "Taking the above variables, which JH cannot control, into account, on a usual Thursday shift, JH plans JH's work to:", while the respondent proposed instead this: "On a usual Thursday shift, JH:"

56 The parties then disagreed about the order in which the main tasks of the JH were, typically, done. Was it first scanning and pre-sorting the delivery? Or was it, as the claimants claimed, first replenishing any pre-sorted rails of hanging items or dollies of essentials left over from the previous delivery, to free up room in the F&F warehouse? We could not see why that dispute needed to be determined by us. It was obvious that if the delivery had not yet arrived then there would be a need to get out onto the shop floor any items for which there was room on the shop floor which were still in the warehouse. If the delivery had already arrived then it was also obvious that it, and any stock which was left in the warehouse from a previous delivery, had to be put out onto the shop floor if there was room for them.

57 The one thing that was helpful to us in determining the facts relevant to the JH's work was that the parties agreed that the JH's work was "mainly" what the parties called

57.1 "Recovery"

57.2 "Replenishment (including Tagging)"

57.3 "Processing Deliveries (including Scanning-in, Stripping and Pre-sorting)", and

57.4 "Availability".

58 What was in issue was the order in which that was done. We failed to see how that was a relevant question in itself. It seemed to us that what was relevant was the fact that the task list in the handover note set out in paragraph 52 above showed that the JH was not in the shift to which that note related required to do all of the things set out in the preceding paragraph above and was instead required to do only the specific tasks set out in paragraph 52 above. On that basis, we concluded that the disputes maintained by the parties in relation to **paragraph 40** did not need to be determined by us. If the IEs think differently, then they can tell us pursuant to rule 6(3) of the EV Rules.

Paragraph 41

59 After clocking in at the F&F customer service desk, did the JH, as she walked through the F&F department, as she claimed, pay "particular attention to the displays containing Essentials to identify any gaps"? The key issue here was whether she was required to do that as part of her work for the purposes of section 65(6) of the EqA 2010. It could be part of such work only if she was required, when she started the shift, routinely to replenish the Essentials. The claimants' closing submissions identified the "Nub of [the] factual dispute" in this way: "See [382]". The nub in regard to that paragraph of the EVJD was said to be: "Did JH walk around the department at the start of the JH's shift to appraise the scale of the Recovery ahead?"

60 "Recovery" was the heading for section D of the EVJD, and that started with **paragraph 373**. It was not clear to us precisely what Recovery was, even by looking

at that section. In paragraph 167 of her first witness statement, the JH said that she was willing to accept the respondent's definition of Recovery as being to "ensure that the shop floor was tidy and presentable, returning items to their correct displays", but that she wanted to add this at the end of those words:

> "and arranging items in size order, all with the aim of making the department look good {C7/616}".

61 As can be seen, the JH there referred to C7/616, to which we ourselves refer in paragraphs 22-28 above. That document, however, did not really help us to see what the respondent required of the JH and others doing the job of customer assistant in F&F by way of what the JH called "recovery". C7/605 did that a bit more. We have already referred (in paragraphs 16-20 above) to some of the relevant parts of that document. In addition, the following relevant things were said in it. On page 3 of C7/605, this was said.

> "Working in F&F, you'll be involved in all areas of the customer experience. From ensuring we have **the latest trends displayed** with full size availability on the shopfloor, to **advising customers on the perfect outfit** and **creating visual masterpieces** to showcase our product"

62 The text which followed that, whether or not under further pictures, on the next pages, was helpful in telling us (and therefore the IEs) about the job of a customer assistant working in the respondent's F&F department. The relevant additional parts of that text included the following things (and the text which is set out in paragraph 62.3 below is a repeat of what we have set out in paragraph 20 above; we needed to set it out here in order to enable the text set out above and below it in the following sequence to make sense).

62.1 "Part of providing great customer service is **ensuring we have the right products and the right sizes** available on the shopfloor at all times. By understanding your responsibilities and being efficient, you'll help to create the best shopping experience for our customers."

62.2 "**The Replenishment Cycle**

As with other areas of the store, F&F follows the Replenishment Cycle.

You have already seen the Replenishment Cycle in Welcome to Replenishment. In this course, we will use the phases of the Replenishment Cycle to show your role in F&F for each stage. There is a separate part of this course for each phase of the cycle."

62.3 "**Prepare**

The Prepare phase deals with products coming into the store including **deliveries, pre-sorting** products and **tagging** them.

If you work in a store that uses RFID, the Prepare phase also includes **RFID portals** and **RFID counts**."

62.4 "**Present**

The Present phase covers how to **handle new lines**, **sales** and **reductions**. For presenting products, it also describes **retail standards** and **visual merchandising** as well as working the **fitting room**. To respond to customers needs quickly, the Present phase also includes **handling stock queries**."

62.5 "**The Replenishment Cycle**

Put Back

The Put Back phase covers activities like how to handle **backstock**, **returned stock**, **waste** and **recycling**."

63 The "Prepare" phase was described in the document at C7/612. Since the store was an RFID store, we refer only to the parts of that document which related to such a store. On page 3, this was said.

"The Prepare phase covers the following areas in RFID stores:

Deliveries
Pre-sort
Tagging
RFID Portals
RFID Count".

64 To an extent, this and the other documents detailing the three phases for F&F stated the obvious, as can be seen from the text which we now set out, which was in two boxes at the bottom of page 4 of C7/612.

64.1 "**What are deliveries**

Deliveries are an essential part of your role in F&F. To ensure that our customers can buy the latest, on trend products, our deliveries arrive throughout the week, up to 6 days a week, depending on the size of your store and your delivery pattern."

64.2 "**Why are they important?**

> Regular deliveries ensure that we provide the latest fashion trends in a range of sizes.
>
> Deliveries are usually unpacked in the evening or night (depending on your store structure) so the products on the delivery can be worked onto the shopfloor quickly the next morning."

65 On the next page, C7/612/5, there was this "key point".

> "When a delivery arrives at your store, colleagues should take it from the lorry and move it to the delivery holding area in your clothing warehouse.
>
> The delivery will be held here until pre-sorting happens."

66 On the next page, C7/612/6, this was said about pre-sorting.

> "What is pre-sort?
>
> For RFID stores, once the delivery has been validated using the RFID delivery function, the items are pre-sorted in the warehouse.
>
> For both store types [i.e. both RFID stores and non-RFID stores], during pre-sort, clothing is unpacked and separated by category onto runner rails.
>
> The categories that clothes are sorted into are different for NON-RFID and RFID stores."

67 Below that text, the box for an RFID store contained this text.

> "Ladies
> Mens
> Kids
> The pre-sort process is slightly different for Essentials, Footwear and Accessories. These are unpacked directly into backstock. You'll find out more about backstock later."

68 The next two pages described part of the pre-sorting process, referring to "risers" being placed on "each rail", i.e. a rail on which clothing would be hung, and being "used to let your colleagues know which stock needs to go where." This was then said.

> "Make life easier for your colleagues. Use risers so they can easily see which stock is ready to go to the shop floor rather than them having to repeat the process."

69 The "risers" were, respectively, "Red for Rack", "New Lines", and "Green For Go".

70 On the following page, C7/612/8, this was said about pre-sorting.

> "We use **Green for Go** and new styles in all stores – this can be much simpler, green for go on rails to work separating brand new styles out with a new styles riser."
>
> **Why is pre-sort important?**
>
> Pre-sorting deliveries will save you time when replenishing products.
>
> During the pre-sort, items are checked for:
>
> - Swing tickets
> - Security tags
>
> Set up your equipment **before** you start presorting your delivery. If your area is organised, you'll be much quicker and more efficient."

71 The next material page was C7/612/10, where this was said.

> "**All delivery stock must pass through the RFID portal as the delivery enters the warehouse. The RFID portal updates your inventory. Not all products will be identified and read by the portals if they are tightly packed in the delivery.**
>
> You will need to validate all deliveries and add in missed products.
> On your RFID handheld, you will find the Deliveries Function. Here you will see:
>
> **Validate Deliveries Function**
> The Validate Deliveries Function checks what percentage of stock has been read by your portal. If this is under 98% you will need to scan and receive the missed items.
>
> **Receive Function**
>
> To capture the additional products you will need to use this function and weave your way around the delivery dollies
>
> Using this function will only read and add products that aren't already on your inventory."

72 The next material page was C7/612/12, where this was said.

> "**Tickets & Tags**

What are tickets and tags?

Swing tickets provide product information. They also have RFID built into them.

All tickets over £10 will have a dark grey F&F security tag.

Security tags

- All products that are over £10 require a security/tag.
- Products are usually delivered with a security tag pre-attached, however you'll need to re-tag if there is one missing or they are a customer return.
- There are different types of security tags to fit different products.
- Full details on where to tag items can be found on the help centre. Ask a colleague or your buddy/to show you where different items should be tagged as it's important not to damage the product.

Swing tickets

- Swing tickets have information such as size, price, barcode, product code and they also contain the RFID chip.
- In RFID stores, you can reprint tickets if one is missing.
- Both swing tickets and security tags (if over £10) must be attached before the item goes to the shopfloor."

73 We have quoted that section of the document at C7/612 to show that there was in the bundle before us an authoritative statement of at least some of the things to which the EVJD for the JH related. The next section of that document described the RFID portals and how they worked. They were said on C7/612/15 to "allow us to track the movement of stock to ensure we know the location of each product and provide great customer service." On the same page it was said that "RFID is designed to achieve 98% availability as over the course of a week there may be a small amount of products that are not recorded by the portals." On the following page, C7/612/16, this was said (and this was particularly important given the manner in which the parties contested the case before us):

> "If you feel you need to correct this [i.e. the figure of "availability", which was intended to be at least 98%] ahead of weekend trade, you can complete a full movement scan on a Friday. However, it's important to remember that this is not a requirement, as you can still give great availability without it."

74 We record here that, as with C7/605 and C7/616, neither party drew our attention to, or relied on, C7/612 in their submissions in relation to Ms Cannon's work. As with both of those documents, C7/612 was referred to by the parties only in connection with the training that Ms Oz either did, or did not, receive; that was at page 81 of the respondent's closing submissions in that regard, where the respondent responded to the submission of the claimants that C7/612 was relevant to Ms Oz's work. We found another of the documents in the bundle to which neither party referred us in closing submissions which was both instructive and illuminating in relation to the work of a customer assistant in the F&F department. That document was C7/227. It was entitled "F&F Visual Merchandise", and was described on its first page as "your F&F Visual Merchandising e-learning". Under those words, this was said.

> "This e-learning compliments your Visual Merchandise Guide and gives you an insight into the importance of visual merchandising and how you can dramatically effect the customers shopping trip."

75 It seemed to us that that document was aimed in part at department managers such as Ms Humphreys, but also it seemed to us to be intended to educate in particular newcomers to the F&F department to the thinking behind the layouts chosen by for example Ms Humphreys. One page which was of particular assistance to us was page 79, where there was a checklist of the things meant by the respondent's term "Retail Standards". It was in the form of a "yes/no" questionnaire, but it seemed clear what the answers should be: "yes" to all but the question whether one should "Limit the number of sizes available". In fact, we could not be sure of that, since the answers were not given in the version of the document before us. Nevertheless, the document seemed to us to be a very helpful, succinct, statement of what was required when the JH was working through the stock on the shop floor, doing what she must have meant by the word "Recovery".

76 Before returning to the specific wording of **paragraph 41**, we record here that we found in addition the following documents (i.e. to which we have not already referred) to be relevant for the purpose of determining the JH's work:

76.1 C7/226,

76.2 C7/619,

76.3 C7/623 (especially at pages 35-42 and 46-53),

76.4 C7/865, and

76.5 C7/866.

77 Given the factors to which we refer above, we thought that it was entirely possible that the JH would, as she walked to the F&F customer service desk, "[p]ay particular

attention to the displays containing Essentials to identify any gaps", but whether it was part of her job to do so was another matter. In addition, whether any particular demand of value for the purposes of section 65(6) of the EqA 2010 was placed on her as a result of her doing that, was also another matter. It certainly did no harm to look around the department at the start of the JH's shift to see what was going to be required in the form of what the JH referred to as "recovery".

78 As for what was "recovery", we thought that it was in part described (pithily) at C7/605/7 in these words: "Part of providing great customer service is ensuring we have the right products and the right sizes available on the shopfloor at all times." However, that was not the only aspect of what we understood the claimant to mean by "Recovery". It was also described by reference to what the respondent referred to as the "Retail Standards" and Visual Merchandising", which were stated at C7/616/12 in the following words.

> '**Retail Standards and Visual Merchandising includes**:
>
> - Retail Standards includes tidying and making sure we maintain our shopfloor standards.
>
> - Balancing colour and prints across the mat is key when delivering excellent visual merchandising.
>
> Refer to the "**Pride in F&F module**" and the Help Centre for further details.'

79 The "Pride in F&F module" was at C7/623. We refer to the particularly relevant pages in paragraph 76.3 above.

80 So, did the assertion that the JH would, as she walked through the F&F department, pay particular attention to the displays containing Essentials to identify any gaps, refer to something that it was important for the IEs to take into account in deciding the value of the JH's work for the purposes of section 65(6) of the EqA 2010? Was it, in other words, something which the respondent would have wanted the JH to do as part of her work? When put like that, the answer was surely, "yes, it was", if only because it would mean that she would have an idea of what was required by way of replenishment. Did she do it? In our judgment, yes she did: her evidence was given honestly, and she was a measured, careful witness, and this part of her evidence was about something which we thought would have been done by any conscientious and caring employee in the F&F department, which we concluded, having heard and seen her give evidence, the claimant was.

81 We add that the assertion that the JH looked around the department when she arrived at work could not credibly be contested by the respondent, unless there was some concrete evidence to the contrary, but (1) it would be hard to find such concrete evidence, and (2) none was put before us.

Paragraph 43

82 **Paragraph 43** contained what the claimants said was "an indicative idea of how JH's work is divided on a Thursday shift". The respondent responded in its closing submissions with a detailed response to that paragraph. The claimants asserted in their closing submissions on the paragraph that that detailed response was a duplication of "information elsewhere in the EVJD". The respondent's closing submissions retorted: "The version of this paragraph proposed by the Respondent should be retained, on the basis that its content is not duplicated elsewhere and it offers clarity to the ET and IEs regarding JH's typical working pattern."

83 If indeed it did the latter and it was not done elsewhere in the disputed parts of the EVJD for the JH, then it was capable of being of some assistance to us and the IEs. The assertions made by the respondent were in substance about (1) the typical order in which the JH carried out the tasks that the claimants claimed she carried out in her Thursday shifts, and (2) the times when they were done (which had to be read as being estimates; assuming that they were accurate, they were of value in that they enabled us and the IEs to see the percentage of the JH's working time spent doing those things). We therefore examined the submissions, bearing it in mind that the only direct witness evidence adduced in response to the evidence of the JH was given by Ms Humphreys.

84 However, Ms Humphreys did not work during the period from (as we understood it) about 10pm to 4am, and the assertions related in large part to that period. The percentages on which the assertions were based were referred to in the respondent's closing submissions on **paragraph 43** by reference back to **paragraph 24**, and the submissions in relation to **paragraph 24** were drawn from Ms Humphreys' second witness statement. Yet the support in that statement for the figures was evidentially flimsy. By way of illustration, this was said under the heading "Clarification" in the respondent's closing submissions in relation to **paragraph 24**.

> "1. Ms Humphreys notes in her supplemental statement [{E4/9.1/8}, paragraph 37], [{E4/9.1/8}, paragraph 38] that the store delivery report {C4/10} shows that 93% of deliveries from Daventry clothing up to February 2015 arrived prior to JH's starting her shift.
>
> 2. This corresponds with Ms Humphreys' evidence that throughout the period she worked in the store, from June 2014 to the end of the Relevant Period, deliveries arrived prior to JH starting her shift around 90% of the time [{E4/9/15} paragraph 55]. Ms Humphreys explained in her supplemental statement that the shifts of agency workers brought in specifically to process deliveries commenced at 6pm across the business - not just in Watford - given that deliveries did not regularly arrive late[r] than that [{E4/9.1/8}, paragraph 39]."

85 However, the relevant precise words of Ms Humphreys' second witness statement were these.

> "36. Up to February 2015, clothing deliveries arrived from the Daventry DC. I understand that there is the data available for that period show that 93% of those deliveries arrived before Janice started her shift.
>
> 37. After February 2015, clothing deliveries arrived as part of a mixed delivery from other Tesco distribution centres. As a result, it is not possible to identify those deliveries from the later delivery data. However, I recall that clothing deliveries followed the same pattern as those that used to arrive from Daventry DC, namely during the day and before Janice started her shift.
>
> 38. When deliveries arrived during the day it would be moved from the backdoor to the F&F Warehouse by the backdoor colleague in accordance with paragraph 147 of my First Witness Statement. The Day team would have then completed the delivery acceptance process (scan-in) on the handheld RFID device. Depending on how busy the day went, the Day team may have started the Pre-sort. The Day team would have Pre-sorted a delivery between 10% and 20% of the time."

86 Paragraph 36 of that witness statement can be seen to have contained no evidence about the "data" to which it referred. Not even the source of the alleged "data" was given in that paragraph. Ignoring the mistaken cross-reference in the respondent's submissions (set out in paragraph 84 above) to paragraphs 37 and 38 of Ms Humphreys' second witness statement (it was surely intended to be to paragraphs 36 and 37), there is no reference anywhere in paragraphs 36-38 of Ms Humphreys' second witness statement to a "store delivery report". There is a reference in the submissions to document C4/10, but that document was not referred to by any witness when giving oral evidence, or put to any witness in cross-examination during the hearing. Mr Black referred to it in paragraph 16 of his first witness statement, but then said nothing more about it. We saw it for the first time when deliberating. It was a spreadsheet with the heading "Delivery On Time (DOT) Completed Visits 17th April 2014 00:00 To 31st August 2018 23:59". There was no reference in it to F&F. The submissions referred to clothing as being delivered from Daventry, but the only relevant evidence about deliveries from Daventry before us (ignoring the reference to Daventry in paragraph 323 of Mr Gleiwitz's first witness statement, which was plainly irrelevant) was in paragraphs 36 and 37 of Ms Humphreys' second witness statement, which we have set out in the preceding paragraph above. A search for references to "Daventry" in the spreadsheet at C4/10, which was a document produced by the respondent and in our judgment not satisfactorily proved by the respondent, did, in fact, coincide at least in part with what Ms Humphreys said in paragraph 36 of her second witness statement, in that there were no references in the spreadsheet to deliveries as having been made from Daventry after 2015. We did not check all of the specific times when the Daventry deliveries were received, but we

were prepared to accept that the only relevant potentially credible documentary evidence before us supported the assertions made in paragraphs 36-38 of Ms Humphreys' second witness statement.

87 But what did that tell us and the IEs that was material about the JH's work? Did it matter in what order the JH did her work, or were the only relevant issues (1) what she was required to do, and (2) how long it took (or, more accurately, should have taken)? By this time, having considered the relevance of the order in which the JH did her work several times, (see paragraphs 36.1 and 58 above), we had formed the clear conclusion that the order in which the JH did her work did not matter for present purposes.

88 So, we thought that the dispute raised in relation to **paragraph 43** by the respondent was about something that was relevant, namely the core elements of the JH's work and the percentage of her time spent on them, but if it was a duplication of a dispute maintained elsewhere about those things, then it was not appropriate for it to be raised as an issue in response to **paragraph 43**. We therefore (1) assumed for the moment that it was such a duplication, (2) made no findings of fact on the matters raised by the respondent in relation to **paragraph 43**, and (3) continued to work through the disputed factual matters relating to Ms Cannon's work.

Paragraph 50

89 The respondent proposed the insertion into **paragraph 50** of words which were intended to show that "most of the work [which] the JH and the other F&F Customer Assistants carried out was routine and repetitive" "(notwithstanding how the role might be 'sold' to prospective employees)". That was said in relation to the question of the extent of the need for supervision, in the context of the JH asserting that she only rarely spoke to a manager because it was not necessary for her to do so. The respondent then asserted that the reason why the JH rarely spoke to a manager was "due to the routine and repeated nature of her tasks". The respondent's proposed new words for **paragraph 50** raised the same factual issue (raised in relation to **paragraph 23**) as that which we resolve in paragraphs 28-36 above. In addition, the words "routine" and "repeated nature" or "repetitive" refer to evaluative and not factual matters. Accordingly, we decided that the respondent's proposed new words should not be inserted into **paragraph 50**.

90 **Paragraph 50** contained this sentence, which was agreed. "JH goes to the F&F customer service desk at the start of the shift, where JH's manager usually leaves a handover note attached to a clip-board." At this point, we recalled that the agreed text of **paragraph 42** was this: "If JH's manager / team leader is not on shift, JH first goes to the F&F customer service desk to read the handover note which JH's manager usually leaves for the nights team." We failed to see a material difference between the subject-matter of the sentences, or any difference in their substance. We refer to that as an example of the repetition that we found in the JH's EVJD.

Paragraphs 51 and 52

91 The disputed words in **paragraph 51** were "for Customer Service" in the following sentence, which was proposed by the claimants.

> "The store closes at 4pm, and customers are usually in the F&F department until 4.10pm. During that time, JH is available for Customer Service whilst starting to Recover the department."

92 The respondent proposed instead that the words were "to assist customers". While it might be thought that there was no material difference between the words, we understood that the respondent objected to the reference to "Customer Service" because the claimants made a great deal of those words, assigning to them an impact or importance which it was the respondent's case was unjustified. The situation was in part as stated by the respondent, but only in part, because the assistance took the form of the things which the respondent wanted its shop floor staff in its stores to do as described by us in paragraph 9 of our determinations relating to Mrs Worthington's work (in Appendix 1, at pages 33-34 above). For convenience, we refer here again to C7/145 as a whole as showing what the respondent wanted its stores shop floor staff to do by way of giving good customer service.

93 The nub of **paragraph 52** was its statement of what the JH did for the majority of her time in her Sunday shifts, which was agreed at least in relation to the period from 2012 to April 2014 to have been "Recovering the department from the weekend trading (including dealing with the pile of Returns) with the other Nights colleague." We saw that this was a matter which the respondent's proposed additional content for **paragraph 43** was intended to cover (to which we refer in paragraphs 82-83 above), with the result that that proposed additional content was, as the claimants contended, at least in part a duplication.

94 That then caused us to reappraise the manner in which the parties had approached the issue of what was the work of the JH for the purposes of section 65(6) of the EqA 2010, and in what conditions, so far as relevant, it was done. One of the factors which was relevant in that reappraisal was the fact that Ms Humphreys, like for example Mr Richardson in paragraph 332 of his first witness statement and Ms Jemmett in paragraph 122 of her witness statement, in our view wrongly asserted that the JH in question was not required to be vigilant in regard to a material matter. In the case of Mr Richardson the material matter was, as we say in paragraphs 158-160 of our determinations relating to Mrs Worthington's work (so, paragraphs 158-160 of Appendix 1, at pages 71-72 above), obstructions and other potential causes of slips and trips. In the case of Ms Jemmett it was the risk of theft: see paragraphs 74-77 of our determinations relating to Ms Williams' work (i.e. paragraphs 74-77 of Appendix 2, at pages [ ]), read with paragraph 4.1.6 of the draft of the EVJD for Ms Williams at H3/29. In relation to Ms Cannon, the JH here, Ms Humphreys said this in paragraph 80 of her first witness statement.

> 'Neither Janice nor any other F&F team member was required or expected to "remain vigilant for any signs of theft or security risks", as is claimed at paragraph 10.f. of the EVJD. Tesco employed security guards for this purpose.'

95 That was directly contrary to the third bullet point in the middle column of C7/135/5. What Ms Humphreys said in paragraph 154 of her first witness statement in response to **paragraph 93** was similar.

96 Paragraph 93 of the EVJD for Ms Cannon was in these terms.

> "When JH is ready to pull each delivery container, JH looks over JH's shoulder to check that the route is clear and proceeds to pull the delivery container backwards until JH reaches the F&F Warehouse, always remaining vigilant of JH's surroundings and the spaces JH can pull into to give way to colleagues coming the other way."

97 In paragraph 154 of her first witness statement, Ms Humphreys said this:

> 'Whilst Janice took proper care and kept aware of her surroundings when moving delivery containers, it is an overstatement to suggest that she was required to be "vigilant", as is suggested at paragraph 93 of the EVJD.'

98 However, in the third bullet point of the first column on C7/142/9, this was said.

> "Always walk backwards pulling the cage. Look over your shoulder to check your route and make sure nothing is in the way."

99 We failed to see a difference between being vigilant about something and making sure of something. In addition, we failed to see why it was asserted that anything less than making sure that nothing was in the way would suffice. That was borne out by what was said in numbered paragraphs 3 and 4 on C7/660/9. Thus, in saying that it was 'an overstatement to suggest that she was required to be "vigilant"', Ms Humphreys showed her willingness to agree to a proposition which was not supported by the respondent's own training materials and was contrary to what we regarded as common sense.

100 In addition, and on one level of far more, and central, importance, the key documents showing what were the core tasks of the JH consisted of a relatively short series of documents, and neither party had referred us to them more than incidentally (and in seven cases, namely C7/226, C7/227, C7/605, C7/612, C7/616, C7/619, and C7/865, neither party had referred us to the document at all, or at least in any meaningful way, in relation to Ms Cannon's work).

101 Another relevant factor was that the parties had maintained factual disputes about many things relating to the work of the JH the purpose of which disputes we

frequently failed to see, when they could instead (and in our view should) have focussed on the summary of it contained in **paragraph 43**, which was in fact quite helpful, and then expanded the dispute only as necessary in accordance with our understanding of the case law and the relevant factors as stated in our judgment of 12 July 2023 and paragraphs 9-25 of our second reserved judgment (at pages 5-11 above).

102 The final relevant factor which we took into account at this stage was the fact that we had by the time of starting to consider the parties' contentions in relation to the work of Ms Cannon spent a further eight days on the issues arising in regard to Mrs Worthington (i.e. over and above those days which were spent on her case in July 2023) and 12 days working through and determining the factual disputes maintained by the parties in relation to the work of Ms Williams.

103 Those factors led us to the firm conclusion that we here should (i.e. it was in the interests of justice for us to) state our conclusions about the JH's work (that is to say, the work of Ms Cannon) by first deciding what she in fact did in general terms, and then state what we concluded was her work for the purposes of section 65(6) and in what relevant conditions it was done. We have done that in a separate document, which is the next numbered appendix, i.e. Appendix 4. As we say in paragraph 55 of our second reserved judgment (at page 21-22 above), if we have left out of our conclusions something which in the view of the IEs is relevant, then they must, pursuant to rule 6(3) of the EV Rules, tell us why they have come to that view and of course ask us to fill the gap in our findings.

Appendix 4

Janice Cannon

THE TRIBUNAL'S DETERMINATIONS OF THE PARTIES' DISPUTES (1) IN RELATION TO THE WORK WHICH MS JANICE CANNON (TO WHOM WE REFER BELOW IN THIS APPENDIX AS "THE JH") WAS EMPLOYED BY THE RESPONDENT TO DO, AND (2) IN RELATION TO THE OTHER FACTUAL MATTERS WHICH ARE RELEVANT TO THE ISSUE OF WHAT WAS THE VALUE OF THAT WORK FOR THE PURPOSES OF SECTION 65(6) OF THE EQA 2010, AND THE (MAINLY JH-SPECIFIC) REASONS FOR THOSE DETERMINATIONS.

Introduction; the terminology used by us in this document

1 In this appendix, we use the EVJD for the JH in its original form as the anchor for our determinations. Therefore, where we refer below to "the EVJD", we mean the document created by the claimants for the JH as her "Equal Value Job Description", of which there was a copy at C4/1. So, in referring to "the EVJD", we ignore the changes which were made to it after it was first sent to the respondent. However, in determining those things which we concluded were material, wherever it is necessary in order to explain those determinations, we refer to the text which (1) was subsequently agreed by the parties or (2) which was the subject of rival contentions.

2 Instead of referring to that document every time we refer to a part of it, as with all of the appendices containing our determinations of the work of a sample claimant and relevant facts relating to that work, we have referred to the part in question in bold text. So, for example, a reference below to **paragraph 43** is a reference to paragraph 43 of the EVJD as it stood when it was served by the claimants on the respondent.

3 Here and for the rest of following numbered appendices, our description of the frequency with which something occurred follows the schematic (as the IEs called it) at H31. The same is true of the percentages which we use when stating our findings about the JH's work. The frequencies were stated in that document as follows.

3.1 Rarely: annually or less.

3.2 Occasionally: over a period of several weeks or months.

3.3 Regularly: in a week or month.

3.4 Frequently: during a shift or several times a week.

3.5 Continuously: the activity or event is ongoing during a shift.

4 This was then said.

> "The schematic is not prescriptive but advisory – and the time periods need not necessarily equate in every instance to the adjacent descriptive. All that is required is that when a descriptive is used such as above ... it is further qualified by reference to a time period. This can mitigate any confusion and consequently improve clarity.
>
> It is not applied only to activities but can also be used in relation to decision making – how often are decisions required and environmental factors where the frequency and time of exposure to difficult conditions is an issue."

5 As for percentages, this was said on H31, under the heading "Percentage of time spent undertaking specific activities" and the sub-heading "Frequency in relation to a time period".

5.1 5% - 20% of shift

5.2 25% - 40%

5.3 45% - 60%

5.4 65% - 80%

5.5 85% - 100%.

6 We note here that the IEs by saying that appeared to cater for the factor that it is likely to be impossible in practice to be precise (or at least impossible to be precise with any hope of accuracy) about (1) the frequency with which things happened or work was required to be done and (2) the amount of time the work took as a proportion of a job-holder's time.

The place where the JH worked, her job title and her working hours

7 The JH worked for the respondent in the F&F (i.e. the clothing) department at Watford Tesco Extra (which is referred to in this Appendix 4 as "Watford", or, as the case may be, "the store") throughout the relevant period. The JH's job title was "Customer Assistant - Nights".

8 The JH worked on two days a week, in a night shift on each day. The shifts were (1) from Thursday evening to Friday morning and (2) (except for the final four months of the relevant period) Sunday evening to Monday morning.

9 The hours which the JH worked were from 6.30pm to 3.30am on Thursday to Friday, with two 30 minute breaks, which the JH was able to take when she wanted. Thus, the number of hours she was employed to work during those shifts was 8.

10 The hours which the JH worked on Sundays until April 2018 were from 3.30pm to 12.30am, with two 30-minute breaks. After March 2018, when the JH worked instead on Mondays, her shift was from 4pm to 8pm with a 15-minute break which she could take when she wanted.

11 So, until April 2018, the JH worked 16 hours a week, and then from April 2018 to the end of the relevant period, she worked 12 hours per week.

12 If and to the extent that the JH did work for the respondent outside her contracted hours, so that it could then be called "unpaid overtime", as we say in paragraph 79 of our second reserved judgment, at page 28 above, it was in our judgment not relevant to the determination of the value of the JH's work for the purposes of section 65(6) of the EqA 2010 and we therefore make no reference below to such work done in "unpaid overtime".

Some relevant facts relating to the work which the JH did

(1) When deliveries of clothing were made to the store

13 Deliveries of clothing for the F&F department were made (according to page 4 of C7/612; we took it and other documents in the series starting at C7/522 and ending with C7/667 into account for the reasons and on the basis stated in paragraphs 22-27 of Appendix 3, at pages 158-160 above) on most days of the week: up to 6. On that page, this was said in two boxes at the bottom of the page.

13.1 "**What are deliveries**

> Deliveries are an essential part of your role in F&F. To ensure that our customers can buy the latest, on trend products, our deliveries arrive throughout the week, up to 6 days a week, depending on the size of your store and your delivery pattern."

13.2 "**Why are they important?**

> Regular deliveries ensure that we provide the latest fashion trends in a range of sizes.
>
> Deliveries are usually unpacked in the evening or night (depending on your store structure) so the products on the delivery can be worked onto the shopfloor quickly the next morning."

14 The parties did not address the issue of the extent to which the passage set out in paragraph 13.1 above was accurate, or true for Watford, but it appeared not to be material since it appeared that the parties agreed that (1) a delivery of clothing was made to Watford either during the day before the JH started her Thursday night shift, or after she started that shift and before it finished, and (as shown by reference to

their agreement of the material words of **paragraph 58**) that (2) no delivery of clothing was made to the store during the day on Sunday or during the course of the Sunday night shift. In fact, C7/612/17 stated specifically that "there is no delivery on a Sunday."

(2) The store was an "RFID" store within the meaning of the terminology used by the respondent

15 The term "RFID" was defined at C7/605/12 in this way.

> "Most of our stores support a technology called RFID (Radio Frequency Identification). This simply means that our products have data chips attached to the swing tickets that can tell you everything you need to know about the product."

(3) The times when customers were present on the shop floor when the JH was working

16 During the relevant period, the store was (it appeared to us, doing the best we could with the evidence before us, taking into account in particular (1) paragraph 157(c) of the JH's first witness statement, (2) paragraph 17(b) of her second witness statement, (3) **paragraph 14**, and (4) **paragraph 51**) open to customers at all times except (1) midnight to 10am and from 4pm to midnight on Sundays, or (2) midnight to 10am on Sundays and from 4pm on Sundays until 8am on Mondays. However, we accepted that in practice, as stated by the JH in paragraph 17(b) of her second witness statement, the store was open for another 10 minutes after 4pm on Sundays.

(4) The implications of the presence of customers

17 The presence of customers on the shop floor, or their possible presence because the store was open for custom, meant the following things as far as the work of the JH was concerned (and what we say here is sufficient to resolve the disputes maintained by the parties in regard to the content of **paragraphs 366, 368-371 and 501-504**).

17.1 The JH was required to be vigilant to the risk of theft (see the third bullet point in the middle column of C7/135/5).

17.2 The JH was otherwise required to be aware of and take the steps referred to on pages 1-6 of that document.

17.3 The JH was required to apply the principles relating to good customer service stated for example at pages 2-17 of C7/145.

17.4 The JH was required to "[r]emember [to put] customers ... first when tidying or putting out stock". That was stated specifically at C7/616/12 as a "Top Tip!".

(5) The risks to the JH and others in the working environment, and the steps which she was required to take to mitigate those risks

18 The JH was required to be aware of and apply the guidance and requirements stated at pages 3-23 and 25-33 of C7/142 and pages 7-25, 27-36 and 53-60 of C7/823.

19 The risks to the JH from being on the shop floor when customers were present until April 2018 (and in part after then) were lower than they were for customer assistants who worked during the day, simply because there were fewer customers on the shop floor when the JH was working and the store was open than there were during the day. However, that there were nevertheless risks to the JH from being present on the shop floor is shown by C7/705, which included guidance of which the JH was required to be aware. The findings made in this and the preceding paragraph above were in our judgment sufficient for present purposes. We accordingly declined to determine the disputes about the content of **paragraphs 520, 530, 532, 533, 539 and 540**. If the IEs believe that we should determine those disputes then we will reconsider the question whether we should do so.

20 The extent to which the JH worked in isolation given that there were other members of staff working at nights, and given that a manager and security staff were on the premises when the store was open, was the subject of a dispute in relation to **paragraphs 537 and 538**. We saw that the respondent accepted part of the claimants' proposed words for **paragraphs 537 and 538**, but rejected other parts. As far as we could see, the only substantive dispute in that regard was about the number of colleagues who were present at the store during night shifts. The latter was in our judgment immaterial: whether it was 25, as the claimants asserted, or 40, as the respondent's asserted (on the basis of what Ms Humphreys emphasised in cross-examination was an estimate of hers), the store was a large one and, we concluded, even if the number was 40, a customer assistant in the position of the JH might reasonably have felt isolated and vulnerable given that the store was open to the public overnight at least from Thursday to Friday. However, whether or not the JH did in fact feel vulnerable was not relevant. The fact that (as we find in the preceding paragraph above) she was in fact at some risk, as evidenced by C7/705, was material.

(6) The extent to which the JH was given instructions about what to do in a shift

21 For the reasons given by us in paragraph 50 of Appendix 3 (at page 165 above), we concluded that from the start of the relevant period until about the beginning of 2015 there was a team leader present at the start of the JH's shift on Thursdays, and that team leader would tell the JH what she needed to do during the shift, i.e. the tasks and the order in which she should do them.

22 For the reasons given by us in paragraph 42 of Appendix 3 (at page 163 above, after June 2014, the JH's line manager would leave a handover note for the members of the F&F team, stating what she wanted them to do in their shifts. Examples are at

C4/38.9, C4/38.10, C4/38.11, C4/38.12 and C4/38.13. Those notes were typically more detailed for Thursday night shifts than for Sunday night shifts. The JH was obliged to do what was stated on the note if possible, and was accountable to her line manager if she did not do what was asked of her.

23 Approximately four times a year (i.e. occasionally) there would be a more than minor reorganisation of the F&F department, in which case the JH's manager would be present during a Sunday shift to oversee the reorganisation (see **paragraph 38(d)**).

(7) The extent to which the JH would receive information about forthcoming events in the F&F department

24 After June 2014, approximately monthly (i.e. regularly), the JH's manager would hold a meeting for all of the F&F staff, at which the manager would inform the staff of the next month's priorities and of any forthcoming developments (see **paragraph 38(c)**).

(8) Clocking in, the existence of CCTV, and the possibility of being searched

25 The JH was required to clock in, as claimed in **paragraph 519(a)**, and CCTV was, as the respondent accepted in responding to **paragraph 519(b)**, present throughout the shop floor and the warehouse, and as shown by C7/784, at the latest by April 2018 customer assistants in all of the respondent's stores knew that their actions might be monitored via that CCTV in the circumstances described in that document. The respondent accepted also in response to the content of **paragraph 519(d)** that the JH was subjected to random searches of her pockets, clothing, bag and car.

(9) The physical environment in which the JH worked

26 The environment in which the JH worked was the store's warehouse and its shop floor. Describing the warehouse as an "industrial setting" (as was done in **paragraphs 21 and 521**) was, as we say in paragraph 193 of Appendix 1, at page 79 above, evaluative. The words "industrial setting" therefore added nothing material in our judgment. The proportion of the JH's time spent in the warehouse was relevant only to the extent that the conditions in the warehouse were less favourable than those on the shop floor. The parties agreed that the external doors to the warehouse were open for a third of the time. They disagreed about the distance from the area where the JH worked in the warehouse to the back door, but the disagreement was based on separate measurements taken by the respondent. That was clear from the fact that the claimants said that the distance was 29 metres, and the JH referred to that distance in paragraph 216 of her first witness statement as having been stated by the respondent. The respondent's proposed words for **paragraph 523** included a statement that "The F&F warehouse is approximately 30 metres from the external warehouse doors of the main warehouse area", but that was not based on any evidence, and the respondent's submissions in support of its proposed words for **paragraph 523** referred to the distance as being "29m". Thus, we concluded that the distance was approximately 29 metres.

27 The key issue (which arose in relation to **paragraphs 523, 524 and 535**) was what was the effect on the JH of working in the F&F warehouse as compared with working on the shop floor, and even Ms Humphreys accepted that there was a difference in temperature of up to 2 degrees Centigrade. The evidence of Ms Humphreys in paragraphs 513 and 514 of her first witness statement that the gap between a delivery lorry and the doorway was minimal so that when the lorry was in place, the draught would not be severe, was material. However, the possibility of the draught being minimised by stock on the warehouse floor between the doorway and the place where the JH worked (as claimed in paragraph 514 of Ms Humphreys' first witness statement) was probably irrelevant, given the tendency of cold air to bypass physical objects. The respondent also contended in relation to **paragraph 524** that the JH could have worn her own clothing in the warehouse if she did not want to wear the gloves, fleece and thermal jacket which it was the respondent's evidence (in paragraph 517 of Ms Humphreys' first witness statement) the JH could have ordered. We concluded that it was sufficient for present purposes for us to conclude that (1) working in the warehouse was less congenial than working on the shop floor, (2) the warehouse was colder than the shop floor, but (3) sufficiently warm clothing was available to the JH. In coming to the third of those three conclusions, we took into account fully what the JH said in paragraphs 210 and 211 of her first witness statement. We also took into account the evidence of the JH in paragraph 213 of her first witness statement that the warehouse was "very cold and cramped" and that she worked "next to a large generator, which [the JH understood was] high voltage and [worried her]". If it was in fact a generator, then it would probably have been a back-up generator, but in any event, we could not see how the need to work next to a large item of electricity supply-related equipment could be more than minimally material to the determination of the value of the work of a customer assistant, especially when bearing it in mind that the JH was chosen as a sample claimant, and not all claimants would work next to such a piece of equipment. Therefore, we concluded that the finding that we should make in this regard was that the store's warehouse contained large pieces of equipment and that the JH was required to work in its vicinity, so that the IEs can take that factor into account if they think it is relevant. Having said that, if it is relevant, then so will be comparable factors in the environment in which the DC comparators worked.

28 The brilliance or otherwise of the lighting in the warehouse was the subject of disagreement in regard to **paragraph 525**. We rather doubted that the respondent would have deliberately failed to light the warehouse adequately, but if there was a failure at Watford to light the warehouse sufficiently well for the JH to see what she was doing without difficulty at all material times, we would regard that as not being material here. That is because it would have been an instance of the respondent not doing what it should have done, which we would regard as being as irrelevant as the JH doing something that she should not have done (such as getting inside cages, to which we refer in paragraph 101 below).

29 As for the proportion of the JH's time spent in the F&F warehouse, the parties agreed (we could see from paragraph 491 of Ms Humphreys' first witness statement) that the JH spent 50% of her Thursday to Friday shifts in the warehouse. There was, it appears, at one point a disagreement about the overall proportion of the JH's time which was spent in the warehouse. That is because the claimants' closing submissions recorded that the respondent had asserted in regard to **paragraph 521** that, overall, the JH spent about 25% of her time in the warehouse. That was not based on anything material, as far as we could see. Ms Humphreys' evidence in paragraph 491 of her first witness statement could not be seen as a basis for that assertion, since it was Ms Humphreys' own estimate that the JH spent 35% of her time in the warehouse. In fact, by the time of closing submissions, the respondent had ceased to argue for an overall figure for the proportion of the JH's time spent in the warehouse as compared with time spent on the shop floor, being instead willing to agree simply that the JH spent 50% of her time in the warehouse during her Thursday night shift. We concluded in those circumstances that we should conclude here that the minimum proportion of the time that the JH spent in the warehouse was 35%.

(10) The extent to which the JH interacted with colleagues when she was working

30 We assumed that the extent to which the JH worked in isolation was capable of being relevant, although we were unable at this stage to see in precisely what way it might be relevant. The claimants proposed the inclusion of something about this in **paragraph 536**. The respondent resisted its inclusion on a factual basis. The claimants proposed this text for that paragraph.

> "Working nights on the shopfloor is isolating. JH generally works alone during Replenishment and Recovery, and is discouraged from talking to colleagues on the shop floor while on the clock. JH has been informally admonished for speaking with colleagues on shift."

31 The respondent objected to that passage on the basis that it was not justified by, or inconsistent with, the evidence. We found it hard to believe that Ms Humphreys would not have done what was recorded in paragraph 229 of the JH's first witness statement, which was this:

> 'If my colleagues and I were together in a group on the shop floor, even if we were discussing work, and [Ms Humphreys] saw us, then she would likely break it up and say "*come on, we've got lots to do today*".'

32 What Ms Humphreys said in response to that evidence focused on the JH continuing to work while talking. Since the JH worked alone for much of the time, we concluded that that was not an answer to the proposition that the JH was generally isolated, and that if the JH and her colleagues were talking and not working, then Ms Humphreys would break up the conversation with a view to getting them back to work. We emphasise that we saw nothing awry in Ms Humphreys doing that, and that that

factor assisted us in concluding that what the claimants proposed for **paragraph 536** was apt and should be a finding of fact made as claimed by the claimants. We therefore accepted that **paragraph 536** was accurate.

The work which the JH was employed to do

Introduction; an overview of the JH's work and some factors which were relevant to our determinations of that work

33 The parties agreed that the JH's main tasks were as described in **paragraph 8**. The respondent put percentages on the tasks referred to there, but without putting in a figure for what was possibly the main part of the JH's work, which was what the JH called "Recovery". That figure was the subject of submissions made by the respondent, however. We return to those submissions in paragraph 44 below.

34 The parties agreed the substance of **paragraph 40(d)**, which was that on Thursday night shifts ("Thursdays"), the JH did (and this was what the respondent said, with the elements in a different order from the one which was proposed by the claimants):

34.1 "Recovery",

34.2 "Replenishment (including Availability and Tagging)", and

34.3 "Processing Deliveries (including Scanning-in, Stripping and Pre-sorting)".

35 The claimants proposed that the work was instead best described as follows.

35.1 "Replenishment (including Tagging)",

35.2 "Processing Deliveries (including Scanning-in, Stripping and Pre-sorting)",

35.3 "Availability and Recovery".

36 On Sunday night shifts, the JH was agreed by the parties to do the following things (stated in or by reference to **paragraphs 52 to 54**).

36.1 Between 2012 and April 2014, when the JH worked alongside a colleague during her Sunday night shifts, the JH did what the parties called "Recovering the department from the weekend trading (including dealing with the pile of Returns)" and, if she had time to do it after finishing such "Recovering", "conduct[ing] Availability ... of Essentials".

36.2 After March 2014 and to the end of the relevant period, the JH's time was almost all taken up with such "Recovery".

37 We record here for the sake of completeness that it was the claimants' contention that "After Recovery, on approximately two Sundays per month, JH conducted Availability on at least one silver's-worth of Essentials", but that to complete that amount of work she had to work unpaid overtime and that she worked that unpaid overtime because of the impact on her colleagues of her not finishing that "silver", i.e. rail. The respondent accepted that on approximately two Sundays per month (so, about half the time), the JH "conducted Availability during the last hour of her shift [in relation to Essentials]".

38 The labels used by the parties for what the JH did were plainly not determinative of the work which she did for the purposes of section 65(6) of the EqA 2010. It was, however, helpful to us that the parties agreed in broad terms what the JH did. If they had not done so then we would have had to decide that question.

39 However, the question could not sensibly be decided in the abstract. Instead, it had to be decided by reference to the proportion of the JH's time spent doing the various tasks which constituted her work.

40 The parties disputed those proportions. They did it in a number of ways and in a number of places in their contentions on the various issues which were raised by the EVJD.

The percentages of the JH's time spent on the work which she was employed to do

The evidence before us

41 In paragraph 12 of her first witness statement, the JH said this.

> "It is very difficult for me to put precise numbers on the amount of time I spent doing a particular task on an average shift, not only because the Relevant Period was some years ago, but because every shift was different. My Thursday shifts were the most unpredictable because they were dependent on the timing of the delivery arrival, but Sundays could also be unpredictable depending on how busy the weekend trading had been, and how messy the department was at the end of the weekend. Therefore, whilst I have tried my best to offer estimates of the percentage of time spent on each of my main tasks, I stress that these are rough estimates and do not reflect every shift throughout the Relevant Period."

42 However, the table in the following paragraph of that witness statement, which was apparently intended to state the percentages of the time spent doing the various tasks which the JH said she did during her shifts, was blank. That apparent error was remedied by what the JH said in paragraph 17 of her second witness statement, where she gave some percentages for the things which she described in those tables. In the following paragraph below, we summarise them by reference to the order set out in the table used in paragraph 17 of the JH's second witness statement,

but ignoring the references there to doing what the JH called "Customer Service". We have ignored those references because they are catered for sufficiently in our judgment by it being borne in mind by the IEs and us that (1) during the times when the store was open to customers, the JH's current task was capable of being interrupted by the requirement, as part of her work for the purposes of section 65(6) of the EqA 2010, to respond to a customer query, and (2) the possibility of such interruption was therefore continuous during those times. By saying that, we are in no way diminishing the impact of that requirement. Rather, it seemed to us to be a major factor affecting the work, for those purposes, of a customer assistant.

43 The JH's estimates of the amounts of time spent by her on the main tasks of her job, as set out in paragraph 17 of her second witness statement, were as follows.

Sunday shifts

43.1 "Recovery: Around 5 to 7 hours".

43.2 "Returns: Around 30 to 45 minutes".

43.3 "Around 1h 30 mins of Availability":

(1) "Filling up a silver from the backstock takes 45 mins – 1 hour";

(2) "Replenishing a full silver onto the shop floor takes around 30 minutes (it is slightly quicker to off load than to load a silver because, when loading the silver, I would organise it efficiently for Replenishment."

Thursday shifts (so up to April 2018*)*

43.4 "Processing deliveries (including Scanning-in, Pre-sort, Stripping and Tagging)":

(1) "Stripping rails takes around 30 to 40 minutes"

(2) "Pre-sort takes between 4 hours and 4 hours and 30 minutes".

43.5 "Replenishment of Essentials (including Ordinary Merchandising)", which took "Around 2 hours (spent on the shop floor), including stripping of Essentials".

43.6 "Recovery/ Availability/ Replenishing left over rails": "I do this for around 1 – 2 hours at the beginning or end of my shift, depending on when the delivery arrives".

Monday shifts (so after March 2018)

43.7 “Around 2 hours 30 minutes spent on Availability of Men’s Essentials (and occasionally Hanging items) including Tagging”.

43.8 “Around 1 hour and 30 minutes on Recovery of the Men’s department, both Essentials and Hanging.”

44 The respondent’s submissions on those percentages were stated in response to **paragraph 8**. That paragraph was stated in the EVJD to be about the “Job Purpose”. No percentages were stated in **paragraph 8**. It is nevertheless helpful to record here what the respondent’s submissions (as stated in response to **paragraph 8**) were in regard to the relevant percentages.

‘1. Ms Humphreys’ evidence is that JH’s main tasks were Recovery (which JH described at interview as meaning “to tidy” [{C4/4/8} p.29, line 10]), Processing Deliveries, and filling the shop floor (Replenishment), [{E4/9/13}, paragraph 48], and that she spent more than half of her time tidying, around 25% of her time processing deliveries, and around 15% of her time filling the shop floor from deliveries and backstock [{E4/9/13}, paragraph 49]. During [XX] [Day 17, p.41, lines 3 to 7] JH accepted that she may have spent around 60% of her shifts undertaking Recovery. These percentages are relevant factual information and should therefore be included in this paragraph, particularly as the paragraph is unhelpfully structured, with JH’s primary task (Recovery) misleadingly positioned at the end of the list.

2. There is no reason to separate replenishment from backstock (Availability) from replenishment from deliveries (Replenishment): both are “filling” or “replenishment” and are accounted for as such in the percentages above. Filling from backstock should not be listed separately as a core task. By itself, filling from backstock accounted for a very small proportion of JH’s overall shift time and could not be considered a core or main task in any event. Accordingly, subparagraph (c) should be deleted from this paragraph of the EVJD, and subparagraph (b) amended so as to include filling from backstock.

3. What the EVJD refers to as ‘Merchandising’ is not a main or core task and should therefore be deleted from this paragraph. To the extent this refers to making space whilst filling, that is already covered at (b). To the extent this refers to ad-hoc merchandising tasks, JH assisted with these around six times a year, so this was not one of her core or main tasks. Subparagraph (d) should therefore be deleted from this paragraph of the EVJD in its entirety.

4. Ms Humphreys’ evidence is that JH assisted customers with ad-hoc queries only occasionally, around eight to ten times per week across both her shifts [{E4/9/20}, paragraph 72 (a)]. Given that each customer

> interaction lasted on average around three minutes [{E4/9/69}, paragraph 358], this represented a very small part of JH's job (accounting for 2.5% of JH's normal working week, taken together with the miscellaneous tasks in paragraph 10 (b. to e.)) and therefore cannot be considered a core or main task. JH's own evidence is that the Night shift is generally quieter and does not have as many customers [{E1/4/52}, paragraph 158]. Accordingly, subparagraph (e) should be deleted from this paragraph of the EVJD."

45 Those submissions were accompanied by the following text which the respondent proposed should be used instead of the claimants' proposed text for **paragraph 8**, but with cross-references (which were in the claimants' proposed text) removed by us on the basis that they were unnecessary.

> "(a) Scan-in, Pre-sort and Strip deliveries (Thursdays only), (approximately 25% of JH's normal working week);
>
> (b) replenish the clothing department including Availability (i.e. replenishment from backstock), (approximately 12.5% of JH's normal working week); and to
>
> (c) ensure that the shop floor looks presentable, returning items to their correct display.
>
> In addition, JH assisted customers when working on the shop floor, (which, taken together with the miscellaneous tasks described in paragraph 10 (b. to e.) comprises 2.5% of JH's normal working week)."

46 We inferred from the text which we have set out in paragraph 44 above that the respondent's position was that ensuring that the shop floor looked presentable, including by returning items to their correct displays, took up 60% of the JH's time. That was, it appeared, what the parties agreed could be called for the purposes of deciding what the JH's work was, "recovery". We thought that that was not the whole picture, and that what the JH called "recovery" was part of what the respondent in its training materials dated 01/07/2019 described as the "Present" phase of the "Replenishment Cycle", to which we refer in paragraphs 106-130 below. We saw that the claimants proposed in relation to **paragraph 373** this definition of the word "recovery".

> "[T]he process of maintaining the professional appearance of the F&F department and ensuring that it looks presentable, well organised and inviting. ... Where possible, displays are to be stocked with all available sizes, with items arranged in size order and positioned on the correct display arms/bars."

47 Our conclusion on the percentages of the various activities of the JH during the relevant period was that the JH's evidence as set out in paragraph 43 above was the

best and most reliable evidence of what she did in fact do during that period, so we accepted that evidence. As for what that work was, it had to be decided by us by reference primarily to the relevant training materials before us, to which we now turn. However, we found that the JH's description of what she did, if understood by reference to the detailed findings which we make below, was the best guide to what was her work in broad terms during the relevant period.

The JH's work in the F&F department as determined by us by reference to the relevant training materials and such other evidence before us as we concluded was relevant

Overview

48 There was something of an overview of JH's role in F&F in C7/605. That role was capable of being described as participating in the "Replenishment Cycle" as the respondent described it at C7/605/8. That had three phases, namely as stated on that page:

48.1 "Prepare",

48.2 "Present", and

48.3 "Put Back".

49 In summary, "preparing" meant what was said on C7/605/9, which was this (with the bold text being in the original: in any quotation below, unless otherwise stated, any bold text is original, that is to say it has not been added by us).

> "The Prepare phase deals with products coming into the store including **deliveries, pre-sorting** products and **tagging** them.
>
> If you work in a store that uses RFID, the Prepare phase also includes **RFID portals** and **RFID counts**."

50 In summary, the "Present" phase meant what was said on the next page of C7/605, which was this.

> "The Present phase covers how to **handle new lines**, **sales** and **reductions**. For presenting products, it also describes **retail standards** and **visual merchandising** as well as working the **fitting room**. To respond to customers needs quickly, the Present phase also includes **handling stock queries**."

51 "Put Back" was described on the following page of C7/605, i.e. page 11, in these words.

> "The Put Back phase covers activities like how to handle **backstock**, **returned stock**, **waste** and **recycling**."

(1) Prepare

52 The "prepare" part of the "Replenishment Cycle" was described in C7/612. The JH's role in that part of that cycle started (see C7/612/5) after the clothing delivery had been moved by colleagues to the "holding area" in the F&F warehouse at Watford. Given that Watford was an "RFID store" and that, as a result of what was said at C7/612/10, the newly-delivered stock should have been passed through the store's RFID portal (as to which, see C7/612/15) as it entered the warehouse, the JH's first role in relation to a delivery was (see C7/612/9 and step 18 on C7/866/4) to "validate" the delivery and "add in missed products" by obtaining an "RFID handheld" device, of the sort described in detail at C7/865, and following steps 5-8 of C7/866, or, as the case may be, steps 5-17 of C7/866.

53 The JH did not normally take newly-delivered UoDs from the back door to the F&F warehouse. By the time of closing submissions, the parties were in agreement in that regard but not about the extent to which the JH might, exceptionally, pull those UoDs to the F&F warehouse. By reference to **paragraph 79** the claimants asserted that that occurred about once a month and the respondent asserted that it occurred about once every three months. We concluded that both descriptions fell within the definition of "occasionally" at H31, which we have set out in paragraph 3 above.

54 The physical aspects of the deliveries were in part recorded at **paragraphs 63-69**, almost all of which were agreed. It appeared from for example **paragraph 83**, which was agreed, that the roll-cages referred to in **paragraph 69** were two-sided. Only the size of the boxes as asserted there was the subject of disagreement, as stated in the parties' closing submissions in relation to **paragraph 68**. We accepted the claimants' case in that regard, however, for the following reasons.

54.1 It was based on the JH's oral evidence, given on day 17, as recorded at internal pages 69-70 of the transcript of that day, that the picture on the bottom half of C4/1/108 (i.e. the JH's EVJD) was of the "standard size that came on the cages" which were delivered to the store.

54.2 Ms Humphreys merely made (in paragraph 212 of her first witness statement) a general assertion about "the average box" size, namely that it was "significantly smaller than that shown in the Defined Terms and Equipment List, which is the largest size of cardboard box that was used".

55 **Paragraph 70** was about something which was irrelevant: the JH's knowledge of what might be in a delivery. What was material was what tended to be in the deliveries, and that should have been dealt with in regard to pre-sorting, which is where we make our relevant findings of fact below.

56 The content of **paragraph 82** as it stood by the time of closing submissions was in substance agreed, given H31. Thus, the JH would regularly have to deal with a roll cage which was covered from top to bottom with several layers of plastic wrap, which the JH was required to remove with a case cutter as defined at C7/0.1/10, namely a "case opening safety knife". (For the avoidance of doubt, we have not in this paragraph and below referred to "roll-cages", but to "roll cages". That is because there was no hyphen between "roll" and "cage" at e.g. C7/142/9.)

The relevant disputes in paragraphs 81, 85-96 and 526 of the EVJD

57 The disputes maintained in regard to the content of **paragraphs 81 and 85-96 and 526 (which referred back, we guessed, to paragraph 81(d) and not paragraph 81(c))** were catered for in part by what was said at C7/142/8-10 and C7/823/19-23. Otherwise, that is to say to the extent that we needed to make any further findings of fact, we made the following findings. (For the avoidance of doubt, if the parties have agreed a frequency or a fact on which we would, if asked, have declined to make a finding because it was in our view immaterial, then of course it can be taken into account by the IEs, if they believe it to be relevant.)

58 In regard to for example potholes and cracks in the surface of the store's warehouse, we concluded that the key issue was not what happened in practice at Watford but what were the requirements of the JH's job in regard to moving roll cages and what difficulties in practice she and other employees doing the same job elsewhere in the respondent's business faced or tended to face.

59 However, we could see that it would help if we determined the disputes maintained in relation to the content of **paragraph 81**, if only because of the need (stated by Underhill P in note 4 to his judgment in *Prest v Mouchel* [2011] ICR 1345) to anchor our findings in regard to potholes and cracks on a particular employee's situation. The disputes maintained in regard to **paragraph 81** needed in our judgment to be read against the background of the respondent's own training materials and on the balance of probabilities. So, for example, in **paragraph 81(a)** it was said that "heavier trays are often placed on top of lighter trays, which JH comes across multiple times a shift". That was disputed on the basis (stated in the respondent's closing submissions) that Ms Humphreys said in paragraph 151(a) of her first witness statement that "this did not render the column unstable, since the arms of the trays locked into one another, and the stacks were very stable". In fact, that was not what paragraph 151(a) said, since in that subparagraph, Ms Humphreys included the caveat that the trays in a column would not be unstable "provided they were stacked properly". In addition, at C7/660/69, there was this "top tip".

> "Before moving any cage or dolly ensure there are no defects, it is stacked evenly and not top heavy, ensure the load is secured so no objects can fall off."

60 Thus, the respondent's own evidence was to the clear effect that there was a risk that cages and dollies might arrive with an uneven or top-heavy load.

61 In addition, reference was made in **paragraph 81(d)** to potholes and cracks appearing in the warehouse floor throughout the relevant period, and it was countered on the basis of Ms Humphreys' evidence in paragraph 498 of her first witness statement was that "It is not the case that the Warehouse floor had potholes and cracks for extended periods during the RP and which rendered delivery containers, or any other equipment being wheeled across the floor, unstable." However, that was a bald assertion. It is true that it is difficult to prove a negative, but plainly (i.e. as a matter of common sense, or simply on a balance of probabilities) there was the possibility of the warehouse floor being uneven, and that was catered for by what was said by the respondent at C7/660/67 about the need always to "use 2 colleagues to move 1 [roll] cage at a time when moving over uneven ground, door or mat threshold, slope, ramp or incline as this could cause the cage to topple".

62 Given those factors, we accepted the claimants' proposed words for **paragraph 81**.

63 Equally, the key issue in relation to the question of the possibility of wheels on cages or dollies being stiff or wobbly (as raised in **paragraph 91**; the issue of the risk of the wheels of a running rail being faulty was raised in **paragraph 197** and we deal with that issue in paragraph 135 below), was not what happened in practice at Watford but what were the requirements of the JH's job in regard to cages with wobbly or stiff wheels, and how often the JH had to deal with such cages. As for the frequency with which those adverse events occurred, we concluded that Ms Humphreys' evidence had to be seen in the light of our findings of fact stated in paragraphs 94-99 of Appendix 3 (at pages 178-179 above) and by reference to a balance of probabilities. In paragraph 152(c) of her first witness statement, Ms Humphreys said this.

> "Although the wheels of the delivery containers were relatively stiff (in order that the delivery containers were stable and did not roll when intended to be stationery) it did not take any significant physical effort to move them."

64 We found it hard to see what was meant by "any significant physical effort", as that was an evaluative term, and in any event necessarily subjective. In addition, stiff wheels make the things which they are on hard to move. Ms Humphreys then said this:

> 'I never came across a "wobbly" wheel.'

65 We doubted the accuracy of that statement, given for example the evidence (which we accepted) of Mrs Worthington on which we made the findings of fact stated in paragraphs 62-65 of Appendix 1 (at pages 48-49 above).

66 Ms Humphreys then said this.

> "As noted at paragraph 151.f above, if any piece of equipment developed a fault it was taken out of use immediately until repaired."

67 Given our findings in paragraphs 62-65 of Appendix 1, we rather doubted the accuracy of that evidence.

68 As for Ms Humphreys' evidence about the likelihood of plastic wrap getting caught in a wheel (which was the subject of **paragraph 85(d)**), we thought that the respondent's submission missed the point. That submission was in these terms.

> 'Ms Humphreys' evidence is that plastic wrap became caught in the wheels no more than twice or three times per year [{E4/9/34}, paragraph 152 (d)]. Ms Humphreys' specific estimated frequency should be preferred to the Claimants' unspecified schematic frequency, "occasionally", which is inaccurate if used in the sense set out in the frequency schematic.'

69 That missed the point because (1) in our judgment it assumed unrealistically that the number of times when the event in question occurred could be guessed with a degree of accuracy here, and (2) the schematic was adopted deliberately to cater for the impossibility in practice of arriving at a reliable estimate of the number of times such events occurred. The appropriate frequency was in our judgment "occasionally", as claimed by the claimants.

70 In addition, the things which were dealt with in **paragraphs 90 and 91** concerned the things dealt with by us in paragraph 64 of Appendix 1 (at page 49 above). As with the evidence of Mrs Worthington about the use of cages which were difficult to move, we accepted the JH's evidence about the extent to which she would simply work round the difficulties posed by faulty roll cages and stacks of trays on dollies. **Paragraphs 90 and 91** were as far as we could see about the same thing, and should therefore have been combined. We concluded that, as combined, using the word "regularly" (as the claimants did) as defined in H31 for the frequency with which the thing in question happened, from the point of view of factual accuracy, we accepted their content as proposed by the claimants. However, and this was a major caveat: all of the respondent's training materials were to the effect that a seriously faulty roll cage had to be taken out of service as soon as it became known that it was faulty. That was the clear instruction at C7/142/9: "If you find a cage that is damaged you must not use it." That instruction was repeated at C7/664/13, where this was said: "Never use defective equipment. Always take it out of use to protect you and other colleagues". The same thing was said about a damaged dolly at C7/823/22. In these circumstances, we found what Ms Humphreys said in paragraph 155 of her first witness statement to be less than accurate on the facts, but accurate about the respondent's requirements. Having said that, consistently with the manner in which we assessed the situation of Mrs Worthington with which we deal in paragraphs 62-65 of Appendix 1 (at pages 48-49 above), we concluded (applying a balance of probabilities) that some faults were sufficiently minor to be overlooked, and we concluded that the JH's work (as with that of all other persons employed by the respondent who moved roll cages and dollies) was to continue to use and move roll cages and dollies which were faulty unless the fault interfered to such an extent with

the use of the cage or dolly that it was unsafe to use it, at which point the JH's work involved taking the cage or dolly out of use.

71 The respondent made a specific contention about the maximum weight of a roll cage. It did so in relation to **paragraph 86**, and the contention was based on the agreed content of **paragraph 83**, where it was said that the JH estimated that the weight of a cage, which was about 30kg empty, might "[double] when stacked with clothing and bars to its maximum capacity". That was a weak basis for such a firm contention, but the parties appeared to agree that the weight of a fully-loaded cage was about 60kg. The respondent accepted that "sometimes" a roll cage loaded with cardboard boxes full of shoes and clothes would be heavier than one which was filled with clothes hanging on rails, and the claimants asserted that the majority of the cages loaded with cardboard boxes full of shoes and clothes were heavier than cages loaded with clothes on rails. However, in the absence of evidence about the relative frequency with which a cage would be filled with full boxes rather than clothes on rails, we saw nothing on which we could make a relevant determination. For the avoidance of doubt, however, we saw that the respondent's position in this regard was not based on evidence. That was because the only evidence cited in support of the proposition that the word "sometimes" should be used was paragraph 157 of Ms Humphreys' first witness statement, which was in these terms.

> "Whilst roll-cages loaded with cardboard boxes containing shoes were heavier than those containing clothing rails, Janice and the other F&F colleagues never had to exert significant force to move them. Had Janice and the other F&F colleagues not been able to move a delivery container comfortably themselves, they could have asked a Backdoor colleague (who regularly moved far heavier delivery containers filled with products for other departments) to assist them. Janice was never required or expected to move a delivery container she considered to be too heavy. She could always have left it for another colleague to move, or to assist her in moving. Neither Janice nor any other F&F colleague ever complained to me about the weight of delivery containers or otherwise reported to me that they were excessively heavy."

Validating a delivery

72 That which was required to be done to "validate" the delivery was described rather better in C7/866 than in paragraphs **105-110** as a whole. We have already referred to the steps referred to in that document in paragraph 52 above, but for the avoidance of doubt we say here that taking steps 5-8 of C7/866 would (as recorded in relation to step 9 of C7/866) inform the JH whether or not there was a need to "scan in or receive the delivery with [the] handheld device". If there was such a need, then the steps to follow were numbers 9-16. Nevertheless, we found the description in **paragraphs 108 and 109** of the way in which the scanning-in was done helpful and accurate. That was for the following reasons. What Ms Humphreys said in paragraph 172 of her first witness statement about how the staff (including her) were trained to scan in was in part consistent with (1) that which the JH said as recorded in

paragraphs 108 and 109 and (2) the content of box 12 at C7/866/3. To the extent that what Ms Humphreys said in paragraph 172 of her first witness statement about the manner in which the scanning had to be done was inconsistent with C7/866, we rejected it. That which she said as relied on by the respondent in relation to **paragraph 109** was so inconsistent, given the content of box 12 at C7/866/3. The additional words about the effectiveness of the RFID device which were proposed by the respondent to be used instead of the content of **paragraph 108** were inapt, since they were not relevant to the way in which the JH had to work. The additional words proposed by the respondent for **paragraph 107** were inapt since they were inconsistent with C7/866. We therefore rejected them. For the avoidance of doubt, the respondent's contention that **paragraph 109** should be deleted was in our judgment wrong because it was inconsistent with the content of box 12 at C7/866/3.

73 The dispute in **paragraphs 97, 99 and 246** about whether or not a hand-held computer was used by the JH before 2015 was material here. In that regard, we made the following findings.

73.1 The respondent's submissions to the effect that the JH did not use a "Personal Digital Assistant" or "PDA" before 2015, relied purely on the evidence of Ms Humphreys in paragraphs 163 and 164 of her first witness statement. Since (1) the PDAs to which the claimants referred in **paragraphs 97 and 99** in relation to the period before 2015 were the predecessors to the handheld RFID devices which were used after 2014, and (2) Ms Humphreys arrived at the store only in June 2014, Ms Humphreys' evidence in paragraph 164 of her first witness statement about the pre-2015 devices was given to us over eight years after the last time when she might have seen the JH using a PDA of that sort. In any event, figure 10, at the top of page C4/1/111, i.e. page 111 of the EVJD for the JH (to which Ms Humphreys referred in paragraph 164 of her first witness statement), showed a device which plainly had on it commands relating to F&F stock. The device appeared to be an example of (albeit not precisely) the "Existing Device" referred to on page C7/842/5, where reference was made also to the "New Device". C7/842 was issued in March 2017. Therefore, figure 10 on page C4/1/111 was apparently a version of the PDA which was in existence before March 2017. In those circumstances, it was impossible to decide by reference to the type of PDA to which the claimants referred whether or not the JH used one for F&F scanning before 2015.

73.2 For the avoidance of doubt, we saw no material evidence in the subparagraphs of **paragraph 99**, as they were a summary of other evidential assertions which in itself meant that they constituted comments and in any event were a repetition of those other assertions. We did see, however, at C4/19/37, a reference to "the hand-held computer" which was in use at the time when that document was issued (which was March 2012) being used to scan. That was in the following sentence: "On the hand-held computer ensure that the cursor remains in the box when scanning to ensure each item is captured within your transfer." That was said in relation to returning products to the respondent's

Saltley DC and what was said on the following pages of C4/19, up to and including page 41, showed in our judgment that the JH's evidence about the use of a PDA which did the same sort of thing as did the hand-held RFID device which was in use when Ms Humphreys worked at Watford, was reliable. Thus, we accepted that hand-held computers were, as the JH said in paragraph 8 of her first witness statement, introduced before the start of the relevant period and that they were able even then to show (as the JH said in paragraph 8c) "whether there was an item available in the backstock". We also accepted that PDAs (of one sort or another) were used throughout the relevant period to "validate" deliveries.

74 For the sake of convenience, we deal here with the disputes which were maintained about the content of **paragraphs 100 and 102-104** about the use of RFIDs in practice.

75 We thought that the dispute in regard to **paragraph 100** was about something which was obvious in principle, but assuming that it was necessary to determine the dispute, we decided that the key thing was the responsibility of the JH to look after the RFID. We decided in that connection that (1) because of its value, the JH had to take particular care of the RFID when it was in her possession, and (2) she had do to that, it appeared to us on the balance of probabilities, daily, i.e. applying H31, frequently.

76 We accepted **paragraph 102** as proposed by the claimants because we accepted paragraph 86 of the JH's first witness statement. For the avoidance of doubt, we also rejected the first three sentences of paragraph 168 of Ms Humphreys' first witness statement as they were shown to be wrong by for example C7/612/15 and step (or paragraph) 9 on C7/866/3. In fact, as we record in paragraph 157 below, Ms Humphreys accepted implicitly that what she said in those sentences of paragraph 168 of her first witness statement was wrong.

77 We rejected **paragraph 103** as it was unnecessary given the existence of C7/865 and C7/866.

78 We found paragraph 169 of Ms Humphreys' first witness statement to be of relatively little weight, since there was no objective, or even apparent, justification for her limiting the time when RFID devices froze to 2019 onwards. We accepted that the JH's own evidence, given in 2023, about the frequency with which an RFID froze during the relevant period was given long after the event, so it might have been unreliable. However, we found what she said in paragraph 87 of her first witness statement to be cogent and likely on the balance of probabilities to be true, so we accepted it. We therefore accepted the substance of **paragraph 104** as proposed by the claimants but on the basis that the frequency with which the RFID device froze was "frequently", and that the words of that paragraph should be replaced by these.

> "The handheld PDA or RFID device would frequently freeze. When it did, the JH would either find another one or carry on with her current task and scan the items when she next had a working PDA or RFID device."

Pre-sorting

Introduction

79 The next part of the JH's role as part of the "prepare" phase was to "pre-sort", which meant (see C7/612/6) unpacking the clothing and separating it "by category onto runner rails", although, as Watford was an RFID store, "Essentials, Footwear and Accessories" were (see that page) "unpacked directly into backstock" as shown at C4/19/15. As recorded in submissions made in regard to **paragraph 84**, that involved (it was agreed) moving roll cages around, including up to a distance of 3 metres. Whether all or only some of the cages that were there at the time needed to be moved, was disputed. As a matter of common sense the number was likely to vary from time to time. However, there was no evidence from either party about the frequency. In the circumstances, we concluded that the correct word was "some", but that in any event, it was evidently agreed that every week, i.e. frequently, the JH would have to move the cages around when preparing to "pre-sort", or in the course of pre-sorting.

80 "Runner rails" and their use in pre-sorting were described at C7/612/7 and C4/19/12-14.

Security tagging

81 During pre-sorting, the JH was required (see C7/612/8) to check for swing tickets and security tags. Those tickets and tags and how they needed to be used were described at C7/612/12-13 and C4/19/30-33 and 35. At C7/612/12, this was said:

> "**Security tags**
>
> - All products that are over £10 require a security/tag.
> - Products are usually/delivered with a security/tag pre-attached, however you'll need to re-tag if there is one missing or they are a customer return.
> - There are different types of security tags to fit different products.
> - Full details on where to tag items can be found on the help centre. Ask a colleague or your buddy to show you where different items should be tagged as it's important not to damage the product.
>
> **Swing tickets**

- Swing tickets have information such as size, price, barcode, product code and they also contain the RFID chip**.**

- In RFID stores, you can reprint tickets if one is missing.

- Both swing tickets and security tags (if over £10) must be attached before the item goes to the shopfloor."

82 Since the issue of tagging was in our judgment best dealt with in one place only, we refer here to the disputes maintained about tagging in **paragraphs 299-310**. The first was in **paragraph 303** where it was asserted by the respondent that about 90% of Essentials items were below the £10 tagging threshold. That might well have been correct, but it was not based on any documentary evidence: it was based only on an estimate of Ms Humphreys, stated in paragraph 266 of her first witness statement. The facts that (1) Ms Humphreys said in paragraph 270 of that statement that the JH "was neither required nor expected to proactively check that [items above the threshold] were tagged", but (2) it was (given the final bullet point in the passage set out in the preceding paragraph above) plainly a requirement to do that, cast doubt on the reliability of Ms Humphreys' evidence (as did the factors to which we refer in paragraphs 94-99 of Appendix 3, at pages 178-179 above). However, the claimants put no alternative evidence forward (which, we acknowledge, would have been disclosed by the respondent, or would otherwise have consisted of an estimate of the JH), and what Ms Humphreys said in paragraph 267 of her first witness statement appeared to be based on some sort of statistical evidence which supported the proposition that the majority of Essentials items did not need tagging. However, no such statistical evidence was drawn to our attention. We did see that at C4/19/30, which was issued in March 2012, this was said: "Around two thirds of Clothing product is now tagged by our suppliers using blue tags." In the circumstances, we accepted that at least two thirds of clothes were tagged by suppliers by the start of the relevant period.

83 Given that we would have been surprised to see posters on the shop floor showing how to tag items (as was asserted in paragraph 271 of Ms Humphreys' first witness statement), we preferred the JH's evidence in paragraph 148 of her first witness statement that there were no such posters. However, we could see that at C4/19/31-32 there was pictorial guidance, accompanied by words of guidance, about how to tag clothing. The guidance was not comprehensive, but in substance, the disputed parts of **paragraphs 305 and 306** were in line with it. We therefore accepted the claimants' additional proposed words for **paragraphs 305 and 306**, and not those proposed by the respondent for **paragraph 305**.

84 The claimants' proposed words for the frequency with which the things referred to in **paragraph 308** occurred were (applying H31) accurate, so we preferred them to the respondent's proposed words. We would if necessary have also preferred the claimants' proposed word of "occasionally" for **paragraph 304**, but it appeared from

the respondent's closing submissions that the wording of that paragraph was agreed by the respondent by the time of closing submissions.

85 **Paragraph 309** was inapt since it referred to the JH's knowledge of security spot checks relating to the tagging of items, and such knowledge was in our judgment irrelevant given that it would not (as Ms Humphreys said; we accepted her evidence on this) be possible to attribute to the JH or any of her colleagues responsibility for the fact that an item which required a security tag did not have one. As for **paragraph 310**, we accepted the respondent's position (based primarily on paragraph 268 of Ms Humphreys' first witness statement) that the JH was not required to double-tag, not least because there was no reference to such double-tagging in either C7/612 or C4/19.

Pre-sorting generally

86 Pre-sorting as a topic was dealt with at length at pages 5-16 of C4/19, which contained a careful description of the manner in which F&F product was intended by the respondent to be stored in the F&F warehouse. We concluded that the JH's work done in pre-sorting was as stated in all of the parts of the training materials to which we refer in this paragraph and paragraphs 79-80 above, with the following additional things. We add that we have not, unless the context required it, repeated findings of fact in this document. Therefore, we have assumed that if and to the extent that any factual finding made above or below is relevant to pre-sorting and it is not referred to in this section on pre-sorting, then it must be applied to this section. The same is true of every other section of this document.

87 The parties agreed the content of **paragraphs 71-72 and the first sentence of paragraph 73**, which were relevant here. We could not see the relevance of **the rest of paragraph 73** and therefore declined to determine the dispute about it.

88 Given what we said in paragraphs 53-55 of our judgment of 12 July 2023, we declined to include the content of **paragraphs 74-76**.

89 **Paragraph 77** was irrelevant to the issues before us, given that it was not contended by the claimants that the JH did not have enough space to do her work in the F&F warehouse.

90 In **paragraph 112** (and in **paragraph 31 and paragraph 70** as later expanded) it was said that "at least 50% of delivery containers are delivered to the store uncategorised", so that women's, men's and children's clothing was "all mixed together in each tray or roll-cage", but that "Boxes of clothing" were not mixed. However, at C4/19/11, this was said:

> "Currently the DC groups products together to ensure mat [sic] 90% of like products are put into the blue trays together."

91 The respondent's submissions in response were based on an estimate that only 25% of the trays contained mixed products. That estimate was not supported by any documentation. The estimate was contained primarily in paragraph 140 of Ms Humphreys' first witness statement: it was merely repeated in paragraph 175 of that statement. The figure of 25% was merely stated, i.e. baldly and without any documentary corroboration. Thus, both parties relied on rough estimates drawn from memory. However, Ms Humphreys' estimate was rather better supported by what was said at C4/19/11 than was the JH's estimate. In those circumstances, we accepted Ms Humphreys' estimate, which was based on her experience and was (as stated in paragraph 140 of her first witness statement) that "75% of the trays were unmixed".

92 The weight of the trays appeared to us to be capable of being relevant. It was the subject of dispute in regard to **paragraph 132**.The respondent said that the average weight of a full tray was 5.5kg. That in our view was a detail for which there was no evidential basis. We could also see no evidential basis for the respondent's assertions in its closing submissions about the total weight of trays which the JH handled in each of her shifts. Putting the matter another way, the respondent failed to identify any such basis in those submissions. In addition, at C4/19/11, this was said immediately after the words set out in paragraph 90 above:

> "The system [meaning the distribution centre system] looks to fill all blue trays to a maximum fill and does not split trays between product areas. However, to fill a blue tray you may find some cases where a tray is half full the packer will fill the blue tray with the next product list resulting in the 10% that will go to stores mixed."

93 We therefore decided that the relevant finding to make about the matters dealt with in submissions relating to **paragraph 132** was that the average weight of the trays which the JH was required to move from the dollies on which they arrived at the store was 5.5kg.

94 The dispute in regard to **paragraph 142** concerned, essentially, the frequency with which the JH replenished shoes and handbags on display. We saw that the way in which the JH did the job of replenishing those things was inconsistent with what was said at C4/19/10 about being "able to run the warehouse operation with no blue trays" if she used "equipment in the warehouse effectively", which meant using cages for footwear and (as stated at the top of C4/19/11) "High Level Trading Rails Storage" for footwear and bags. In addition, it was said at C4/19/15 that any Essentials, Footwear, Bags or Accessories stock that was stored in the warehouse on "moveable fixtures should be pre-sorted directly onto backstock", and that the "best practice for filling from the rails is to pull the whole rail onto the shopfloor at set times through the week that will be dictated by how many times you need to fill to keep your shopfloor full." In addition, at C4/19/6, it was said that "No product should be stored in blue trays." However, given that the respondent did not object that the way in which the JH did the things described in **paragraph 142**, we concluded that it was approved by the

respondent, so it became part of her work for the purposes of section 65(6) of the EqA 2010.

95 The issue of frequency was raised by the parties also in regard to **paragraph 235**, which was the companion to **paragraph 142**. The claimants proposed that the word "occasionally" was used for the frequency with which the JH replenished shoes and handbags. The respondent proposed that the determination should be that that occurred "3 times a year". The latter figure was drawn from paragraph 194 of Ms Humphreys' first witness statement, but that figure was itself drawn from the statement made by the JH in her interview of 5 May 2022, as recorded at C4/4/29, so that the real evidential basis for the figure of 3 was the JH's own initial estimate. Applying H31, the right word for the period from 2014 onwards was in our judgment "occasionally". We saw no evidential reason to disagree, and therefore accepted, that before then, as the JH asserted, she did that job "regularly" within the meaning of H31.

96 We preferred the claimants' proposed words for **paragraph 147** since they were more in accordance with C4/19/5-15 than those of the respondent.

97 The appropriate word, even on the basis of the content of paragraph 202 of Ms Humphreys' first witness statement, for the frequency with which clothing which was classified as a hanging item would arrive on the floor of a roll cage as described in **paragraph 151(b)**, was "regularly".

98 We agreed with the claimants' proposed words for **paragraph 158**, since they were more in accordance with the content of C4/19/5-15 than the words proposed by the respondent.

99 We were persuaded by the JH's evidence, read in the light of what was said at C4/19/5-15, that the claimants' version of the disputed proposed words for **paragraph 160** was to be preferred to that of the respondent. That was because the respondent's proposed words were based on a number of guesses made by Ms Humphreys in her witness statements, which were made well over four years after the last time that Ms Humphreys was present and working with the JH at Watford, and the JH's evidence was (applying common sense and a balance of probabilities) on its face cogent.

100 However, we accepted that what the JH did as stated in the final sentence of **paragraph 161** was not an authorised way of working, so we concluded that the final sentence of **paragraph 161** had to be omitted. That is because of (1) what Ms Humphreys said in paragraphs 208 and 209 of her first witness statement, which we accepted, (2) what the JH herself said as recorded at C4/4/20, internal page 80, and (3) C7/660/20, where this was said: "Never climb into the cage".

101 The dispute in relation to **paragraph 166** concerned the usual size of boxes of clothing and other relevant items which were delivered for the F&F department, and

in the original words of that paragraph, it was said merely that they "came in different sizes" and that the photograph called figure 5 on page 108 of the EVJD at C4/1/108 showed "the largest of the boxes used". The respondent proposed that we conclude instead that 75% of the boxes were "smaller" than the ones shown in figure 5 (not, as stated by Ms Humphreys in paragraph 151b of her first witness statement, figure 6). The claimants, presumably seeking a compromise, proposed that we conclude that right words to describe the situation were these.

> "The boxes themselves came in different sizes, some of which were smaller than those shown on the Cardboard Box photo in the Equipment List and Defined Terms, which shows the largest of the boxes used."

102 The respondent's proposed figure of 75% was drawn from nowhere as far as we could see: it was not even a guess stated in either of Ms Humphreys' witness statements. In those circumstances, we concluded that the original (and not the claimants' proposed changed) wording for the last two sentences of **paragraph 166** should be accepted by us.

103 The dispute which the claimants thought was maintained in respect of **paragraph 168** was odd. It was obvious that the JH would not know how much the top box weighed. In fact, the respondent did not make submissions on that paragraph, so it must be taken to have accepted the claimants' proposed words for it. That may well have been because it was corroborated by what was said in paragraph 213 of Ms Humphreys' first witness statement.

104 We thought that the parties were mistakenly at odds about **paragraph 173**. That was for the following reasons.

104.1 What would be on the floor after a pre-sort appeared to be agreed to be what was shown by figure 16 at the top of C4/1/114.

104.2 Clearing up as the JH did during pre-sorting was in our judgment obviously required, as shown by e.g. C7/142/13 and C7/660/12 and 14.

104.3 However, the order in which tasks were done was in our view irrelevant. Rather, what mattered was what the tasks were. As a result, the dispute about when the things referred to by the claimants in paragraph 173 were (using the respondent's word) "cleared" was about something which was irrelevant for present purposes.

105 The dispute maintained about **paragraph 175** was in two parts. The first was about the purpose of pushing or pulling the 10-14 running rails into two parallel rows. That was said by the respondent to be "evaluative". However, it was not evaluative. It was, rather, explanatory. Whether it needed to be there was the issue. It was not unhelpful for it to be there, and was consistent with the statement that was agreed in the next sentence, namely that the JH left enough space between the rails to accommodate

her, a colleague and a cage in which to put the "plastic waste cage", i.e. a roll cage used to store plastic waste. It was then said by the respondent that figure 17 at C4/1/114 showed too narrow a gap between the two pictured rails. We thought that that picture was helpful, even if the gap shown might have been wider. On those bases, we accepted the claimants' proposed words for **paragraph 175**.

106 For the avoidance of doubt, we concluded that the disputed contents of **paragraphs 114, 116-126, 155, 177(e), 182(a), 527 and 528,** were about details which were highly unlikely to be material to the assessment of the value of the JH's work, not least (but not only) because they related to the tasks which were in our view authoritatively described in the training materials to which we refer in paragraphs 79-80 and 86 above. In addition, in so far as the parties' submissions depended on estimates which were not based on anything concrete, they were of dubious weight. In some cases too, the disputes were about the obvious (such as the impact of the falling of rain on newly-delivered UoDs or about the inconvenience – or otherwise – of a pipe leaking overhead in the F&F warehouse). Thus, we declined to make any findings of fact about the matters which were disputed by the parties in relation to **paragraphs 114, 116-126, 155, 177(e), 182(a), 527 and 528**.

(2) Present

Replenishment generally

107 There was at C7/616/3 a reference to a training module called "Welcome to Replenishment", of which it appeared no copy was before us, unless there were in substance parts of it at C7/653, C7/654, C7/658, and C7/660 (all of which were stated by the respondent to have been issued after the relevant period, although, as we record in paragraph 22 of Appendix 3, at page 158 above, none of them were so stated internally). We thought that the content of page 10 of C7/653 was informative about the role of all of the claimants who replenished, as it said that the reader might be "involved in the Present phase of the Replenishment cycle" via

107.1 "scheduled replenishment"

107.2 "your initiative" (with an icon showing plainly that the respondent encouraged the use by jobholders of their initiative), and

107.3 "[at] a manager's request".

108 Those three situations were then explained in clear terms on the next page, C7/653/11. The fact that the information in the document applied to all customer assistants, including those in F&F departments, was in our view put beyond doubt by the fact that there were references at C7/653/15-17 to the tagging of F&F stock, which we thought were plainly intended to be read by customer assistants in F&F departments. We noted that under the heading "Your initiative" on page C7/653/11, this was said.

> "You notice a display that is short of stock so you take ownership to resolve the problem."

109 In addition, C4/19, which was issued in March 2012 (it was dated "03/12"), and which therefore was probably at least in part superseded by the developing RFID technology, nevertheless contained on internal numbered pages 15-19 (C4/19/18-22) an informative description of what replenishment of clothing stock involved. The document was probably aimed primarily at managers, but it was informative and relevant for the purposes of determining the JH's work within the meaning of section 65(6) of the EqA 2010. We saw for example that at C4/19/18, this was said:

> "Replenishment product and essentials should be merchandised on a daily basis, generally overnight.
>
> New Styles should be merchandised by more experienced member [sic] of the team during the day."

110 In addition, there was this helpful instruction or piece of guidance at the bottom of that page, said to be a "Key Point!":

> "Pre-sorting directly onto essentials rails/cages means that stock will only visit the shopfloor once during the replenishment process therefore making it a more productive way to replenish."

Visual merchandising and new styles; visual merchandising and "Retail Standards"

111 The rest of what was involved in "presenting" was described in detail in C7/616. While there was some irrelevant material in it, it was possible to discern from it what the next stage of putting out stock which had been delivered to the store involved. The first thing to record was that, as shown by C7/616/3, where there were "New Styles" or "New Lines" (which appeared to be the same thing), the JH would need to "look at the new products and decide where to position them", using the store's "Visual Merchandising Guide to help", as this should show "how the products should flow by department".

112 The steps to be followed next were stated at pages 4-8 of C7/616. The principles to be applied were stated at pages 16-29 and 45-80 of C7/227, although we saw that there was some repetition in those pages, and there were no answers to the questions at page 79. In fact, we thought that the answers were all on page 47 of C7/226 in that they were discernable from what was said on that page.

113 The principles to be applied were also stated in C7/226, which was a 48-page document entitled "F&F Visual Merchandising Principles Pack". That document applied to the JH as well as to her line manager. That was clear from the content of page 3, which for the sake of convenience we now quote.

"**Welcome everyone to the F&F Visual Merchandising Principles Pack!**

This training pack has been designed with you in mind!

Combined with Click & Learn this will give you all the training and skills you need to confidently deliver the 5 Visual Merchandising Principles on your clothing mat.

lt will help you understand the 'How' and the 'Why' and also the huge benefits great Visual Merchandising will deliver in your store.

Throughout this pack there are practical exercises for you to complete so you can put in to practise what you have read on Click & Learn and within this pack."

114 It was also clear from what was said on page 9, which was this.

"**When your manager is planning the shop floor layout there are some key tools available to help**.

These are:

- Space Matrix
- Visual Merchandising Guide
- Plan of the shop floor
- Visual Merchandising Principles
- Work plan Communication

Using the above tools together will ensure that your department has the correct flow, departments have the correct space (mods) needed and the Product Adjacencies make sense.

You can help to make What Good Looks Like a success by reviewing each layout change with you[r] manager. This will help you to understand what the new layout for your department will look like."

115 In addition, on page 4 of C7/226, this was said.

"**In this pack we will take you through the customer journey and how we can make it a better experience**.

We have 5 Visual Merchandising Principles:-

1. **Layouts**
2. **Fixtures & Fittings**
3. **Visual Merchandising**

4. POS
5. Retail Standards

Use the information within this training pack to help deliver F&F to the highest standard for all of our customers."

116 "Retail Standards and Visual Merchandising" were summarised at C7/616/12 as "[including]" (1) "tidying and making sure we maintain our shopfloor standards", and (2) "Balancing colour and prints across the mat".

117 This was then said: 'Refer to the "**Pride in F&F Module**" and the Help Centre for further details". The "Pride in F&F Module" was C7/623. The relevant pages in it were pages 35-42 and 46-53. Those pages described the principles of (1) visual merchandising and (2) "Retail Standards" respectively. We could see only one reference in that document to any kind of "mat". It was on page 3, where reference was made to "the F&F mat". That "mat" was more fully and helpfully described at C4/19/73-80.

118 Pages 61-69 of C4/19 contained what appeared to us to be a thorough explanation or description of what was involved in "visual merchandising". In the course of that description, at C4/19/68, the term "Retail Standards" was helpfully explained in the following terms: "Ensuring the standards are achieved ensures a polished and professional department, tying together the four previous principles." Those previous principles were (1) layout, (2) fixtures including the "Lakes, Trees and Mountains Principle", (3) "Merchandising" and (4) "Point of sale/Graphics", all of which were referred to on the pages immediately preceding C4/19/68 and included in the section on visual merchandising at pages 61-67. There was a helpful "Merchandising Flowchart" for "New Styles" at C4/19/69. We note that those pages (61-69) showed that merchandising as referred to there was, as Ms Humphreys said in paragraph 234(e) of her first witness statement, not what occurred when one was replenishing, or at least not normally. However, at page C7/619/9, the word "merchandise" was used in the sense in which it was used by the JH, in this paragraph, under the heading "Clearance".

> "Yellow stickers should be used for reduced to clear product. For example, if a three pack of knickers has one pair missing, this product is still saleable as a two pack, and can just be sold at a reduced price The reduction process is used across the store. Once you've reduced an item, this should be merchandised within your sale area."

119 In addition, what Ms Humphreys said in paragraphs 109-110 of her first witness statement was shown by the content of C4/19/68 to be wrong. There, she said this.

> "109. After returning an item to the correct display, Janice glanced at the display, and, if she noticed an item obviously out of place, she removed it and put it in the correct place. If the item belonged on a different

display, Janice placed the item on the running rail to return it to the correct display later.

110. Whilst returning items to their displays, Janice was neither required nor expected to check that each item was in the correct place, as is suggested at paragraph 401 of the EVJD; nor that each item was in the correct size order, as claimed at paragraph 403, whether the item had gone into sale, or how the item was hung (and on what hanger and with what pip), as alleged at paragraph 405. Janice was required to size-tidy (i.e., sort all the items on a display by size) only the specific section of the floor she was allocated, rather than doing this each time she returned an item to the correct display (which could have been in any section of the department)."

120 Immediately under the heading "Retail Standards" at the top of page C4/19/68, this was said.

> "Ensuring the standards are achieved ensures a polished and professional department, tying together the four previous principles. They help support the replenishment routines and ensure a great shopping trip for the customer.
>
> Below are the 10 top tips for the shopfloor:
> 1. Clean and tidy - fixtures, fitting room, shopfloor and Clothing cash desk (if applicable).
> 2. Garment zips and buttons done up.
> 3. Fixtures not over or under filled.
> 4. Products in size order- smallest at the front on a multi sized arm.
> 5. All hanger tops facing the same way on a bar (? - like a question mark).
> 6. No product dragging on the floor or bottom of the fixture.
> 7. No product dragging over the top of the product below.
> 8. Product security tagged to company policy.
> 9. No damaged point of sale/graphics on display.
> 10. Would I buy it? Applied to returned/damaged stock before it is returned to the shopfloor."

121 Given that passage, we could not accept Ms Humphreys' evidence in paragraphs 109-110 of her first witness statement. In fact, we would have found it difficult to accept those paragraphs even in the absence of that passage, because we found it impossible to believe that the respondent would have wanted a customer assistant in the position of the JH to ignore for example the fact that items on a display to which the JH was adding an item were not in their correct size order. For the avoidance of doubt, we found the evidence of the JH in paragraph 178 of her first witness statement to be on the balance of probabilities true. It was this.

> "I see that Tesco have removed from my JD the fact that while I am Recovering, I will check that items on an arm are arranged in size order, with the smallest

> size at the front of the arm, and that I correct any mis-ordering. My understanding has always been that we are expected to arrange items in size order. This is how items of the same product are generally displayed in clothing shops, and therefore arranging the items in this way allows customers to more easily find the right size. A significant part of Recovery was re-ordering the sizes on each display arm."

122 In any event, we accepted the claimants' proposed words in closing submissions for **paragraphs 401-403, 406** (which, despite its generality, in the context and given the disputes maintained here, we found to be material), **407-408** (which had to be read as descriptions of what putting stock out on display involved), **411** (since we could not accept that the respondent would not want a person in the position of the JH to seek to ensure that as much stock as possible was on display, consistently with the respondent's Visual Merchandising principles and its Retail Standards), and **420** (since (1) it was consistent with what was said at C7/619/7 about even using a mending kit when necessary on returned items or their packaging, (2) it was to us obvious, applying what we thought of as common sense, that the JH was required to do her best to ensure that a repackaged item did not look as if it had been repackaged, and (3) it was said at C4/19/41 that "Loose Clothing items should be repackaged daily.")

123 In addition, given the multiplicity of references in the respondent's training materials to "merchandising" (see for example paragraphs 50 and 111-118 above), we accepted that the words "or merchandising" (without a capital "m") were appropriately included in **paragraph 512**.

124 We resolved the issues about the correct description of the frequency with which the things referred to in **paragraphs 416, 423 and 429** occurred in the following manner. We thought that the word "frequently" within the meaning of H31 was the best word to describe the frequency of the occurrence of the events described in all of **paragraph 416** (which referred to the JH finding opened packets on Sundays), **paragraph 423** (which related to the JH finding during Recovery a "two piece which has become separated") and **paragraph 429** (concerning the JH "identif[ying] damaged or incomplete items"), as opposed to what the claimants proposed, which was "continuously".

125 For the avoidance of doubt, we concluded that the dispute in regard to **paragraph 404** (about the question whether or not the JH might stand on tiptoes to reach the top of a high display) to be about something which was obvious. In order to reach the top of a display which is above one's head, one has to either stand on tiptoes or use a support, such as, here, a kickstool. The IEs can be taken to know that. But for the avoidance of doubt, as a matter of fact, what the claimants proposed for **paragraph 404** was in our judgment (on a balance of probabilities and having accepted the JH's evidence on it in paragraph 174 of her first witness statement) correct. Whether it was relevant was another matter, and while we left it to the IEs to decide whether it was sufficiently relevant to be taken into account by them, we concluded that it was

capable of being relevant so that they could, if they judged it necessary, take it into account.

126 For the avoidance of doubt, we thought that the claimants' proposed words (at the end of submissions) for **paragraph 188** were entirely apt. Those of the respondent, on the other hand, in our view were inapt. We quote from the first numbered paragraph under the heading "Factual correction" in the respondent's closing submissions to illustrate why.

> "Ms Humphreys' evidence is that JH did not need to have any particular regard to the Respondent's merchandising plan or policies or to use her own discretion or judgment when filling the shop floor [{E4/9/48}, paragraph 229]."

127 Not only was it in itself unlikely that the respondent wanted its F&F staff to use no particular discretion or judgment when "filling the shop floor", but it was directly contrary to many of the parts of the respondent's training materials to which we refer in paragraphs 107-118 above. Even the respondent's own submissions recognised that the words of the submissions which we have just quoted were inapt, as the next numbered paragraph (number 2 in the submissions box in the row of the table stating the respondent's submissions on **paragraph 188**) referred to the need for the JH to use some judgment or discretion, albeit that it was then said to be only "minimal". That was in the following passage.

> "2. JH was required only to transfer items from the F&F Warehouse to the shop floor and place them on the existing displays, making space as appropriate [{E4/9/48}, paragraph 230]. The Respondent's merchandising guide did not affect the way JH filled the shop floor, JH was not required to follow any particular policy documents, and any discretion or judgment JH exercised was minimal. Any discretion extended no further than JH's deciding whether to place items where there was already space on the existing display or otherwise removing duplicate sizes and/or merging arms of existing items where necessary to create space on the existing display.
>
> 3. Ms Humphreys designed the layout of the shop floor. It was not part of JH's role to do so.
>
> 4. Nor did JH have to have regard to any planogram when filling, as opposed to when assisting with ad-hoc merchandising tasks during events, as JH accepted during [XX] [Day 17, p.129, line 13]."

128 The words "The Respondent's merchandising guide did not affect the way JH filled the shop floor" were inconsistent with

128.1 what was said at the top of each of pages C7/616/4-8, which was this: "You can use your Visual Merchandising Guide to help", and

128.2 the following words on C7/623/22.

> "A Visual Merchandising Guide is produced every 6 weeks. This gives overview and information on how best to display new products. As each store is different, this guidance is key to making it work in your store."

129 In addition, the words "JH was not required to follow any particular policy documents" were shown by the documents to which we refer in paragraphs 107-118 above to be wrong.

130 The words "Any discretion extended no further than JH's deciding whether to place items where there was already space on the existing display or otherwise removing duplicate sizes and/or merging arms of existing items where necessary to create space on the existing display" were to a degree true, but also inaccurate given the fact that the JH was, it was in our view clear, not merely a cipher for Ms Humphreys, but also was expected to exercise her judgment when putting out new styles, for example, as shown by what was said at C7/226/38 about using "colours that co-ordinate together" as a "visual merchandisers way to entice customers to be more experimental". "Some points to remember when using colour" were then stated, namely:

> "• Entice customers into the department by showering them with some colour and trigger the receptors in their brain!
>
> • In co-ordination 'pop' out the key colour of the season. This helps balance colour flow through the fixture and department.
>
> • Colour helps you deliver strong and effective blocked statements.
>
> • When you are merchandising a large range of colours, blocking should be carried out light to dark and left to right to ensure balance is maintained.
>
> • Have you displayed your attention grabbers and best stock in the most desirable way and are they easily found?"

131 The guidance on the following pages (39-42) of C7/226 was also, we thought, plainly applicable to the JH when she was putting stock out on the shop floor, i.e. replenishing. The guidance on pages 46-47 was probably as important as anything else, although it was less technical. It was about the respondent's "**fifth VM principle**", namely "**Retail Standards**", as "Excellent Visual Merchandising go[es] hand in hand with excellent retail standards – you can't have one without the other."

132 For the avoidance of doubt, we concluded that at the very least the disputed content of **paragraphs 190, 222, 223, 225-227, 230-232, 265, 266, 269-287, 289, 290, 292,**

293, 295, 296, and 298 was superfluous in the light of the training materials to which we refer in paragraphs 107-120 above and paragraphs 156-161 and below.

133 As for the disputed content of **paragraph 288**, the frequency with which the JH did "Ad-hoc Merchandising" was in all three cases correctly stated by the claimants to be "occasionally" (so that the word "occasionally" should also be used in the respondent's proposed new words for **paragraph 294**). As for the way in which the JH did such merchandising, we found the respondent's proposed words in relation to the opening part of **paragraph 288** to be helpful and an accurate description of what "Ad-hoc Merchandising" involved. That was in part because of what Ms Humphreys said in paragraphs 400-404 of her first witness statement and in part because it was in accordance with the documents referred to in paragraphs 111-120 above. However, we accepted the claimants' proposed words for new paragraph **288(b)** ("when a large display already in situ is otherwise being moved to a different part of the F&F floor, or") given what Ms Humphreys said in cross-examination on day 18 at pages 186-187 of the transcript for that day.

Other findings relating to replenishment

134 Since **paragraphs 191, 206, and 212** were summaries of what was said elsewhere, they were in our judgment inapt. We thought that the content of **paragraphs 375, 376, 378 and 379** in part summarised other evidence in the EVJD of what was the JH's work, and in part consisted of statements about the background which were at best contextual, but were probably evaluative. If and to the extent that **paragraph 379** was about anything material (which we thought it probably was), we preferred the respondent's proposed words for it, which fitted the reality.

135 **Paragraph 382** described what the JH habitually did at the start of a Sunday shift. It was contended by the respondent that it was not part of the JH's job for the purposes of section 65(6) of the EqA 2010 to "walk around the F&F department [at the start of a Sunday shift] to appraise the scale of the Recovery ahead." We resolved that dispute in the manner stated in paragraphs 80 and 81 of Appendix 3 (at page 174 above). We resolved it in favour of the JH.

136 The claimants' proposed words for **paragraph 196** were in our judgment helpful and accurate. Even if, as Ms Humphreys said in paragraph 242 of her first witness statement, the JH and her colleagues did not complain that the running rails were "unwieldy" or "difficult ... to manoeuvre", that did not mean that those rails were easy to move. However, we accepted the respondent's position about faulty running rails and concluded that our finding stated at the end of paragraph 70 above applied also to running rails. Thus, we concluded that (1) some running rail faults were sufficiently minor to be overlooked, and (2) the JH's work (as with that of all other persons employed by the respondent who moved running rails) was to continue to use running rails which were faulty unless the fault interfered to such an extent with the use of the rail that it was unsafe to use it, at which point the JH's work involved causing the rail to be taken out of use.

137 The disputes maintained in regard to **paragraphs 192-193** were about details which were highly unlikely to be material to the assessment of the value of the JH's work, not least because the precise order in which the JH did the tasks which she did was in our judgment immaterial. The disputes about the content of **paragraphs 198-199, 201, 202, 205, 208, 219, 221, 244** (which was not even a dispute about a matter of fact; it was in reality about the description of what the respondent meant by the word "availability"), **and 247,** were about matters which we determine, in so far as in our judgment it was necessary to do so, in paragraphs 57-71 and 111-133 above and paragraphs 156-159 below.

138 The claimants' proposed word of "regularly" for **paragraph 203** was apt, given H31 and the respondent's acceptance that a running rail would be caught in swing doors about once every two weeks.

139 The claimants' proposed word for frequency in **paragraph 207** was apt, especially given that the respondent accepted that it was for an event which occurred about four times a year. The dispute about the additional effort to move "loaded" "silvers" was maintained without any objective evidence of the difference in weight between a loaded "silver" and a loaded "running rail". However, we noted that the respondent accepted that "some additional effort" was required to pull a loaded silver and bring it to a stop as compared with a loaded running rail, so the respondent plainly accepted that a loaded silver was heavier or less manoeuvrable than a loaded running rail. In those circumstances, we accepted the claimants' proposed words for **paragraph 207** in relation to the additional effort involved in moving a loaded silver.

140 We doubted that the dispute in regard to **paragraph 215** would have been maintained if the parties had known that we were going to conclude that the JH needed to use judgment in her work, but in any event we concluded that the claimants' proposed words were a correct statement of fact. Whether they added anything material was, however, another matter. We thought that they were more about the way in which the JH did her work than about the work itself. We reflected on the possibility that if she did not plan her route, then she would spend more time and effort in replenishing and concluded that it was therefore in the respondent's interests for her to plan her route. Assuming (which we doubted) that this dispute was about something relevant, we accepted the claimants' proposed words in **paragraph 215** in preference to those of the respondent.

141 The claimants' closing submissions include some about **paragraph 239(d)**, since, it was clear, the respondent had originally objected to the proposition that the JH might have needed to go down onto her knees when putting shoes on display in the correct size-order on the lower rungs of a display. However, that dispute was not referred to in the respondent's closing submissions, so we assumed that the respondent was no longer objecting to that proposition. We record here, for the avoidance of doubt, that we thought that the IEs would be able to assess the physical demands of replenishing the lowest rung of a display on the respondent's shop floor.

142 The parties disputed the extent to which the JH in practice found items of clothing on the shop floor which were intended by the respondent to be hanging but were in fact without a hanger, or with a damaged hanger, and what the JH was required to do in those circumstances. That dispute related to **paragraphs 393, 395, 396 and 398**. The dispute in regard to **paragraph 393** was one about frequency: the claimants said that the JH continuously (i.e. applying H31, the event was "ongoing during a shift") found items of clothing on the floor or draped over a display without a hanger or with a damaged hanger. However, the respondent, without any evidential basis for saying it, merely asserted that that was an exaggeration, and that the word should be "frequently". We were confident on the basis of our own experience and on a balance of probabilities that there would have been at least one such event per shift, and probably more than that. However, it was not an "ongoing" event, so we accepted the respondent's proposed word of "frequently".

143 **Paragraph 395** concerned a different question, which was what happened next when for example a hanger-less item was found. The correct question was what was the JH required to do, and did any particular difficulties arise in practice when seeking to do it. Clearly, the JH would have to find a hanger which was suitable for the item. The respondent used hangers with appropriate labelling, i.e. what the parties called the "correct 'pip'". The claimants proposed this wording for **paragraph 395**.

> "It is impossible to anticipate which type of hanger JH will need during Recovery, so each time JH needs a hanger, JH goes to the F&F customer service desk to get one, along with the correct 'pip' [397]."

144 By way of background, it is helpful to record here that the parties agreed the content of **paragraph 397**, which was in these terms.

> "Every hanger must be paired with the correct 'Pip', a colourful plastic cube with a garment size number clearly marked. A pip is threaded onto the hook of the hanger so that customers can easily identify what size the garment is without having to find and check the label. A box of various pips is also kept at the F&F customer service desk."

145 The respondent asserted that **paragraph 395** should be deleted, not on the basis that it was factually inaccurate, but on the basis that the JH "could (and should) have placed any items without hangers on the rail and found hangers for them at the same time, which would have been far more efficient". We were not persuaded that the JH was required by either (1) the training materials or (2) any of the evidence before us, to follow any particular practice in dealing with items without hangers, although an obviously inefficient way of working would not be part of her work for the purposes of section 65(6) of the EqA 2010. In the circumstances, we concluded that the work of the JH in this regard was to get a replacement hanger. The frequency with which the need to do so was the subject of a dispute in relation to **paragraph 396**. The respondent proposed the words "around once a month" to describe that frequency.

The claimants proposed the use of the word "regularly". Given the tendency which we saw on the part of the respondent's witnesses to diminish the impact of the claimants' evidence, we concluded that it was at least one a month that that event occurred, but even if it were just once a month, the best word was still "regularly" within the meaning of H31.

146 **Paragraph 398** concerned the difficulty or otherwise of removing "pips" from hangers. The respondent's submissions on that subparagraph included a misrepresentation of the passage of the JH's cross-examination on the issue of the difficulty of replacing a "pip" on a hanger. The relevant part of **paragraph 398 as it stood by the time of closing submissions**, to which the respondent objected, was in these terms (the underlined words having been added by the claimants, apparently with a view to reaching agreement with the respondent).

> "Some spare hangers already have pips on them which need to be removed before placing the correct pip on the hanger. To do this JH,
>
> a. removes the current incorrect pip by squeezing the pip and pulling it off the hook of the hanger with some force,
>
> b. searches in the pip box kept at the F&F customer service desk to find the correct size pip (for the item), and
>
> c. threads it onto the hook of the hanger."

147 The respondent's closing submissions on this were in the following terms.

> "**Factual correction**
>
> 1. This is exaggeration. Ms Humphreys' evidence is that replacing pips was a quick and easy task involving pulling off the incorrect pip and pushing on the correct one, and that no significant force was required [{E4/9/26}, paragraph 107]. JH agreed in [XX] that to put a pip on a hanger she just pushed it over the metal part of the hanger [Day 17, p.47, line 13]."

148 The respondent proposed instead, for **the subparagraphs of paragraph 398**, these words.

> "a. removes the current incorrect pip by squeezing the pip and pulling it off the hook of the hanger,
>
> b. attaches the correct size pip from the pip box by pushing it over the metal part of the hanger."

149 The whole of the passage of the cross-examination of the JH on the issue of the difficulty of replacing a "pip" was at line 20 on page 46 to line 13 on page 47 of the transcript of day 17, and was this.

> "Q. You mentioned also that you may need to put a new pip on the hanger. That would just be a question of pressing the pip over the metal part of the hanger, wouldn't it?
>
> A. Our pips are really hard to get off, they're so strong, and usually the only way I can do it is by a small clip hanger and I yank it off that way. Recently, I asked a customer to do it for me. He was asking me for a product and I couldn't take the pip off as I was recovering and I asked him if he could do it, he had actually couldn't pull that pip off. So it's not just a case of pulling it off. It's very, very stuck on.
>
> Q. Okay. Mrs Cannon, what I was asking about was putting it on.
>
> A. Yeah, yeah.
> Q. And you would just push it over the metal part of the hanger –
>
> A. Yeah, you would –
>
> Q. -- wouldn't you?
>
> A. Yes, sorry, counsel, you would just put it."

150 The word "put" in the last line evidently should have been "push".

151 Ms Humphreys said this in paragraph 107 of her first witness statement.

> "Whilst Janice sometimes needed to replace the pip from a hanger with one matching the item, this was a quick and easy job involving pulling off and pushing on the respective pips. It did not require her to use any significant force, contrary to paragraph 398 of the EVJD."

152 We accepted the JH's evidence given in cross-examination about the difficulty of pulling the pips off. **Paragraph 398(a)** was therefore not an exaggeration, at least as far as part of the time was concerned. It was entirely possible that some pips would come off more easily than others. Common sense suggested that both (1) what the JH said about the difficulty of pulling pips off and (2) what Ms Humphreys said in paragraph 107 of her first witness statement was true for part of the time, so that the full picture was given by neither of them. In any event, we accepted the claimants' proposed words for **paragraph 398(a)**, amended slightly by the replacement of the words "with some force" with these: "which regularly required considerable force". We decided on the use of the word "regularly" in that regard because it was something that happened, we concluded, at least once a month.

153 The respondent objected to the claimants' proposed words for **paragraph 398(b)** on the basis of Ms Humphreys' evidence on the issue, which was primarily in paragraph 533(n) of her first witness statement, which was this.

> "The box of pips at item {C4/9/32} of the Bundle (Photo 32) is not organised as it was during the RP [i.e. the relevant period]. When I was working in the store, all the pips were stored in logical order so the correct pip could be easily found. The box was also stored under the F&F desk, rather than on a trolley, and during the RP was kept separate from what appears to be colleague shopping."

154 The claimants' response to that was that it was just an "editorial" correction. It was not the subject of cross-examination. While we accepted that not every point which was not put to a witness in cross-examination was accepted by the cross-examining party, we found here that the claimants accepted that the pips were in a logical order in the pip box. However, the reality was that the job of the JH was to find a correct pip and put it on the hanger to be used for the item which needed the hanger. Variations between stores in the methods of storing of pips were in our view one of the minor differences which had to be regarded as irrelevant to the task of determining the value of the work done when obtaining the pips. That was because the value of the work done for the purposes of section 65(6) of the EqA 2010 would otherwise vary from store to store, and it would mean that minute differences were relevant for the purposes of determining value, but (applying section 65(2)) not for the purpose of determining whether the work was like work within the meaning of section 65(1). Thus, we decided that the claimants' proposed words were apt. The IEs will be able to assess the demands on a JH arising from the need to obtain a correct pip from a pip box. Similarly, we thought (applying our own experience of handling shop clothes hangers with pips on them) that putting a pip over a hanger's curved hook was better described as threading it than as simply pushing it.

155 The respondent opposed the wording of **paragraph 424** on the basis that "JH was not required to tidy the entire F&F department singlehandedly." That was not a dispute about the factual basis for, and therefore the accuracy of, **paragraph 424**. It was in our view about an irrelevant matter.

Scanning

156 The content of **paragraphs 189, 209-211 and 254** related to the scanning of items. It was in our judgment less helpful and accurate than the content of C7/865, which was in our judgment the best statement of how to use a "handheld RFID device". For the avoidance of doubt, we concluded that the JH's recollection about how the RFID portals and the RFID devices worked in practice was mistaken. That mistaken recollection was shown also by what was said in **paragraph 237** about the use of an RFID device. As it was said at the head of C7/865:

> "To update product locations on the stock inventory system, when the product moves from warehouse to sales floor (or vice versa) it must be updated. This usually happens by transporting product between the RFID portals which are located between the warehouse and sales floor.
>
> If a store has no portals installed or when a portal is not able to be used e.g. it is not functioning, colleagues must manually update stock movements using the RFID handheld device."

157 Ms Humphreys' second witness statement contained an explanation for the JH's misunderstanding which made sense. In paragraph 10 of that statement, Ms Humphreys said this.

> "Having read Janice's First and Second Witness Statement I believe that she is confusing how movement scans are now conducted as the Portals are no longer at the Watford store and so movements are all scanned manually. Janice may also be confusing delivery scans which would also pass through Portals but did require a top-up scan. To do this, colleagues would need to put the RFID device into a different setting; "Delivery Acceptance" and then complete the actions specified at paragraph 13(a-c). [That was probably a cross-reference to paragraphs 8(a-c) of Ms Humphreys' second witness statement, in fact.] I accept that we did scan in the delivery to top up to 98% as soon as it arrived. The 98% is the delivery received against the delivery invoice."

158 That was in part a correction of what Ms Humphreys said in the first three sentences of paragraph 168 of her first witness statement. The whole of paragraph 168 was in these terms.

> "Since the RFID portals at the entrance of the F&F Warehouse scanned around 96% of stock as it was entering or leaving the F&F Warehouse, there was no requirement or expectation for Janice to scan the items later if an RFID device were not immediately available, contrary to paragraph 102 of the EVJD. Indeed, there was no requirement during the RP for Janice or other F&F colleagues to scan the items with the RFID devices at all. This was an optional 'top-up' which colleagues could do if they wished. The situation during the RP contrasts with that after the Evaluation Period, when the portals were removed. Janice and her F&F colleagues now do need to scan all items using the RFID device."

159 We agreed with Ms Humphreys' analysis in paragraph 10 of her second statement: the JH had confused the situation which pertained after the removal of the portals with what was required when the portals were in place.

Sales and markdowns

160 That which was involved in "Sales and Markdowns" was described in general terms at C7/619/9-11 and C4/19/27-29 and 35-36, when read with the documents or

sections of documents to which we refer in the preceding paragraphs above (principally paragraphs 111-131) describing what the respondent called "merchandising", and "retail standards". In addition, the WIBI (would I buy it?) principle plainly applied to F&F stock as well as to all stock on display. That was clear from for example C7/143/5 and C7/227/78. Thus, that which Ms Humphreys said in paragraph 298 of her first witness statement was potentially misleading. That paragraph was as follows.

> 'At no point were Janice or any other colleague required to check that any item was in "perfect condition" as alleged at paragraph 221 of the EVJD. As Janice confirmed at interview, by this she meant that she "just look[ed] at it" – see page 105 of the interview transcript, item {C4/4/27} of the Bundle.'

161 Most customers will not want to buy something that is in any way damaged or dirty. That is the point of buying new products. Whether one ought to describe the product as "perfect" when it is new is an unhelpful question. The issue here was whether the JH was required to apply the respondent's "would I buy it?" policy, which she plainly was. That policy required her to ask herself whether she would buy a product on sale and, if not, then "remove it from the shelf", i.e. immediately. The reason for that was stated at C7/823/47, where (as part of the guidance to new staff of all kinds at any of the respondent's stores) these things were said.

161.1 "As you go about the store, if you see a product that isn't of the quality you expect, think 'Would I Buy It?' If your answer is 'no', then customers won't either. Having products of low quality on the shelf gives a bad impression to customers."

161.2 "You can remove products from any shelf if you think they wouldn't pass the 'Would I Buy It?' test. Either place the product in the department's waste area or give the product to a manager or member of staff from that area, who will deal with it."

162 Thus, the respondent's opposition to the claimants' proposed words for **paragraph 389** (and therefore also **paragraphs 427 and 428**, the dispute in relation to which was about the same thing) was mistaken: the JH was required to check each item of clothing which she had taken from the fitting room rail as she put it back on display, and not just glance at it. That was, in fact, accepted by Ms Humphreys in cross-examination, as recorded in the passage from line 6 on page 84 to line 11 on page 87 of the transcript for day 18, although it was put to her (wrongly) that there was "no guidance given by Tesco [as] to how carefully you check".

163 Equally, the claimants' proposed content of **paragraphs 390-391** about the extent to which the JH was required by the respondent as part of her work for the purposes of section 65(6) of the EqA 2010 to check the state of stock as she was replenishing the items on display was wrongly disputed. The dispute was resolved by the training materials to which we refer in paragraphs 160-161 above.

164 The dispute about **paragraph 432** was described by the claimants as an "editorial" one. We could not see why the respondent objected to the inclusion of the words "so that customers can identify the new price" and proposed that the JH and her colleagues only "may" (i.e. she might or might not) "print off a 'sale sticker' showing the new price". The respondent's stated reasons were as follows.

> "Ms Humphreys' evidence is that sale items were generally picked up by other F&F colleagues tasked with marking down a large number of items [{E4/9/57}, paragraph 283], JH only engaged in ad-hoc markdown tasks for all or most of her shift no more than one or twice per year [{E4/9/80}, paragraph 428], and marking down of individual items around once a week when a sale launched, and with decreasing frequency thereafter [{E4/9/65}, paragraph 340]. Accordingly, it is inaccurate for this paragraph of the EVJD to state that JH "*must*" print off a sale sticker; the word "*may*" more appropriately describes the frequency with which this arose.

165 It was in our view impossible to avoid the conclusion that what the claimants asserted the JH did was required when what was referred to at C4/19/28 as a "Central Markdown" was required. We therefore accepted the claimants' proposed words, including the words "so that customers can identify the new price", which were explanatory, albeit not essential. For the avoidance of doubt, the role of the JH in this regard was shown most clearly by C4/19/28, and she did what was required by way of printing off sale stickers. The fact that her colleagues did that too was irrelevant here.

166 The dispute about **paragraph 433(a)** related ultimately to the issue of frequency. If it was only once a month that the JH carried out what she called an "ordinary markdown", i.e. of stock which was marked down purely because it was now regarded as old, and was not damaged, then the correct word to describe the frequency was "regularly". The respondent proposed that the occurrence of the event "approximately once a month" be recorded. That fitted with the definition of the word "regularly" at H31. Thus, in reality the parties were in substance agreed that the event occurred "regularly" for present purposes, and in any event we accepted that the word "regularly" was applicable. The other words proposed by the claimants for **paragraph 433(a)** to which the respondent objected helped rather than hindered our understanding of the subject-matter of the paragraph, so we accepted them also.

167 Without any evidence to support it, the claimants proposed adding some words to **paragraph 433(b)** to the effect that there were markdowns on a "rolling six-to-eight week basis" after a "department-wide 'refresh', also known as a 'what good looks like' review". That proposed addition was not the subject of any evidence given by Ms Humphreys either. The "department-wide 'refresh', also known as a 'what good looks like' review" appeared to be the procedure which was described at C4/19/28 as "Local Markdown". At C4/19/79, this was said.

> "Every 6-8 weeks, Clothing space allocations and department flow adjusts to reflect seasonal changes in demand for product.
>
> To ensure our customers can get what they want as well as comply with our corporate Clothing strategy a full layout exercise must be completed every time a new Instore Guide and matrix is issued. Completing this exercise will also ensure that we don't have too much or not enough stock of certain products sitting in our Clothing Warehouses."

168 On the preceding pages of C4/19, the "new Instore Guide and matrix" were described. On page 76, this was said.

> "The Instore Guides arrive 2 weeks before each planned layout change/what good looks like date and must be used in conjunction with your space matrix. The Instore Guides are produced for womens, mens and kids outerwear.
>
> The front cover:
>
> • Highlights key changes to space and layout by department. Also gives information such as key products that will be launching or merchandising techniques that are used for example, blocked or coordinated merchandising.
>
> Page 2:
>
> • Details the priority flow/order that you should merchandise your department. This can change for each season/phase that is being launched. This is the most important page of the Instore Guide.
>
> • The order of departments relates to your priority, secondary and tertiary space for example, F&F blue in priority space, essentials and sale in tertiary space.
>
> Page 4 onwards:
>
> • This section contains all the detailed merchandise plans for outerwear. Using your Space Matrix you should identify your range for each merchandise group and find this within the Instore Guide before you begin merchandising. You must always follow these plans as they reflect the company strategy. The majority of product shown will be available for you to implement what good looks like, however as we plans are produced for a moment in time [sic] you will need to make logical amendments to the layout throughout the phase."

169 On page 77, under the heading "Understanding the Clothing Space Matrix", this was said:

> "The Clothing Space Matrix arrives in stores 2 weeks before each planned layout change/what good looks like and shows a store specific breakdown of Clothing space and ranges."

170 On page 78, this was said.

> "A new layout communication will arrive instore via the Workplan 2 weeks before each planned layout change/what good looks like and must be used in conjunction with your Space Matrix, Instore Guides, point of sale guide and Clothing floor plan. The layout communication is in three parts.
>
> **Part 1** - Space change information includes trend by department and space change information, for example departments that [are] being introduced, departments that are being extended to more stores or departments that are featured in less stores.
>
> **Part 2** - Clothing layout plans shows ideal layout plans and flow for various types of store and shows location of priority rolling wall ends. Stores must identify the plan that most closely represents their Clothing mat and use it to plan your layout (these are key when planning your layout).
>
> **Part 3** - Planning your space details planning your block layout, planning essentials space and planning outerwear space.
>
> Within your layout communication pack sent via the Workplan before your space change this pack is one of the most important tools to help you achieve your layouts, in this session you must go through the pack in detail and discuss each point."

171 At page 9 of C7/616, this was said:

> "**All clothing products have an expected lifetime from the day that we receive them in stores to the day that they should have sold out.**
>
> When clothing products do not reach their expected sales, the price is reduced to encourage further sales. These products need to be cleared to make room for next seasons range."

172 All of the passages set out in the five preceding paragraphs above, taken together, provided strong support for the claimants' proposed new words for **paragraph 433(b)**, so we accepted them. As for the dispute in regard to the frequency with which the "ad-hoc Markdown task" referred to in that subparagraph occurred, the respondent said that it was at most twice a year that the JH was asked to carry out such a task, and the claimants proposed the word "occasionally" to describe the frequency of that occurrence. If the respondent's estimate of at most twice a year was accurate, then the claimants' proposed word best reflected the schematic of

H31. We therefore accepted the word "occasionally". That finding also resolved the dispute about **paragraph 444**.

173 The content of **paragraph 434**, which concerned "Ordinary Markdowns" (or, as the respondent contended, "Routine Markdowns"; we state our solution in regard to that dispute in the final sentence of this paragraph), was disputed by the respondent in part on the basis that the JH had not put before us cogent evidence that in practice she did the things which were referred to in that paragraph. It seemed to us that the factual content of the claimants' proposed words for **paragraph 434** stated (or should be read as stating) what a customer assistant in the F&F department would have been expected by the respondent to do, especially when one bore in mind the content of the documents to which we refer in paragraphs 167-171 above. We therefore accepted the claimants' proposed words for **paragraph 434** (read as a statement that it was part of the JH's work for the purposes of section 65(6) of the EqA 2010 to realise that a reduction in price was required in the circumstances stated in the paragraph), but with an addition, the need for which arose from the fact that the content of **paragraph 434** was also resisted by the respondent on the basis that the issue of frequency needed to be addressed. That (i.e. the need to address the issue of frequency) was a valid point, but the respondent's proposed solution was in our judgment too detailed and as a result unhelpful. That was because the proposed solution focused on the various reasons why there might be a need for an "ordinary" or "routine" markdown, when the real issue was how often there was a need for such a markdown. In the absence of any proposed text relating to the frequency from the claimants, we concluded that the best way to resolve the dispute about frequency and terminology was to say that the words "JH comes across products which may require Ordinary Markdowns" in the opening part of **paragraph 434** should be replaced by "the JH regularly came across products which needed to be marked down simply because of their relative age and not because of their condition".

174 The content of **paragraph 438** was disputed because it was asserted by the respondent by reference to evidence from Ms Humphreys that the JH did not use a desktop sticker printer at the F&F customer service desk before 2014 because there was no such printer at the store when she, Ms Humphreys, worked there. The respondent's submission was this, under the heading "Factual correction":

> "Ms Humphreys' evidence [{E4/9/66}, paragraph 345] is that whilst JH used one of the five hand-held sticker printers or a pre-printed roll of reduction stickers to mark down items, there was no desktop sticker printer on the F&F desk during her time at the store.'

175 That was said in opposition to the claimants' case, stated in **paragraph 438 as it stood at the close of submissions**, that the JH used the "desktop sticker printer at the F&F customer service desk ... before 2014 when the hand-held printer was not working / not available, as JH ha[d] to wheel the silver / rail to the F&F customer service desk in order to Mark Down the items". The JH gave direct evidence on this in paragraph 184(c) of her first witness statement. Ms Humphreys was not at the

store before 2014, so she could not give any relevant evidence about that evidence. In those circumstances, we could see no good reason to reject the claimants' proposed words for **paragraph 438**, so we accepted them.

176 **Paragraph 439** gave rise to a dispute about whether the JH (1) counted the number of markdown stickers required, or (2) just printed out the required number. The latter proposition was advanced by the respondent on the basis of Ms Humphreys' evidence in paragraph 346(a) of her first witness statement that the RFID device stated how many items had to be reduced. There was no documentary evidence before us on this issue: neither C7/865 nor C7/866 referred to the use of the RFID device to identify the number of items to be marked down. However, we concluded on a balance of probabilities that it probably did state how many items needed to be reduced. Nevertheless, it was clear, the items would need to be found and only when they were found would a markdown label need to be printed. In those circumstances, we were driven to the conclusion that the claimants' proposed words best reflected the factual position, so we accepted them.

177 It was alleged by the respondent in relation to **paragraph 441** that the frequency with which the JH had to get new blank labels from the F&F customer service desk was properly classified as "occasionally" rather than, as claimed by the claimants, "regularly". That was despite the fact that Ms Humphreys said in paragraph 348 of first witness statement that the "sticker printer ran out of labels ... around once a month" at which point the JH "went to the F&F desk to obtain new blank labels to feed into the printer". Thus, the dispute was maintained against the background that the respondent's own evidence supported the claimants' words. The dispute was therefore wrongly maintained. The appropriate words for **paragraph 441** would therefore have been that the JH regularly had to go to the F&F desk to obtain new blank labels to feed into the printer. Accordingly, that was our finding of fact in relation to **paragraph 441**.

178 As for the words of **paragraph 442**, the claimants' proposed words reflected those which we have set out in paragraph 118 above as a quotation from C7/619 ("Once you've reduced an item, this should be merchandised within your sale area"), and were therefore apt. Thus, we accepted the claimants' proposed words for **paragraph 442**.

Fitting rooms

179 Part of the "Present" phase of the "Replenishment Cycle" was doing what was required in regard to the fitting rooms. By way of background, the importance of those rooms was recorded at C7/616/14, in the following manner.

> "The fitting room is a **key customer touchpoint** and an important part of the customer experience.

> It is also an **ideal place to drive sales**, through loving our products and having the confidence to give outfit advice."

180 That which the JH was required to do by way of helping customers was stated on the same page, as these things:

180.1 "providing **different sizes**";

180.2 "[giving] suggestions on **alternative products**";

180.3 "[advising] on **latest trends** and **complimentary accessories**"; and

180.4 "[sharing her] passion for [the respondent's] products".

181 It was also clear from that page that the JH and her colleagues were required to try to ensure that there was a "tape measure at the fitting room to help". The "key routines" to use "when working in the fitting room" were stated at pages 15-20 of C7/616, and other guidance on the use of the fitting rooms was at C4/19/55-57. By way of illustration, this was said at the top of C4/19/56 about advising customers.

> "Ask staff to think about their responses, should a customer ask you for your opinion on what they are trying on. It is important to get the balance right between appearing genuine and also not offending the customer."

182 The question whether it was part of the JH's work for the purposes of section 65(6) of the EqA 2010 to check the 6-8 fitting rooms at the store on Sundays to see if they were clean was disputed in relation to **paragraph 383**. This was said at C4/19/57, to be what by "all Customer Assistants who manage the fitting rooms on the Clothing Department ... should be doing when the fitting rooms are quiet": "Checking every single fitting room is clean tidy and free of any rubbish." That showed that if the JH did indeed go to the fitting rooms at the store at the start of her Sunday shifts and check whether they were clean, then she would be doing the job of a customer assistant in the F&F department, unless (1) someone else was instructed to do it, or (2) she, the JH, was instructed not to do it.

183 It was Ms Humphreys' evidence, in paragraph 96 of her first witness statement, that she "usually asked a member of the Day team (whose shift partly overlapped with [the JH's] shifts, finishing at 10pm on a Thursday and 6pm or 7pm on a Sunday) to tidy the fitting rooms and return to the shop floor the unwanted clothing which had been hung on a rail in the fitting room throughout its opening hours". However, as Ms Humphreys said in paragraph 98 of her first witness statement, the JH "occasionally (around once a month), assisted in returning items of clothing from the running rails in the fitting rooms to the shop floor, as part of tidying the department." The latter thing occurred, said Ms Humphreys in the same paragraph, "usually ... when there were fewer colleagues on the Day shift than usual and/or more items to return to the shop floor, meaning that the Day team were unable to finish this task before the end

of their shift." In paragraph 176 of her first witness statement, the JH said that she "would clear up the fitting rooms approximately once a month." That accorded with what Ms Humphreys said about the frequency with which the JH did in fact deal with clothes that had been tried on in the fitting rooms and not bought. All that the JH did was, she said in paragraph 176 of her first witness statement, "make sure all clothes and rubbish had been removed [and if] anything had been left there, or if there were spillages or big smudges on the mirrors, then [she] would clear it up."

184 Therefore, Ms Humphreys did not say that the JH should not have checked to see whether the fitting rooms were clean, tidy, and free from rubbish. It was implied by C4/19/57 that it would have been the JH's job to do that if she was assigned to the fitting room and there was a quiet moment. If she had not done that then the next time a customer assistant in the store was responsible for managing the fitting rooms, that customer assistant would have had to do it. However, that could have been fitted into a quiet moment. Nevertheless, it could not be said that it was not to the respondent's advantage for the JH to do that quick check. In those circumstances, we concluded that it was part of the JH's work for the purposes of section 65(6) of the EqA 2010 to check at the start of her Sunday shifts to see whether the fitting rooms were clean, tidy and free from rubbish even though her line manager might never have found out about her doing it.

185 **Paragraph 384** was in these terms.

> "JH does a visual check of the items hanging on the rail [of clothes that had been tried on but not bought] to get a rough idea of what is there and what needs to be put back out on display."

186 The accuracy of that was disputed by the respondent, on the basis of the following paragraph (number 99) of Ms Humphreys' first witness statement.

> 'If returning clothing from the fitting room rail to the shop floor, there was no reason why Janice needed to do a "visual check" as is claimed at paragraph 384 of the EVJD. She simply pulled the fitting room rail around the shop floor until all the clothing had been returned to the relevant displays, including any items of clothing she came across on the shop floor which were out of place.'

187 That was a dispute on the facts, about which we understood Ms Humphreys was unable to give direct evidence as she would not normally be present at the store on a Sunday. The respondent could have contended that it was not part of the JH's work to carry out a visual check of what was on the rail of clothes to be dealt with, but that would have had to be assessed in the light of the JH's evidence in paragraph 177 of her first witness statement, which was in these terms.

> "When I go to the fitting rooms to get the rail of items which customers have tried on, the first thing I do is stop and have a look at the rail to get a rough idea of what is there and what needs to be put back out on display. I then start to

> organise the items on the rail to put women's products on one end, children's products on the other, and men's in the middle. Arranging them in this way makes it quicker for me to return the items to their respective displays."

188 That was completely credible evidence, and, indeed, evidence of a very sensible way of working. The way of working was further explained and described in paragraph 28 of the JH's second witness statement. **Paragraph 392** was expanded slightly during closing submissions, apparently in the light of that further evidence of the claimant. As expanded, **paragraph 392** was as follows.

> "If the fitting room rail becomes full as JH moves around the department Recovering, JH returns undamaged items from the rail to the displays in order to free up space for other items as JH Recovers. In order to carry this out efficiently JH first sorts the items on the rail into men's, women's and children's clothes."

189 However, there was no evidential basis in either paragraph 177 of the JH's first witness statement or paragraph 28 of her second witness statement for the first sentence of **paragraph 392**. That sentence was, nevertheless, not opposed by the respondent. The respondent simply opposed the inclusion of the second sentence, basing that opposition on paragraph 104 of Ms Humphreys' first witness statement, which was in the following terms.

> "If the fitting room rail became full of items of clothing, Janice returned the items from the rail to their respective displays. I did not require or expect Janice to sort the items on the rail before returning them to their displays, as she states at paragraph 392 of the EVJD. If she did this, it was unnecessary."

190 In the circumstances, we accepted that what the JH did when going to the fitting rooms to get the rail of items which customers had tried on was accurately described in paragraph 177 of her first witness statement and paragraph 28 of her second witness statement. That finding of fact accordingly determined the disputes about the content of **paragraphs 384 and 392**.

191 There was a dispute in regard to **paragraph 385** which, as proposed by the claimants by the time of closing submissions, was in these terms.

> "Having appraised the department at the start of the shift, JH pulls the fitting room rail to the untidiest section first and methodically works around each section, returning clothes to their correct displays until the department is fully Recovered."

192 The respondent's submissions in response were these.

> "**Factual correction**

1. Ms Humphreys' evidence, both in her Witness Statement and in [XX], is that, since during almost all of JH's Sunday shift the store was closed (JH's Sunday shift starting towards the end of the store's opening hours), it was irrelevant which section of the floor she and the rest of the team began by tidying, as the entire floor needed to be tidied eventually [{E4/9/25}, paragraph 100], [Day 18, p.83, line 3].

2. It therefore made more sense, and wasted less time, for JH to begin by tidying the nearest display.

3. JH was not required or expected to unnecessarily complicate the task by approaching the displays in order of tidiness, as Ms Humphreys noted in [XX] [Day 18, p.83, line 4].

4. This paragraph should therefore be amended in line with the Respondent's proposed changes."

193 The order in which the JH did the work of putting back stock on the fitting room rail was in our judgment irrelevant to the question of what was her work for the purposes of section 65(6) of the EqA 2010. There was nothing in the respondent's training materials which stipulated that order and no evidence before us that Ms Humphreys or anyone else acting on behalf of the respondent instructed the JH to follow any particular order. However, it was plainly not part of the JH's job only to return stock by going to the untidiest section first. We concluded on the evidence before us and on the balance of probabilities that what the respondent required the JH to do as part of returning fitting rail stock was simply to put it back as quickly as possible, but adhering to what the respondent called its Retail Standards. Doing that was accordingly part of her work for the purposes of section 65(6) of the EqA 2010. That was our resolution of the dispute in regard to the content of **paragraph 385**.

Stock inquiries

194 How to deal with stock inquiries in an RFID store was described at pages 22 to 23 of C7/616. The content of those pages was simple, so it is convenient to repeat it here rather than incorporate it by reference. That content was as follows.

"**What are stock enquiries?**

Customers may enquire about a product in a different size or an alternative colour.

The Stock Enquiry Function on your RFID handheld enables you to answer customer queries around stock availability quickly, efficiently and with confidence.

Why are stock enquiries important?

> RFID gives us immediate stock information. That helps you find products quickly, make less trips back and forward to the warehouse and spend more time serving our customers
>
> **What help with stock enquiries can we offer?**
>
> Alternative sizes – Just scan the product label to find out if there are alternative sizes in the warehouse.
>
> Local stores – If a size is out of stock you can complete a local store search. This will let you and your customer know if a store nearby has the item in stock."

195 The factual disputes maintained by the parties in relation to stock inquiries arose in relation to **paragraphs 356, 357, 359 and 362**. We doubted the need to resolve them, but in this instance were able to do so by reference to the parties' contentions. The frequency issue in **paragraph 356** was (given the acceptance by the respondent that no RFID device would be available about once every six months) correctly resolved by the use of the word proposed by the claimants: "occasionally". The dispute concerning frequency which was maintained in relation to **paragraph 357** was best resolved by the use of the word "frequently", given that (1) it was the respondent's case that the JH "on most shifts" until 2017 did what the respondent asserted in relation to assisting customers to use the F&F online terminal on the shop floor, and (2) that was in substance what the claimants asserted. The respondent's proposed words for **paragraphs 359 and 362** in relation to what the JH did when helping customers to use the online terminal were more apt than those proposed by the claimants since the issue was what the JH was required to do until 2017, not what she knew about what she was required to do.

Promotions and point of sale banners

196 It appeared to us that the word "promotions" as used by the claimants went hand-in-hand with the words "Point of Sale" (abbreviated to "POS"). That was clear from the box on the bottom left of the four boxes on page C7/227/74, where it was said that POSs were used in part for promotions. On the next page of C7/227, it was said that the reader should "refer to your Visual Merchandising Principles Guide for more information on how to use all of the POS effectively." It was also clear from the content of **paragraphs 447-453** that the topics of the use of POSs and promotions were intertwined. We therefore doubted the value of separating out from the topic of how to deal with POSs the topic of promotions. In fact, the parties appeared to be in agreement about the respondent's requirements in regard to promotions POSs, and it appeared that they were in dispute only about the extent to which the JH was involved in changing the POSs for promotions. For example, in regard to **paragraph 451 (and paragraphs 452 and 466**, which were about the same thing, namely putting up or taking down POSs for promotions), the respondent accepted that it was the night shift team's role to put up a promotion POS if it arrived during their shift and

that a promotion POS might be taken down by the night shift team. That was based on the following passage in Ms Humphreys' first witness statement.

> "414. Promotions usually launched and were active on the tills at midnight. Sometimes I asked the Night team to put up POS, but to avoid disrupting their regular work, I often came in early the following morning with the Day team to do it.
>
> 415. Whilst ideally the POS were intended to be put up as soon as possible after the promotion was activated on the till, sometimes they were not put up until between 6am and 8am, after the Night shift had ended. POS were always taken down by either the Day or Night team when the promotion ended. Promotions usually ended on a Sunday, and the POS were taken down whilst the store was closed to the public.
>
> 416. I instructed Janice to put up or take down POS around twice a year."

197 In reality, therefore, the only thing that the parties disputed in relation to **paragraphs 451, 452 and 466** was the frequency with which the JH put up or took down POSs for promotions. The claimants proposed the use of the word "occasionally" in **paragraph 452** (which was really the second part of **paragraph 451**) and **paragraph 466** (which was about how the JH took down promotions POSs). We thought that the JH and her colleagues would not have put up or taken down POSs only when they were specifically instructed to do so, and that was borne out by what the JH said in cross-examination on the matter as recorded at pages 145-147 of the transcript for day 17. In the circumstances, we accepted the first of the disputed sentences proposed by the claimants for **paragraph 452**, corrected editorially to "The JH put up POSs occasionally". The second proposed sentence ("JH reprioritises JH's work accordingly [42] and [50].") initially appeared to us to be irrelevant because it was about the order in which the JH did her work. However, what the JH said about it (in paragraph 188 of her first witness statement) was this.

> "Tesco have removed the fact that when I am asked to do an ad-hoc task of putting up POSs, I re-prioritise my work accordingly. It is true that in those circumstances I re-prioritise and work differently because I have more to get done. I would have to put up all the POS but also do everything I could to make sure the delivery was complete. I would be more focused and work at a faster pace."

198 That was not just about the order in which the work was done. However, it was not about the work that was done: it was about the conditions in which it was done. Given that we accepted that the JH worked under time pressures (as recorded by us primarily in paragraphs 54 and 55 of our judgment of 12 July 2023; although if our revised view of the impact of PI rates, as stated in paragraphs 62 and 63 of our second reserved judgment, at page 23 above, is correct then those time pressures

were in any event irrelevant at this stage), we saw no reason to include the second proposed sentence of **paragraph 452**.

199 While the claimants' closing submissions worked on the basis that a dispute was maintained in relation to the content of **paragraph 456**, the respondent made no submissions on that paragraph in its written closing submissions, so we assumed that the respondent accepted the claimants' proposed words in their final form for that paragraph. We concluded that it was right to record here that the JH would have had to find the right frame for a POS, as shown by for example the pictures on C7/227/73.

200 As for the question whether the JH would need to lift a POS above her head when standing on a kick stool to put up the POS in tandem with a colleague (which was the subject of what was in the end a half-hearted dispute by the respondent of the proposed content of **paragraph 461**),

200.1 C7/227/73 showed that the JH might need to do so, and

200.2 Ms Humphreys accepted in cross-examination that that was so (as recorded in lines 5-13 on page 190 of the transcript for day 18),

and we therefore accepted the claimants' proposed words for **paragraph 461**, despite Ms Humphreys' evidence in the final sentence of paragraph 424 of her first witness statement, which was that

> "Since she was standing on a stool, Janice did not need to hold the POS above head height."

(3) Put Back

201 The third and final phase of the "Replenishment Cycle" (which the respondent called "Put Back") was described in some detail in C7/619. The first part of that cycle was "backstock replenishment". It is convenient here to record what was said in that regard at C7619/13, which was this.

> "**What is backstock replenishment?**
>
> Any product that could not be displayed on the shopfloor should be returned to your warehouse.
>
> You'll need to hang a 'Red to Rack' riser on the rail to show your colleagues that this product is now backstock and ready to be put away within the area.
>
> Don't forget to move backstock items through your RFID portals to update stock records.
>
> **Why is it important?**

> **Moving products into Backstock means that our shopfloor is kept clutter free, in line with our retail standards.**
>
> You'll need to replenish throughout the day to ensure that we have good availability for our customers on the shop floor."

202 That passage showed that the word "availability" had to be interpreted as meaning keeping up levels of stock on the shop floor so that there was as much stock as possible available on the shop floor to be bought by customers, but maintaining the respondent's retail standards (about which we have made factual findings in paragraphs 111-122 above), including by seeking to (1) ensure that displays were attractive, (2) avoid clutter, and (3) avoid over-filling the racks and displays.

203 Using the "Out of Stocks" function on the RFID handheld in the F&F warehouse would (as stated on C7/619/14) "identify products that are missing from the shopfloor", meaning (see C7/619/15) that it would show "exactly what products, and what sizes are needed." The JH would then need to "Simply **pick these products**, and place them onto a rail" and then (see C7/619/16) "**walk them through the portals** onto the shopfloor".

204 Given the findings which we make in the two preceding paragraphs above and in paragraphs 46- 47 above, we could not see a need to determine the details about which the parties disagreed in **paragraphs 247-250, 256-258, 260, and 263**. For the avoidance of doubt, we thought that it was incontrovertible that (as indicated, but not stated precisely in this way, in **paragraph 249**) if the JH saw a gap in a display, it would be her job to try to fill it. That was in our view obvious. It was also shown by the text which we have set out in paragraph 108 above ("You notice a display that is short of stock so you take ownership to resolve the problem.")

205 As for the availability targets to which we refer in paragraphs 54 and 55 of our judgment of 12 July 2023, and the JH's evidence set out in paragraph 54 of that judgment, we now state for the avoidance of doubt (in relation to **paragraph 249**) that we accepted that evidence and we record that it was, as the claimants pointed out, supported by Ms Humphreys' evidence given in cross-examination on day 18, at pages 43-44. There, Ms Humphreys acknowledged that she had set "the team" an "availability target" of "no more than 2% of the sizes of stock missing on the shop floor which were being stored in the backstock in the warehouse".

Returned stock

206 Returned stock (i.e. stock which was returned to the respondent by customers to the store) and how to deal with it was described at pages 18-20 of C7/619, but it is possible that the text which was cut off at the top of C7/619/21 was relevant also.

207 The first sentence of **paragraph 468 as it stood at the time of closing submissions** was descriptive of the background, but it was helpful background. The second sentence was also helpful background if it was read as a statement that it was part of the JH's work to process "the pile of returns for re-display". We accordingly accepted the claimants' proposed words for **paragraph 468**.

208 The first part of **paragraph 469** was (as we understood the situation; the claimants' closing submissions showed that they were of the same understanding) disputed by the respondent on the basis of what Ms Humphreys said in paragraphs 125 and 129 of her first witness statement, which was, so far as relevant, respectively,

208.1 that the JH 'was not required to "assess" or check each item against "high quality standards" as is suggested at paragraph 469 of the EVJD', and

208.2 that the JH did not '"carefully assess each item and packaging", as is alleged at paragraph 474'.

209 However, what was said on page 19 of C7/619 was evidently correct and contradicted those paragraphs. At that page, this was said.

> 'Why are returns important?
>
> We want to keep returned items in a good condition so that they will appeal to other customers.
>
> **Try to ask yourself** "Would I buy or wear it?".'

210 And in any event, as we say in paragraph 160 above, the JH was required to apply the WIBI test at every stage of her work, which was surely all that needed to be determined in regard to **paragraph 469** (and **paragraph 474**, which was disputed on the same basis) and we therefore made that determination. (For the avoidance of doubt, the word proposed by the claimants for the frequency with which the work referred to in **paragraph 469** needed to be done was correct, even on the respondent's case: the claimants proposed that the work be recorded as being done "regularly", and the respondent accepted that it was done "around once every two Sundays", which was within the definition of "Regularly" at H31.)

211 We turn now to the related dispute in regard to **paragraph 475**. That paragraph was to the effect that if the JH applied the WIBI test to an item of stock and decided that she would not buy it, then she should do the thing which is stated at for example C7/823/47, which we have set out in paragraph 161 above. At C7/143/5, it was said that if the answer to the question "Would I Buy It? ... is 'no', the product should be removed from the shelf". The content of **paragraph 475** was therefore entirely apt. The JH said (in the appendix to her first witness statement, at E1/4/98) that the event occurred about once every shift, and we saw no reason to doubt that, so we concluded that the appropriate word to describe the frequency with which the event

occurred was "frequently". The content of **paragraph 476** as proposed by the claimants was dependent on the content of the paragraphs which preceded it, and appeared to us to be uncontroversial, given our decision about the aptness of **paragraph 475**. The words proposed by the respondent were dependent on its position which was in substance that the JH was not required to apply the WIBI test, and we therefore rejected them. The words proposed by the claimants for **paragraph 476** were therefore accepted by us.

212 The parties disputed the words to be used to describe the frequency with which the work described in **paragraph 470** (processing returned items and putting them onto a running rail) was done by the JH alone on Sundays. The JH said that she did it usually with a night-shift colleague who retired in 2014 and after then on her own. That evidence was unequivocal, and was in paragraph 26 of the JH's first witness statement. The respondent asserted in its closing submissions that throughout the relevant period, the JH "more often than not" did the work with a colleague. The respondent's position on that depended on the evidence of Ms Humphreys, but since she started working at the store only in June 2014, she will have had no direct evidence to give on the issue if the night shift colleague who retired in 2014 left before June of that year. Ms Humphreys said nothing about the date when the colleague in question retired. It was, however, Ms Humphreys' clear evidence (in paragraph 127 of her first witness statement) that throughout the relevant period (presumably to the extent that Ms Humphreys was able to give direct evidence about it), the JH "mostly" worked with a colleague in processing the returns. That was because (it was clear from the passage of the cross-examination of her on this, which was at pages 102-103 of the transcript for day 18) "normally the fitting room rails were cleared by 7 or 8 o'clock", so that she had assumed that the JH did the work "mostly" with a colleague. However, the JH started her Sunday shifts at (see paragraph 10 above) 3.30pm. In those circumstances, we accepted the JH's evidence, which was unequivocal, on the issue of frequency, so that we concluded that she spent 30-45 minutes every Sunday shift after 2014 processing returns. Applying H31, that was done "regularly".

213 There was a dispute also about the frequency with which the JH did the work referred to in **paragraph 471**. The work was not just going to the F&F service desk "on Thursday shifts at around 9.45pm", it was going there to "pick up items of F&F clothing which ha[d] been returned" and processing them as described in **paragraphs 469 and 470**. The respondent in response to the proposition that it happened "Regularly" asserted that it happened "a maximum of once per month". In doing so, the respondent relied on a paragraph of Ms Humphreys' first witness statement (paragraph 369) which, we could see, related to a different issue, which was about how often the JH "responded to a call to the main customer service desk" to deal with a general F&F query. The claimants identified the actual basis of the respondent's opposition to the content of **paragraph 471**, which was paragraphs 130 and 131 of Ms Humphreys' first witness statement. In any event, the respondent submitted in its closing submissions in relation to **paragraph 471** that "JH confirmed in [XX] that she was unable to provide an estimated frequency [Day 17, p.55, line

24]". However, the whole of the relevant passage including line 24 was in these terms.

> "Q. It's also agreed that sometimes you might do returns on a Thursday but that would only be if there was a specific tannoy call; is that right?
>
> A. That's correct, yes.
>
> Q. Would you accept that that was fewer than half of your Thursday shifts overall that that would happen?
>
> A. No.
>
> Q. What would you estimate was the frequency?
>
> A. I can't really give a -- I can't really -- I can't really say."

214 So, in its submissions in relation to **paragraph 471**, the respondent misrepresented what the JH had said in cross-examination. She implicitly said that the thing in question happened on more than half of her Thursday shifts, but she could not be more precise than that. So, she could and did give an estimate of the frequency, but realistically accepted that she could not say any more than that the thing occurred on at least half her Thursday shifts. In those circumstances, we accepted the claimants' case in regard to **paragraph 471**. The frequency with which the thing in question occurred was "regularly".

Waste

215 While there was no dispute about the JH's role in regard to dealing with waste and recycling, we mention it here so that it can be seen how that work fitted into the framework which we have described above on the basis of the training materials in the bundle before us.

216 Pages 8-12 of C7/619 dealt with waste and recycling of stock, and in the course of doing so touched also on clearance of stock (which is why we refer to most of those pages at the start of paragraph 160 above as well as here). Pages 40-41 of C4/19 also referred to, and prescribed how to deal with, stock which was "wasted" on the basis that it was "unfit for re-sale to the customers". Thus, those pages of C4/19 were relevant also to what was done by way of the wasting of stock.

217 What the JH had to do by way of sorting out packaging waste and the recycling of packaging was in general terms the same as any other customer assistant, which was as shown by for example pages 4-6 of C7/262. That was recognised by what was said at C7/619/8 (and repeated at the top of the following four pages) about waste, which was this.

> "**Your role is key to reducing unnecessary waste and ensuring we recycle as much as possible.**
>
> You'll come across waste and recycling in your daily routines. This starts with pre-sorting in the warehouse where all cardboard and plastic is removed from items before they are moved onto the shop floor."

The JH's work replenishing groceries

218 Rarely, the JH assisted with replenishing groceries. The EVJD for the JH dealt with this in inordinate detail, given that rarity (it was stated in **paragraph 311 as agreed by the time of closing submissions** to occur once or twice a year). That inordinate detail may well have resulted from the fact that it was initially said in **paragraph 311** that she did that "[o]nce every one or two months". In any event, given the rarity of the occasions when the JH assisted with replenishing groceries, it is not proportionate to do more than say the following things about that replenishment.

219 The dispute in regard to **paragraph 315** about whether or not the JH was required to make "the aisle look presentable" and the related dispute about **paragraph 328** was surprising since the respondent cannot have wanted the JH to just put stock out on display without caring how it looked. It was in our judgment her job, i.e. her work for the purposes of section 65(6) of the EqA 2010, to ensure that the things that she put out in an aisle did not make the aisle less presentable than it already was, and the overriding obligation of a replenisher of groceries was, we concluded, as stated at C7/656/2, which was to "[make] sure products are always **displayed attractively** and are **as good as you would want** if you were a customer".

220 The requirement to check the shelf-edge label when doing that was of course the same as that of any other replenisher. Accordingly, our finding in that regard in paragraph 83.1 of Appendix 1 (at pages 52-53 above) applies here also, so that the dispute in regard to **paragraph 326** is resolved accordingly.

221 The dispute maintained in relation to **paragraph 329** concerned the respondent's WIBI policy. We resolve that dispute in paragraph 160 above. At the risk of repetition and stating the obvious, it applied to the JH's work of replenishment of groceries, even if a member of the grocery department team subsequently also carried out a WIBI check.

Interactions with customers

222 The parties' disputes about the section of the EVJD concerning customer service, namely as maintained in relation to **paragraphs 332-339 and 342-346**, fell to be seen in the light of our conclusions stated in paragraphs 17 and 18 above. At the risk of repetition, what the JH knew she was required to do (as for example was asserted in **paragraph 342**) was irrelevant. What was relevant was what she was required to do. That is as shown primarily by the documents referred to in paragraphs 16 and 17

above and what we say above in paragraphs 179-181 above in regard to fitting rooms.

223 We record here by way of illustration of the extent to which the respondent had ignored for the purposes of this case the contents of its own documents (which we concluded for the reasons stated in paragraphs 75-85 of our judgment of 12 July 2023 were relevant) that Ms Humphreys said this in paragraph 355 of her witness statement.

> "Janice was expected to respond to customer queries as best she could, but not to actively approach customers."

224 That was directly contrary to the first and the fourth principles on page C7/145/4: they were to be "First To Greet" and "First To Help", i.e. respectively:

224.1 "I acknowledge customers, say hello and ask how their day is going. I should always say hello to customers before they greet me."

224.2 "I should always identify where customers need help, even if they have not asked for it yet."

225 The frequency with which the JH was required to interact with customers was, however, not dealt with by the respondent's training materials and was something which the IEs might need to take into account. However, even that was doubtful if the JH was at least occasionally approached by customers. That was because in those circumstances the JH had to be alert to the possibility of being approached, and the need for that alertness will have been constant when the store was open to the public. We saw that there was a dispute maintained in relation to **paragraph 337** about the number of customers who tended to approach the JH during her Monday shifts: was it, as the JH said, ten, or was it, as Ms Humphreys estimated, four? Neither the JH nor Ms Humphreys was likely to have counted the number of customers who actually approached the JH during her day-time working hours. That meant that they would have had to guess the number, and in the circumstances, so would we. In addition, it was entirely possible that the IEs would attribute the same value to dealing with an average of four customers as to dealing with an average of ten customers. In those circumstances, we declined to make a decision on the point, concluding that if the IEs needed one, then they should tell us, and we would then arrive at a firm conclusion.

226 There was a the dispute about the number of particularly busy nights for the F&F department when customers went to the store "to make last minute purchases", maintained in relation to **paragraph 338**. The claimants said that they occurred "occasionally", and the respondent acknowledged the existence of only one per year ("the shift prior to Christmas Jumper Day"). Applying our own experience and some common sense, we thought that the number would have been more than one per

year, and that it will have been somewhere between (applying H31) "rarely" and "occasionally".

227 The issue of the possibility of a customer complaint which was raised in regard to **paragraphs 372 and 519(c)** was resolved by us in the same way as in paragraph 210 of Appendix 1 in relation to paragraph 680 of the EVJD for Mrs Worthington (see pages 81-82 above). Our conclusion on this issue was that the JH, and all other customer assistants employed by the respondent, worked in the knowledge that a customer might make a complaint to the respondent about them. That was not the same as being monitored, but it was a material factor.

228 Similarly, the issue of the possibility of a mystery shopper (as raised in **paragraph 519(c)**) was determined by us in the same way as in the first sentence of the indented passage at the end of paragraph 13 of Appendix 1 (at page 35 above), which was this.

> "The JH's performance in regard to customer service was monitored by (1) the JH's managers and (2) until 2013 by the mystery shopper regime as shown by C7/184 and C7/785."

Cleaning and fire safety responsibilities

229 The disputed content of **paragraphs 483-490 and 492** related to cleaning. **Paragraphs 505-506 related to fire safety**. The JH's responsibilities in those respects, including to clean as she went (in accordance with the respondent's "Clean As You Go" policy), were the same as those of any other customer assistant or worker in the respondent's stores. We state those responsibilities in paragraph 268 of Appendix 2 (at page 149 above), and for the sake of convenience now repeat it.

> The JH had responsibility, as did all other members of the respondent's shop floor staff, for seeking to ensure that all parts of the store were safe for all persons on the premises, through the JH having an individual as well as a shared responsibility for keeping those parts reasonably clean and reasonably free from the risk of slips and trips. The manner in which the JH was required to comply with that responsibility was shown by pages 13-15 and 27 of C7/142.

230 Therefore, the respondent's proposed words for **paragraph 483** were inaccurate and we rejected them. The disputed words in **paragraph 492** about the frequency with which the JH in practice used some blue roll to mop up a spillage were these: "around three times per year". That was, applying H31, occasionally, and both parties agreed on the use of that word. We accepted it and therefore concluded that the respondents proposed additional words "around three times a year" were superfluous.

231 If and to the extent that the content of **paragraphs 484 and 485** added anything to the content of pages 13-15 and 27 of C7/142 and C7/143 (and we doubted that it

did), we accepted that the additional material was, we concluded, accurate as a matter of fact. That was despite the submission of the respondent that the content of **paragraph 485** ("JH is required to maintain, by cleaning, Recovering and clearing the department, proper standards of cleanliness, as customers will not shop in and buy clothing from a dirty department. Tesco knows from its own research that shopping in a clean and tidy store is one of the most important positive factors for a customer") was "aggrandising duplication". The significance, if any, of what was said in **paragraphs 484 and 485** in relation to the work of the JH for the purposes of section 65(6) of the EqA 2010 is a matter for the IEs.

232 **Paragraph 486** ("JH knows the cleaning equipment used in the F&F department is kept in a trolley in the fitting rooms") was irrelevant. What was relevant was what the respondent required of the JH in regard to the cleanliness of the F&F department and we have stated our findings in that regard in the preceding three paragraphs above. For the avoidance of doubt, we concluded that the fact that the F&F department's cleaning equipment was stored in a particular place in the department was irrelevant, as, we concluded, the value of the work done by a customer assistant such as the JH (i.e. an F&F customer assistant) for the purposes of section 65(6) of the EqA 2010 could not vary from store to store according to the location of the F&F department's cleaning materials.

233 On the other hand, the content of **paragraph 487** was about more than just the Clean As You Go policy, and Ms Humphreys acknowledged in cross-examination on day 18, as recorded at line 7 of page 191, that if the fitting room needed to be cleaned and the JH did it then that was "an additional job task". Partly because of that acceptance, but also because it was in our view obviously an aspect of the role of an F&F customer assistant to do the things referred to in **paragraph 487** in the circumstances stated in that paragraph as proposed by the claimants, we concluded that those things were part of the JH's work for the purposes of section 65(6) of the EqA 2010. We also concluded that the things needed to be done regularly. That was for the following reasons.

233.1 The JH said in paragraph 176 of her first witness statement that the event in question occurred "approximately once a month".

233.2 Ms Humphreys' evidence on this did not include any reference to the frequency of the event. In her witness statement evidence, she simply said (in paragraph 443 of her first witness statement) that the JH "was neither required nor expected to clean the fitting room before tidying the shop floor on her Sunday shift, or before processing the delivery or tidying the shop floor on her Thursday shift". When the frequency of "about once a month" was put to Ms Humphreys as recorded at lines 19-22 of page 190 of the transcript for day 18, she merely denied that the event happened.

233.3 In those circumstances, we accepted the JH's evidence that the event occurred about once a month, which, applying H31, was "regularly".

234 As for the parts of **paragraph 489 as it stood by the time of closing submissions** which were in dispute, we thought that the respondent's words were better than those proposed by the claimants with the exception that the claimants' proposed word for the frequency with which the JH tended to clean the mannequins ("regularly") was better than the words proposed in that regard by the respondent ("around once a month"). So, for the avoidance of doubt, in determining the disputes relating to **paragraph 489** we found that the JH regularly (1) saw dust on one or more of the mannequins in the F&F department, (2) retrieved a cloth and surface cleaner from (in this case) the trolley in the fitting rooms, and (3) cleaned up the mannequin(s).

235 As for **paragraph 490 as it stood by the time of closing submissions**, it was in our view plainly the job of any customer assistant in the F&F department to keep the F&F service desk clean and tidy so that if it appeared to be in need of tidying or a quick clean, then the customer assistant would be required as part of his or her job to tidy and/or clean it. It was the JH's evidence (in the appendix to her second witness statement) that she did that at least a couple of times a month, and although Ms Humphreys said in paragraph 443 of her first witness statement that if the JH did that then it was without the knowledge of Ms Humphreys, we concluded that it was obviously part of the JH's work. Thus, we accepted the words of **paragraph 490 as proposed by the claimants by the time of closing submissions**.

Health and hygiene

236 **Paragraph 495** ("If JH has a cut or sore, JH covers it with a blue plaster obtained from the first aid box.") was, according to the claimants' closing submissions, opposed by the respondent. The respondent, however, made no written closing submissions in relation to that paragraph, which suggested that it was no longer opposed. In case it was still opposed, we record here our conclusions on the factual issues arising from the paragraph.

237 We agreed with what Ms Humphreys said in paragraph 453 of her first witness statement, which was that as the JH "never handled food, there was no specific requirement for her to cover any cut or sore with a blue plaster obtained from the first aid box". The only requirement to cover any cut or sore that we could see in the training materials was stated in relation to food hygiene. Having said that, we could see that the respondent would not want its clothing to be soiled by seepage from a cut or a sore, and in paragraph 452 of her first witness statement, Ms Humphreys accepted that the JH was required to "maintain a proper standard of personal care and hygiene", so we concluded that it was indeed part of the JH's work to do what **paragraph 495** described. Whether that was something that was obvious, or not material to the evaluation by the IEs of the JH's work, was a different matter. We left it to the IEs to decide whether it was material to their evaluations.

Standards of dress

238 Ms Humphreys also accepted in paragraph 452 of her first witness statement that the JH was required to "[attend] work in a clean uniform". Ms Humphreys then referred in that paragraph to C7/777, entitled "Management Guidelines to Standards of Dress" for "Stores only", and said that she had not seen it, it predated the start of her time as an employee of the respondent (it was dated "October 2013"), and as far as she was aware, the JH had not seen it. The latter factor was, for the reasons which we state in paragraphs 75-85 of our judgment of 12 July 2023, irrelevant. The content of C7/777 seemed to us to be of considerable relevance. In fact, there was another document before us which was relevant to this issue of personal appearance when at work. It was C7/863 where, at pages 74-75 there was specific guidance which stated in effect the requirements imposed on the JH in regard to dress and related issues. It was therefore in our judgment to be read as stating the substance of the obligation mentioned in **paragraph 497**. The latter was not in appropriate terms. The obligation of the JH in regard to personal appearance was therefore in our view best stated as an obligation to comply with the standards imposed by the respondent's staff handbook, and on the evidence before us those standards were best evidenced by what was on pages 74-75 of C7/863, expanded if necessary by reference to the content of C7/777.

Assisting new starters and agency staff

239 The JH said (in paragraph 206 of her first witness statement) that she gave advice and guidance to new starters in the F&F department. The respondent argued that the facts stated in **paragraphs 514 and 515** were irrelevant. Those paragraphs had to be read as being to the effect that the JH's work for the purposes of section 65(6) of the EqA 2010 included guiding a new member of staff through the majority of the tasks which the new member of staff was asked to carry out, and answering any questions which the new member of staff might have.

240 The resistance of the respondent to the contents of **paragraphs 514 and 515** was based on the following paragraph (number 471) of Ms Humphreys' first witness statement.

> "Janice was neither required nor expected to train colleagues, contrary to paragraph 514 of the EVJD. If she did this, I was not aware of it. I always provided new colleagues, or colleagues moving from the Day to the Night shift, with all the training and guidance necessary to carry out their duties without the assistance of Janice or any other F&F colleague."

241 However, we understood from what was recorded on page 73 of the transcript for day 18 that Ms Humphreys accepted in cross-examination that if the JH helped new starters then that would have been done as part of her work for the purposes of section 65(6) of the EqA 2010. In any event, we were not persuaded by what Ms Humphreys said in paragraph 471 of her first witness statement that the JH's work for those purposes did not include the giving of guidance to colleagues who were new to the F&F department, including by answering any relevant questions that they might

have, and we found as a fact that it did include those things. We did so not only because Ms Humphreys in effect accepted that that was correct, but also because we thought that a refusal by the JH to do those things would probably have been a repudiation of her contract of employment, as the refusal would have breached the implied term of trust and confidence. In addition, and in any event, it was in our judgment obvious that the role of the JH included helping new starters in the F&F department by giving them guidance and advice.

242 Similarly, we concluded that it was the JH's role (i.e. it was part of her work for the purposes of section 65(6) of the EqA 2010) to do those things for agency staff who were new to the F&F department. Those staff worked in the department only in what the parties referred to as "busy periods such as Christmas and Back to School". It was notable that in this regard too, Ms Humphreys accepted (at pages 73-74 of the transcript for day 18) that if the JH saw the agency staff "floundering or confused" and she approached them and asked them if she could help them, then that would have been the JH doing her job. The substance of **paragraphs 516 and 517 as they stood at the time of closing submissions** was resisted by the respondent only on the basis that it was not the job of the JH to do the things referred to in those paragraphs. We concluded for the same reasons as we state in the preceding paragraph above in relation to new employees, that that resistance was not well-founded and that the content of those paragraphs was relevant and well-founded.

243 Similarly, Ms Humphreys resisted the proposition that the JH might, as part of her job, give agency staff additional tasks if they finished the tasks on the list which they had been given before the end of their shift. That was on the basis of what Ms Humphreys said in paragraph 474 of her witness statement, which was this.

> "It is also not the case that Janice was required, expected, or otherwise had the authority to provide agency workers with additional tasks if and when they finished early."

244 However, this particular point was not put in cross-examination to Ms Humphreys. The issue was put to the JH when she was cross-examined (as recorded at pages 174-175 of the transcript for day 17), and she in effect confirmed her witness statement evidence (in paragraph 205 of her first witness statement) that she would, if they said that they had finished their tasks and asked if there was anything else they could do to help, "get them onto something else that they could help with". In fact, though, the JH then went a bit further, by saying this:

> "I would be keeping an eye open and also if they asked me, then I would help them."

245 We rather doubted that it was outside the scope of the JH's work for the purposes of section 65(6) of the EqA 2010 to do either or both of those things. We also doubted that it would be consistent with the requirement to act in accordance with the implied term of trust and confidence to fail to do those things. Having considered the matter carefully, we came to the firm conclusion that it was in fact part of the JH's work for

the purposes of section 65(6) of the EqA 2010 to do those things. Accordingly, we accepted that it was the JH's work to do that which was stated in **paragraph 518**.

Appendix 5

Rebecca Thompson

THE TRIBUNAL'S DETERMINATIONS OF THE PARTIES' DISPUTES (1) IN RELATION TO THE WORK WHICH MS REBECCA THOMPSON (TO WHOM WE REFER BELOW IN THIS APPENDIX AS "THE JH") WAS EMPLOYED BY THE RESPONDENT TO DO, AND (2) IN RELATION TO THE OTHER FACTUAL MATTERS WHICH ARE RELEVANT TO THE ISSUE OF WHAT WAS THE VALUE OF THAT WORK FOR THE PURPOSES OF SECTION 65(6) OF THE EQA 2010, AND THE (MAINLY JH-SPECIFIC) REASONS FOR THOSE DETERMINATIONS.

Introduction

1 This document is a continuation of the set of documents in which we set out our conclusions on the legal and factual issues which were before us at the end of the stage 2 hearing which took place in the first half of 2023. Thus, with one exception, we do not repeat here for example (1) definitions for the abbreviations used, (2) the background to those conclusions, or (3) the schematic at H31 used by the IEs stating what words they would prefer for describing frequency and related things. The exception is that we repeat here, for the avoidance of doubt, that unless otherwise indicated below, a reference in bold font to a paragraph number is to a paragraph of the EVJD for the JH as it stood before the stage 2 hearing. This document is the fourth in the series determining the factual disputes relating to a lead claimant.

The place where the JH worked, her job title and her working hours

2 The JH worked for the respondent in the main replenishing non-food goods on the shop floor at the respondent's Haydock Church Road Superstore (to which we refer to in this Appendix 5 as "Haydock" or, as the case may be, "the store") throughout the relevant period for the JH, which was 13 October 2017 to 31 August 2018. The parties called that period "the evaluation period" to distinguish it from the period determined by Employment Judge Manley as the overall period for the comparison of the work of the claimants and the comparators (which was from 18 February 2012 to 31 August 2018). We do the same thing in this Appendix 5, i.e. we refer to the period to which this Appendix relates as "the evaluation period". The JH's job title was "Customer Assistant – Replenishment".

3 The JH worked on two days a week, on both days from 4.45pm to 10pm. Those days were Thursdays and Fridays. During each of those shifts the JH had a 15-minute unpaid break.

Some relevant facts relating to the work which the JH did

(1) The times when customers were present on the shop floor when the JH was working

4 The store was open to customers during the whole of the JH's shifts.

(2) The main implications of the presence of customers

5 The presence of customers on the shop floor, or their possible presence because the store was open for custom, meant the following things as far as the work of the JH was concerned.

5.1 The JH was required to be vigilant to the risk of theft (see the third bullet point in the middle column of C7/135/5).

5.2 The JH was otherwise required to be aware of and take the steps referred to on pages 1-6 of that document.

5.3 The JH was required to apply the principles relating to good customer service stated for example at pages 2-17 of C7/145.

5.4 The JH was required to "[r]emember [to put] customers ... first when tidying or putting out stock". That was stated specifically at C7/616/12 as a "Top Tip!". It was plainly applicable to all customer assistants.

(3) The risks to the JH and others in the working environment, and the steps which she was required to take to mitigate those risks

6 The JH was required to be aware of and apply the guidance and requirements stated at pages 3-23 and 25-33 of C7/142 and pages 7-25, 27-36 and 53-60 of C7/823.

7 The fact that there were risks to the JH from being present on the shop floor is shown by C7/705, which included guidance of which the JH was required to be aware. We acknowledge that the JH worked at the end of the store's opening hours, and that during the evenings the store was likely to have been less busy than at peak periods.

(4) Clocking in, the existence of CCTV, and the possibility of being searched

8 The JH was required to clock in. CCTV was, as the respondent accepted in responding to **paragraph 8**, present throughout the shop floor and the warehouse, and as shown by C7/784, at the latest by April 2018 customer assistants in all of the respondent's stores knew that their actions might be monitored via that CCTV in the circumstances described in that document.

(5) The physical environment in which the JH worked

9 The environment in which the JH worked was the store's warehouse and its shop floor.

The work which the JH was employed to do

Introduction; an overview of the JH's work and some factors which were relevant to our determinations of that work

10 The parties agreed that the JH's main task was "non-food replenishment", but as far as we could see, the respondent's training materials to which we refer further below referred to the things that the JH replenished as the main part of her work for the respondent as "hardlines" rather than "non-food" goods.

11 There was a disagreement about the precise percentage of the JH's work which consisted of tasks related to replenishment, but as the respondent pointed out in closing submissions, Ms Parkin, the JH's line manager, was cross-examined on day 7 (as recorded on page 20 of the transcript for that day) on the basis that the claimants' position was that replenishment-related tasks (including the 20% of the JH's time spent on "Rumble"; Ms Parkin accepted, as recorded at lines 22-23 of page 17 of that transcript, that Rumble was part of non-food replenishment) took up 90% of the JH's time. In fact, we counted up the things referred to in the claimants' closing submissions about the content of **paragraph 19 as it stood by the time of closing submissions** as "Working Backstock" (58%), "Working Delivery Cages" (8.5%), "Rumble" (20%), and "Waste and Reductions" (2.5%), and arrived at the figure of 89%. If one added the claimed 5% for replenishment tasks done in relation to health and beauty products, then the figure came to 94%. The other 6% of the JH's time was claimed to have been spent working on the "Combined Desk", the "Mainbank Checkouts" and the "Petrol Station". The respondent's case was that 93% of the JH's work consisted of what we will call hardlines replenishment. We doubted the reliability of the precise percentages of the JH's work on which both parties relied, and we found in any event that they had not applied the IEs' schematic at H31, which would have involved the parties focusing on the tasks done by the JH, and the frequency with which those tasks were done, accepting that estimates of such frequency were necessarily somewhat impressionistic. In fact, the parties accepted (it was clear from what they said in closing submissions in relation to **paragraph 18**) that the percentages which they gave were "indicative" only. Indeed, the extent to which the parties had disagreed on the details of the JH's work needed to be seen in the light of the fact that in paragraph 18 of the respondent's opening section of its closing submissions in regard to the work of the JH, which was the first paragraph under the heading "Breakdown of JH's role", this was said.

> "The parties appear to have agreed that JH spent at least 90% of her time, effectively nearly all of her time, replenishing shelves. This is relevant for two reasons.
>
> (a) Firstly, JH's role within the Evaluation Period had very little variety from shift to shift. She generally worked the same two shifts almost every week during the Evaluation Period, unless she was on holiday or otherwise off work. In summary, JH's role was to replenish shelves with products from Backstock Cages (and, on occasion, leftover Delivery Cages). It is

important this fact is reflected throughout the wording of the EVJD so that the IEs properly understand the context when assessing JH's role and assigning values in accordance with the draft factor plan.

(b) Secondly, while a very small area of dispute between the parties still exists as to the exact breakdown of JH's tasks, the parties are agreed that JH spent 6% of her time during the Evaluation Period working on Checkouts (see paragraph [19] of the EVJD). The remaining dispute relates solely to the proportion of JH's time spent processing Waste and Reductions (see paragraphs 19, 106 and 293 below)."

12 In any event, it appeared to us that neither party had paid sufficient attention to the following key factors.

12.1 There were in the bundle many documents relating to how the job of a hardlines replenisher should be done. The same was true of documents showing how the work of a checkout operator or a replenisher of health and beauty products should be done. Neither party referred to many of them in connection with the question of what was the work of the JH. Instead, the parties both focused on the issue of what the JH did, and worked on the basis that (1) it was only if she did in fact do something that we should conclude that it was part of her work for the purposes of section 65(6) of the EqA 2010 to do it, and (2) if she could not say that she was in fact asked by a customer about something, then it was not her job to know that something. We have addressed this issue in depth in our judgment of 12 July 2023. We mention it here by way of a short explanation for the manner in which we determine below what was the work of the JH for the purposes of section 65(6) of the EqA 2010. By way of illustration at this point, however, we make the following observations.

12.2 If the JH was required to work on a checkout, then she was required to know the things which a full-time checkout operator was required to know in order to be able properly to do the work of a checkout operator, although the respondent probably could not reasonably criticise the JH for not knowing all of the things which were required to be known by a full-time checkout operator.

12.3 Similarly, if the JH was required from time to time to replenish health and beauty products, then she was required to know all of those things which the respondent required of replenishers of those products. Whether or not she actually knew them was only an indication of the extent to which she was doing that work properly. It did not mean that the knowledge required could be ignored by the IEs and us when assessing the value of the JH's work for the purposes of section 65(6) of the EqA 2010.

12.4 It was the respondent's position that if the JH had not (for example) been attacked at work, then the possibility of such an attack was irrelevant. However, a customer assistant who was present on the shop floor of a retail store when

the store was open could be asked a question at any time by a customer, and was in fact at risk of a customer being unpleasant or aggressive. While those three possible events were more likely to occur when the store was busy, so that the impact of the possibility of the event in question was diminished when the store was quiet, the possibilities could not rationally be discounted merely because they did not occur during the period to which the claim related.

The training materials showing what was the work of a hardlines replenisher and a health and beauty replenisher

13 We refer here to the training materials relating to the work of a hardlines replenisher and of a health and beauty replenisher, because we have not so far in our determinations referred to those materials.

Hardlines

14 C7/366 (which was one of a series called "Know Your Stuff for Hardlines Replenishment, and had the subtitle "Welcome to Hardlines") was the first document which would have been given to a person employed to work in a hardlines replenisher's role. It was dated "06/12". We were not aware of any updated draft. It bore close scrutiny. It was to an extent outdated, for example (see paragraph 13 of Appendix 1, at page 35 above) in relation to mystery shoppers. Otherwise, it contained an informative overview of the work of a hardlines replenisher. For the avoidance of doubt, we saw that at C7/366/4, there was a cross-reference to what was almost certainly the document at C7/142. (At C7/366/4 there was a reference to the "things learnt about health and safety in Bronze for Everyone", and C7/142 contained a full, but not necessarily comprehensive, statement of health and safety factors. At page 2 of C7/142, there was the heading "Know Your Stuff For Everyone - Bronze".)

15 C7/367 was subtitled "Product Knowledge And Customer Service". Its contents were highly material here. By way of example, this was said on page 1.

> "Regardless of where you work on Hardlines, an important part of your role is to deliver great customer service at all times. [This includes:]
>
> - Being warm, friendly and helpful.
> - Being knowledgeable about the products we sell.
> - Providing accurate information when dealing with queries.
> - Seeking opportunities to help customers whenever possible or when you see a customer having difficulty or looking confused.
> - Asking open questions to find out what the customer wants or needs.
> - Knowing how to find help if you are unable to directly deal with the customers request."

16 At the bottom of page 2, this was said.

"***Product Knowledge***

Product knowledge is important because:

- customers will feel satisfied that staff can advise them about the products on the department;
- there should be fewer returns as customers will be more informed before making their purchase;
- staff can recommend alternative products and advise on co-ordinating products in the range;
- promotions and special offers can also be pointed out to customers;
- customers will get the help they need finding the location of products.

Customers will have an expectation that you know all there is to know about the products on the department and in the store."

17 The way in which a customer assistant in the position of the JH was required to obtain information and update it was shown by the following passage at the top of page 3 of C7/367.

"• Listening to and asking more experienced colleagues. Don't just pass the customer onto a colleague if you can't help. Stay with the customer and learn the answer to the query from your colleague. The next time you are asked you will be able to help the customer yourself.
- Walking around the department each week and taking note of new products and when products move locations.
- Finding out from the Merchandising Assistant which products are discontinued after range changes.
- Reading information about products and taking note of Hardlines products that are advertised.
- Reading information on the communication board and in weekly/daily updates.
- The packaging on products often provides a good source of information, for example:
  - Safety Information.
  - Information on accessories included.
  - Dishwasher/Oven/Microwave proof safety.
  - Washing Instructions/Symbols for towels and bedding."

18 At C7/386 there was a "Know Your Stuff for Hardlines Replenishment" document with the subtitle: "How to Fill". That document seemed to us to be of central importance to the work of a customer assistant replenishing the things which the JH mainly replenished. The document contained (at C7/386/8-13) some "Replenishment Rules". By way of illustration of how helpful it was, we now set out the first part of the section containing those rules (it was on C7/386/8).

"**Work All backstock**

Work through all the cases of backstock, these may be in the warehouse or on capping shelves.

Fill to the facings on the shelf edge label.

Complete product protection for the relevant products.

Complete a Four Point Check on all products.

Leave gaps where there is no stock.

Do not face across any product.

Check promotion ends, stacks and seasonal displays are full.

Post-Sort The Backstock

Stock that will not fit on shelf is to be put back in the warehouse in its correct location or placed back on the capping shelf above the shelf location of the product. Note: Stock for the count area is to be decked on the floor in front of the fixture.

Key Point!

It is important to ensure that all backstock is worked before deliveries."

19 The following five pages were also a very helpful contribution to making it clear what the work of replenishment of hardlines involved. The parties agreed that (as stated in **paragraph 51**) the JH did not replenish newspapers, magazines or greetings cards (although she did tidy greetings cards, as we say in paragraph 80 below). So, in theory C7/386/11 was not relevant to the work of the JH. As an aside, however, we record here that (1) plainly that page could lawfully be taken into account by us and the IEs when determining the value of the work of a hardlines replenisher who replenished newspapers, magazines and greetings cards, and (2) we rather doubted that if the JH was involved in replenishing newspapers and magazines then her work was of any greater (or less) value than if she were replenishing for example electrical items.

20 C7/388 consisted of a series of the questions asked at Bronze 1, Bronze 2, Bronze 3, Bronze 4, Bronze 5, Bronze 6, Bronze 7 and Bronze 8 of the "Know Your Stuff for Hardlines" series, together with the correct answers to them. It was therefore a helpful overview of the work and (as a 20-page document containing a series of pithy, informative, answers) something of a comprehensive statement of the key tasks of a

hardlines replenisher and how to carry them out. It also contained highly informative answers to the practical questions which were likely to arise in the course of replenishing hardlines. C7/389 was a document of the same sort, but related to the three stages of Silver training; it was entitled "Know Your Stuff for Hardlines Silver".

21 There was at C7/393 a document entitled "General Merchandise - Colleague Guide". Without intending to imply that any part of that document did not need to be taken into account, we record that at C7/393/12, this was said in relation to the "Home and Cook & Dine" department.

> "• With the level of frequent change and specialist nature of the products, it is imperative that you keep your product knowledge up to date with all of the key products we sell instore and online.
>
> • In addition to our range in store, a full extended range is available online."

22 In addition, on page C7/393/14, these things were said in relation to the "Electrical department".

22.1 "The Electrical department is a highly specialist area within our business, requiring a great knowledge of the products we sell."

22.2 "In all stores, it is really important that we tell our customers about our other services that will help them get the most out of their purchase (including accessories, credit or drops and spills cover)."

22.3 "In addition to the products in store, we should always recommend our extended range online if we don't have what they are looking for in store."

23 C7/369 (which was entitled "Know Your Stuff for Hardlines Replenishment – The Aisles Are Clear") was helpful to show (1) that the work of a hardlines replenisher included keeping the aisles on the shopfloor as free as possible, (2) how that objective was required by the respondent to be met in practice, and (3) "what [the JH was required] to do with cardboard, plastic and stock that [did not] fit on the shelf". Only pages 2 and 6 were directly relevant here. That is because they related to the work of a replenisher during the day. Pages 3-5 related to the work of a night-shift replenisher.

24 C7/371, which was entitled ""Know Your Stuff for Hardlines Replenishment – Clipstrips", was not referred to by either party, although the use of "clip strips" was referred to in **paragraph 80** and in paragraph 110 of her witness statement, Ms Parkin acknowledged that "Replacing clipstrips can ... sometimes be fiddly". We therefore concluded that the IEs and we needed to take into account what was said in C7/371 about clipstrips. We also concluded that what was said about clipstrips at C7/393/16 was relevant. We noted too that question and answer 14 of C7/426

showed that a "clip strip" should "hang" on the right hand side of a health and beauty "fixture/mod".

25 C7/372, entitled "Know Your Stuff for Hardlines Replenishment – Point of Sale and Display Standards" was highly informative about the things called by the respondent "Point of Sale" and what was referred to at the top of page 4 of the document, "product display and protection guidelines".

26 C/373 was entitled "Know Your Stuff for Hardlines Replenishment – Warehouse Layout and Organisation". The whole of the document was relevant, but we noted in particular that it was said on page 5 that it was the responsibility of the "Hardlines Replenishment team"

26.1 "to keep the backstock areas tidy and stock sorted into the pre-agreed product groups",

26.2 "for keeping the promotional stock holding area well marshalled and tidy", and

26.3 "for dealing with and processing waste and damages within the warehouse".

27 C7/376 was entitled "Know Your Stuff for Hardlines Replenishment – Dealing with Discontinued Stock". It showed that the JH had limited responsibilities in regard to such stock. They were to do the following two things at the bottom of page 6.

"• Implement exit plans communicated by [her] Line Manager.
• Merchandis[e] in clearance space on the shopfloor if the product ha[d] been marked down."

28 There were also some relevant "guidelines for merchandising in clearance space" at the top of C7/376/7. C7/383 described what was involved in "Clearing Discontinued Stock" (including how to "Clear As You Go"; as stated on page 5 it was "a process that we follow to write off and clear discontinued stock from the store") and what was an "exit plan", which would be (as stated on page 4) "communicated by the Central Buying team to advise on how to deal with discontinued products". An example of an exit plan was given, and it was this.

"• Store in the warehouse and await further instructions.
• Use particular products in place of unavailable stock.
• Move discontinued products that have been reduced into clearance space."

29 C7/377 was entitled "Know Your Stuff for Hardlines Replenishment – Promotional And Seasonal Events". There were the following helpful passages in the document showing the responsibility of the hardlines replenishment team in regard to such events.

29.1 On page 5, this was said:

> "Setting up and merchandising new promotions and seasonal events is the responsibility of the Space, Range and Merchandising team, but they are not responsible for filling up the space or remerchandising as stock sells out. It is important that both the Space, Range and Merchandising and the Hardlines Replenishment team support and communicate with each other on merchandising and filling the space."

29.2 On page 6, this was said (showing, incidentally, that the above text was aimed at persons in the position of the JH and not her line manager):

> "The Price Integrity team have the responsibility for putting up and taking down Point of Sale on Promotion Ends and Seasonal space at the start and end of each promotion or event. The Hardlines department have the responsibility for maintaining the Point of Sale during the promotion or event and should remember:
>
> - Price messages being displayed should be removed or replaced if stock of the particular price message sells out.
>
> - Where stock sells out and is replaced with new or different promotion or event stock, ensure all Point of Sale is still relevant.
>
> - Check with your Line Manager if you are unsure about the Point of Sale to use or if you have a query."

30 C7/378 was entitled "Know Your Stuff for Hardlines Replenishment – Fix at shelf". "Fix[ing] at shelf" was stated on the first page of that document to be "a process for fixing any repairable products that are found damaged during filling up or tidying the shelves." The process was described with some useful photographs on page 4. On page 2, this was said.

> "Whenever a damaged product is found it must be removed from sale. Follow these steps to help you decide what to do:
>
> 1. Review the quality of the product.
> 2. If you would not buy the product yourself, remove it from sale.
> 3. Decide if the product can be repaired (fix at shelf will be covered later in the training) or needs to be taken to the designated waste area.
>
> ...
>
> Anyone who is involved in filling Hardlines and anyone that takes part in Rumble will need to follow this process.

...

You must carry out the following actions when you find any product which is damaged:

- Check any products that are damaged to make sure they are still fit to sell to a customer and are in a condition that would be acceptable.

...

- **Full Price** - Damage is minimal, product still very much intact, for example, the wrapping of a duvet is open (product can be fixed at the shelf).

- **Reduced Price** - The wrapping outer box of an example iron [sic] is dented and torn (remove from the shelf, repair and reduce)."

31 At the bottom of the next page, this was said.

> "If you find any products that can be repaired and are still fit to sell then apply the [fix at shelf] sticker(s) to the product and place back on the shelf rather than put the product in the designated waste area where it is likely to get even more damaged and then require recording as waste."

32 C7/379 was entitled "Know Your Stuff for Hardlines Replenishment – Using the Hand-Held Computer". The use of a hand-held computer was described on the first page of that document in this way.

> "On Hardlines we use the hand-held computer to enter data such as stock counts, waste and gaps. The information entered into the computer is transferred to the Store Ordering system via a radio frequency signal in the store. There are radio frequency receivers around the store that pickup the information that is submitted from the hand-held computer."

33 There was also on that page this helpful information.

> "It is important that hand-held computers are always signed out and back in again so that we know who has them and that someone else cannot use them with your ID. Most functions on the hand-held computer are selected using the stylus on the touch screen, or by using the buttons."

34 All four of the documents to which we refer below in this paragraph were also part of the "Know Your Stuff for Hardlines Replenishment" series. C7/380 described how to use the hand-held computer to record waste, and how to store and dispose of damaged or out of code products, or ones which had been subjected to an "Emergency Product Withdrawal" (as stated at the bottom of page 3 of the

document). C7/381 (subtitled: “Reductions”) described why and how price reductions of hardlines were to be made. C7/382 described how to carry out “Hardlines Rotation”. C7/385 was about “Emergency Product Withdrawals”.

Health and beauty

35 There was a similar series of documents relating to health and beauty replenishment. We do not refer to them in detail here, because it was not proportionate to do so, given that the JH’s work of replenishment of health and beauty products was only a small proportion of the work that she did. We record here, however, that the relevant documents included those to which we now refer. (All of the ones before us which were applicable specifically to the work of a replenisher of health and beauty products are referred to by us in paragraphs 24-34 of Appendix 6, relating to the work of Ms Oz, at pages 300-304 below.)

36 C7/398 was an informative but short introduction to the department, which in addition cross-referred to “Making Moments Matter”. C7/399 (it was also in the bundle as C7/411) was a longer document entitled “Know Your Stuff For Health And Beauty – Department Overview And General Points”. C7/400 was an 85-page document entitled “Know Your Stuff for Health and Beauty – Beauty”. It consisted of a series of “information cards” describing the kind of products sold in the department. C7/401 was also part of the “Know Your Stuff for Health and Beauty” series. It was subtitled “Backdoor, Warehouse And Pre-sort”. C7/403 was also part of that series and was subtitled “Department Routines”. It was very informative about for example what the respondent called its “Rumble” routine. In addition, at C7/403/1, under the heading “Introduction”, there was this passage.

> “In this session we are going to look at certain routines in the department that happen on a daily or regular basis. Each routine is important for the department and we need to understand the part we play in each one. Although as Health and Beauty colleagues we may not even carry out every routine – gap scan for example – unless we understand its function we run the risk of impacting the routine’s success and therefore affecting the shopping trip for the customer. This section will give an overview to the basic daily routines; why we carry them out and the impacts of not doing so.”

37 We thought that that was plainly applicable across the store, to all customer assistants. That was because if they did not know why the processes which were carried out by other employees (in many cases the customer assistants’ managers) were carried out, then that lack of knowledge might hinder the effectiveness of the processes, and that would be detrimental to the interests of the respondent. Accordingly, it was in our judgment not credible for the respondent to say that the sample claimants did not need to know about, for example, gap scanning.

38 It was relevant too that at C7/410 (which was subtitled “Standards, Cleaning and Ways of Working”), this was said (in the right hand column on the first page).

> "Health and Beauty is where customers have the biggest basket spend and we need to make sure that the cleanliness reflects the nature of the department.
>
> At the start of each shift, you should check the department to ensure that the fixtures, floor and stripping is all clean and well presented. We carry out a routine called five minute cleaning."

39 C7/414 was informative about "Restricted Fill And Product Protection". It related to the protection from theft of "High value and high risk products on Health and Beauty". C7/425 (entitled "Know Your Stuff For Health And Beauty – Replenishment") was a very informative document relating to replenishment of health and beauty products generally.

Our determinations of the factual disputes maintained by the parties in so far as we concluded it was necessary to determine those disputes

Introduction

40 We concluded that, given what we say above, our findings on the factual matters in dispute needed to start with the content of **paragraph 7**.

Supervision

41 Whether or not the JH (1) actually spoke to her line manager(s), (2) otherwise came into contact with her line manager or any other manager, or (3) was given lists of tasks to do (as disputed in relation to the things said in **paragraphs 7-10, 21-22 and 25**) was in our judgment of little relevance. What mattered rather more was the responsibility of a person in the position of the JH, and the evidence relating to the JH was that she was both permitted and required to exercise judgment as shown by the training materials to which we refer in paragraphs 14-39 above. It was self-evident that a failure to do whatever was required or at least expected by the respondent as shown by those materials could be the subject of disciplinary or capability proceedings, but that was irrelevant here, since those materials showed what was the JH's work for the purposes of section 65(6) of the EqA 2010 as far as the vast majority of her time at work was concerned. In addition, we failed to see how the order in which the JH did the things which needed to be done (and therefore the extent to which she exercised judgment about priorities, which was the subject of dispute in relation to **paragraph 25**) could affect the value of what she did, unless she was required to decide that order.

42 In that regard, we concluded that it was part of the JH's work for the purposes of section 65(6) of the EqA 2010 to do whatever her line manager had decided was required to be done by her during her shifts, as shown by what the parties agreed in relation to **paragraph 21**. That was in summary that a list of the replenishment tasks which the JH was to undertake during the shift would usually have been created

before she started her shift and would be waiting for her at the start of the shift. The reason for that practice was, as stated by Ms Parkin in paragraphs 50 and 53 of her witness statement, to make the most efficient use of the JH's time at the start of her shift. The precise proportion of the times when the JH was told which backstock cages should be worked seemed to us to be impossible to state reliably, but since the claimants accepted it was at least 50% of the time when that occurred, and the respondent said that it happened 80% to 90% of the time, the parties agreed that it did not happen all of the time. Therefore, at least for part of the time the JH was required to use some initiative in finding out from which backstock cage it would be most advantageous to the respondent to replenish. What the JH did in that regard was in our judgment (bearing in mind what was said in the agreed text of **paragraph 46**) with one exception, to which we refer in the next paragraph below, accurately stated by the respondent in its closing submissions in relation to **paragraph 22** (by way of words asserted to state the true position), which was this.

> "When the shifts did not overlap and there was no handover on the board (about 10% of the time), JH checked the lists on the front of the Backstock Cages in the Non-Food Warehouse to identify which Backstock Cages had not been worked very recently and so should be replenished by JH during her shift."

43 Whether the JH did that only 10% of the time was not the subject of submissions from the claimants, but nor was it supported by such evidence as there was from the respondent on the matter: Ms Parkin said in paragraph 84 of her witness statement that she "would say", i.e. she estimated, that she "specified which Backstock Cages [she] wanted [the JH] to work 80 to 90 percent of the time". If that was the case then the JH did what was referred to in **paragraph 22** for 10% to 20% of the time. In the circumstances, neither party was doing more than estimating the percentages, and we found that we could not accept either party's estimate of the precise percentage as reliable. We therefore concluded that at least half of the time, the JH would be told by Ms Parkin which backstock cages to "work", and that for the rest of the time she was required to check the lists on the backstock cages, as the JH said in paragraph 38 of her witness statement, "to see when they had last been worked". The JH would then "[start] with the ones that had not been worked recently", and as she went along, she "checked the aisles to see which ones needed filling". We concluded that she did that also when she was given a list of backstock cages to work, as it would have been inconsistent with the training materials to which we refer in paragraphs 14-20 above to do otherwise. We accepted in the light of those training materials that the JH was required to be flexible so that if there was an obvious need (in the respondent's business interests) to do something other than what she had been told Ms Parkin to do, then it was part of her work for the purposes of section 65(6) of the EqA 2010 to do that thing. We therefore accepted the claimants' proposed words for **paragraph 25** (assuming, which we doubted, that we needed to do that given the content of those training materials).

Co-ordination with colleagues

44 **Paragraph 23** was in these terms.

> "JH sometimes discussed the task list with colleagues. Although JH was mostly the only member of staff working on the Non-Food department on evening shifts there were generally two members of staff working on the Health & Beauty department. Approximately once per month, JH coordinated her tasks with these colleagues."

45 The respondent opposed that paragraph in its entirety on the basis that the JH accepted in cross-examination that she "did not talk about tasks or coordinate tasks with her colleagues in Health and Beauty". In fact, the proposition that she might have discussed with health and beauty colleagues the list of tasks for her, as a member of the hardlines team, to do, was surprising. Even if she did do that, though, then, we wondered, how was that going to be relevant to our task of deciding what was her work for the purposes of section 65(6) of the EqA 2010 in this regard?

46 **Paragraph 24** was more credible. It was in these terms.

> "During the 2017 Christmas period there was a temporary Christmas employee on shift to assist the Non-Food department . The temporary employee was given their own list of tasks to complete by JH's line manager. Sometimes JH and the temporary employee discussed their lists of tasks and split certain tasks between them. If there were heavy items that needed to be moved out to the shopfloor for replenishment, JH and the temporary employee decided how to allocate the items and whether they needed two people to move an item."

47 That paragraph was not opposed in its entirety. That was because it was accepted by the respondent that it was partly correct factually. But, again, we wondered, how was that going to be relevant to our task of deciding what was her work for the purposes of section 65(6) of the EqA 2010?

48 It was, we concluded (inevitably), part of the JH's work for those purposes to work in collaboration with any colleague, including a temporary member of the hardlines replenishment team (whether a temporary member of staff such as at Christmas, or someone who was employed primarily to work in another department), whenever it was reasonably necessary to do so. That was because not doing so would in our view have been a breach of the implied term of trust and confidence. We could not see how the parties could have disagreed with those propositions, and we suspected that if we had asked them for their responses to those propositions then they would have accepted them without any hesitation. If and to the extent that those propositions were relevant to the task of deciding what was the JH's work for the purposes of section 65(6) of the EqA 2010, then that was all that needed to be decided by us, we thought. But that conclusion was obvious, and as a result we suspected that the IEs would have taken the propositions stated in the first two sentences of this paragraph into account in any event.

49 Given those conclusions, we doubted that we needed to determine the parties' contentions in regard to **paragraphs 23 and 24**. In case it was necessary to do that, however, we state now that we concluded that whether the JH was required to (1) co-ordinate her work with colleagues in the health and beauty replenishment team or (2) split tasks in the manner asserted by the claimants in **paragraphs 23 and 24** respectively would have depended on the circumstances. Having said that, while we could not see how it could credibly be asserted that the JH would have been acting outside of her role as a customer assistant in doing the things referred to in those paragraphs if it was reasonably necessary to do so, we could also not see for what reason the JH might have needed to co-ordinate her work with the one or two members of the health and beauty replenishment team who would have been present at the time in question. The JH's evidence in cross-examination (recorded at pages 56-57 of the transcript of day 5) was consistent with her not needing to do that. The JH's witness statement did not refer specifically to **paragraphs 23 and 24**, although in paragraphs 8 and 10 of that witness statement she said that she stood by the wording in the EVJD. The claimants' submission in support of **paragraph 23** was that "The evidence of the jobholder should be accepted." Since (1) there was no specific evidence from the JH in support of the content of **paragraph 23**, and (2) there was before us oral evidence from the JH which was inconsistent with part of that paragraph, we rejected that submission. In the circumstances, we concluded that it was not part of the JH's work to discuss her work, and thereby co-ordinate her tasks, with the members of the health and beauty replenishment team unless the JH was herself replenishing health and beauty products.

50 As for what was described by the claimants in **paragraph 24**, it made perfect sense for the JH to do what it was said in that paragraph she did in fact do, and we accepted (if it was necessary to do so, i.e. assuming that it was relevant) that it was part of the way in which the JH did her work.

Interactions with customers

51 In practice, it was the JH's evidence (recorded at page 51 of the transcript for day 6), which was relied on by the respondent in closing submissions and which we accepted, the JH would usually have only one interaction with a customer in the hardlines area of the store per shift.

The manner in which the JH replenished

<u>The JH's work in the warehouse</u>

52 The dispute about **paragraph 27** and the related dispute about **paragraph 36** concerned the need or otherwise of the JH to keep the warehouse tidy. It was the respondent's contention that it was not part of the JH's work to "tidy up" unless it was on her list of tasks for the day. That was inconsistent with C7/373, as can be seen from what we say in paragraph 26 above. In any event, C7/373 showed that it was indeed part of the JH's work to "keep the backstock areas tidy".

53 The respondent did not assert that it was not part of the JH's work to do the other thing referred to in **paragraph 27**, which was to move empty cages to "the 'Central Delivery Area'". The respondent therefore accepted that **paragraph 27** accurately stated that it was part of that work. However, the respondent asserted that the JH needed to do that only about once every six months. We saw that Ms Parkin's oral evidence in cross-examination (recorded on page 65 of the transcript for day 7) was (so far as relevant, merely) was to the effect that if the JH came across an empty delivery cage or pallet when she was "working delivery", then she was required to take it "into the central delivery area". The JH said in paragraph 30 of her witness statement that for example if she saw that "a particular shelf needed filling up or the Recycling Cage needed to be moved to the Central Delivery Area" then she "did that before working through [her] list" and that to the best of her recollection, she "completed at least one task which was not on the list every other week". In those circumstances, we agreed with the thrust of the respondent's submissions and concluded that the JH took empty UoDs to the Central Delivery Area only (applying H31) occasionally.

Replenishing from cages generally

54 As for the disputes maintained in relation to **paragraphs 30-31**, it seemed to us that we had to decide whether there was any material difference in practice in terms of the demands and skills required to replenish from a delivery cage as compared with replenishment from a backstock cage. One possibly material difference that we could see was that there might be a need to remove more packaging from a delivery cage than from a backstock cage. However, that was likely to be so only if the contents of the delivery cage were wrapped in, for example, cling film, and we heard no evidence about the incidence of that. As for the fact that the delivery cage might have products which were on display in different aisles (and that was probably not the case, given what we say in paragraph 86 below), that would mean at most that there might be a need to move from aisle to aisle more when replenishing from a delivery cage than when replenishing from a backstock cage. However, the JH would not in those circumstances have had to work longer hours if it took longer to replenish from a delivery cage than it would have taken to replenish from a backstock cage. In any event, we concluded on the balance of probabilities that, given the factors to which we refer in paragraph 86 below, the store's back door staff would not do anything to the products on a delivery cage if it did not need to be pre-sorted. That suggested that if the JH was left with a delivery cage to work, then it would be one which contained goods from one particular area and that there would be no material difference between replenishing from a backstock cage and replenishing from a delivery cage.

55 Assuming for the sake of completeness that at least in some circumstances there was a material difference between a cage filled with backstock and one which could realistically be said to be a "delivery" cage, the issue of the frequency with which the JH in practice replenished from a delivery cage arose. The JH said (via **paragraph**

30) that she "handled delivery Cages approximately every other shift". Ms Parkin said in paragraph 181 of her witness statement that the JH would have done that only "around once every six months". The respondent asserted in closing submissions that 'By XX, when asked for a frequency, JH volunteered "once a month" - see Day 6 p. 6 §3 - 7.' In fact, the relevant exchange was on internal page number 83 of the transcript of day 6, at page 22 of the pdf file containing that transcript. The full exchange started at the bottom of page 82 and was this.

> "Q. Let me go back to then how often delivery cages were left over for you to work on a Friday evening. Would you agree it was around once every six months?
> A. No, it was a lot more frequent than that.
>
> Q. What figure do you put on it if it's not once every six months?
> A. At least once a month I would have some .... maybe just one or half of one, but I would have some form of delivery to work."

56 Ms Parkin was cross-examined on the issue as recorded on pages 27-29 of the transcript of day 7. The relevant part of the exchange was in lines 10-24 on page 27.

> "Q. ... I suggest that regularly, following a Thursday non-food delivery, there would be some cages left over by the time the day shift left and Ms Thompson's shift started.
> A. Very rarely.
>
> Q. You don't have any records, do you, of when delivery cages were left over on a Friday evening?
> A. Not a record, no.
>
> Q. I think you say twice a year, Ms Thompson says more often. It would be an odd thing for her to get wrong, wouldn't it? Is it not more likely that she can remember how often she had to deal with a delivery cage than you can?
> A. Possibly, but again I'm going off what I can remember and I only remember it being every six months, roughly."

57 We found both witnesses to be doing their best to tell the truth but that their recollections were arrived at with the benefit of hindsight and that we should approach them with caution. We preferred the evidence of the JH and concluded that the frequency was once a month.

58 We turn now to **paragraph 32**. It related to the number of cages in deliveries, which were said in it to vary from "8-10" to 30. Its content was in part clearly irrelevant in the circumstance that it was agreed by the parties that the JH did not deal with full deliveries. However, as the claimants pointed out in closing submissions, the content of the paragraph was not disputed, only opposed on the basis that it was irrelevant.

After careful consideration, we agreed that on its face the content was irrelevant but that the factual assertions in the paragraph might be relevant in some way that we could not currently see. In those circumstances, we declined to decide whether or not the factual assertions in **paragraph 32** were correct.

59 We saw that the factual content of **paragraph 37** was not disputed. The respondent's proposed typographical change to **paragraph 37.3** was therefore irrelevant. We say no more about proposed typographical changes unless the proposed change involved a change in meaning.

Checking high-value items

60 The issue of frequency which arose in relation to **paragraphs 38 and 39** was resolved by the conclusion that what both parties proposed fell within the definition of "Occasionally" in H31.

61 As for the dispute about **paragraph 39.1**, we first ascertained that the reference to a "Tote" was to a tote box of the sort shown at C7/696/10. The first part of paragraph 39.1 was that

> "JH opened the Totes to check the small items. The Totes were sealed with a security seal, which JH broke by gripping it and pulling it away from the Tote to snap it. JH understood that if a seal was broken she should not accept the item and that she should tell her manager. This happened approximately once every 6 months."

62 The respondent's contentions included that

62.1 "JH did not identify any incident when she identified that the seal was broken. It is implausible that JH did so given the factors identified in Ms Parkin's unchallenged evidence", and

62.2 "Even if she were to have broken the security seal (which is very unlikely), this could be done with minimal effort."

63 Those submissions were not about what the respondent employed the JH to do as part of her work. In any event, we could not see a justification for rejecting the factual propositions set out in paragraph 61 above. From what we could see, and on a balance of probabilities, the need to consider whether to accept a tote box the seal on which was broken was a factor of which the JH needed to be aware. The significance of that need in the determination of the value of the JH's work for the purposes of section 65(6) of the EqA 2010 was another matter. We doubted that it had much significance but concluded that the possibility of there being a need to reject a tote box the seal on which was broken was a possibility to which the JH needed to be alert, so that if it added anything to the requirement to pay attention to what she was doing, then that possibility was relevant.

64 Similarly, the respondent accepted that, as claimed in **paragraph 39.3**, it was the JH's responsibility to inform her line manager "if anything was missing from the delivery". The fact (if it were so) that she did not have to do that during the evaluation period was in our judgment of little weight in the circumstance that the JH was (and we thought that this was an obvious part of the JH's role) required to be alert to the possibility that something was missing from a delivery and that in the event that something was so missing, she had to tell her line manager accordingly.

65 We resolved the dispute about **paragraph 39.4** in the same way: the JH was required to be alert to the possibility of a delivery for another store having been made to Haydock.

66 As for the dispute maintained in relation to **paragraph 39.5**, that concerned the claimants' proposed final sentence ("A full delivery included up to six or seven boxes, each with around thirty small items, alongside two to three Cages of electrical goods."). We concluded that that sentence stated some helpful factual background information about what was usually in a full delivery. The sentence's content was not disputed: only its relevance. The respondent submitted that we should not make a finding of fact on that sentence because the JH "never dealt with a full delivery". That was in our judgment not the test of relevance here. That test was whether we accepted that the factual material in question might need to be taken into account by the IEs. We could see that it might. Therefore we accepted the final sentence.

Checking for damaged goods

67 The issue of frequency arose in regard to the content of **paragraph 40**. The factual content of that paragraph (checking "the leftover Delivery Cages for damaged goods" and consequential things) seemed to us to be obviously correct in that it was obviously part of the JH's work for the purposes of section 65(6) of the EqA 2010 to do what was described in the paragraph. In fact, the parties' contentions on the issue of frequency were (applying H31) to the same effect: the event in question occurred occasionally.

Backstock

68 **Paragraph 43** was disputed in relation to the extent to which the JH needed to "remember which products were displayed in which aisle" when adding stock to the backstock cages. The respondent submitted in that regard that we were able to see from the photographs at C3/6.6, C3/6.15 and C3/6.17, that the JH "could easily identify the particular Backstock Cage from a glance in order to add the same or similar surplus products." We ourselves recalled what was said at the top of C7/373/5, which we have quoted in paragraph 26.1 above, namely that it was the responsibility of the "Hardlines Replenishment team ... to keep the backstock areas tidy and stock sorted into the pre-agreed product groups". In those circumstances, we agreed with the respondent's submissions here.

69 However, the respondent submitted that the JH only once or twice in the evaluation period put into backstock cages stock which had just been delivered and which could not be put out on the shelves. The respondent submitted that "[f]requency is important to include for context so that the IEs are not misled as to the limited circumstances in which JH moved surplus stock from Delivery Cages onto Backstock Cages." However, there was no evidence before us about that frequency, and the respondent's proposal for the insertion of the words "Once or twice in the Evaluation Period" in that regard was unsupported by anything that we could see. In any event, we regarded the issue as irrelevant because if, as the respondent accepted, there was a possibility of a need to put newly-delivered stock into backstock cages then that was plainly part of the job, or work for the purposes of section 65(6) of the EqA 2010, of the JH.

70 **Paragraph 45** started:

> "JH was required to use spatial reasoning skills to stack products in a way that maximised the space in the Cage. She stacked products in a staggered manner rather than directly placing them on top of one another to improve the stability of the stack of products."

71 The respondent relied on the claimants' pictures of the backstock cages at for example C3/6.6, C3/6.14, C3/6.15, C3.6.16 and C3/6.17 rather than its own training materials relating to stacking of cages in the process of assembly to which we refer in paragraphs 61-66 of Appendix 8 at page 403 below. That was probably because in putting stock into backstock cages, there might be a temptation to just cram the new stock in. We concluded that common sense suggested, and those pictures showed, that the JH was required for the purposes of section 65(6) of the EqA 2010 to juggle items on the backstock cages when putting new stock on the cages. The assertions made by the claimants in the first two sentences of **paragraph 45** in our judgment in part missed the mark, since, we concluded, it was sufficient for present purposes to conclude that fitting new backstock onto a backstock cage plainly could be problematic, and that in order to do that, it might be necessary to move the existing stock around.

72 In the third sentence of **paragraph 45**, it was asserted by the claimants that the JH would in some limited circumstances add shelves to a backstock cage. The evidence in paragraph 59 of the JH's witness statement supported that assertion, but Ms Parkin said in paragraph 204 of her witness statement that she could not remember ever seeing that happen and that the "positioning of the shelves on the Backstock Cages was very rarely changed, as colleagues liked to keep the Backstock Cages the same". The latter was likely to be true but it did not mean that the shelves were never, or, more aptly, never needed to be, moved. The photographs to which we refer in the first sentence of the preceding paragraph above showed that the shelves plainly could be moved. We thought that it could not reasonably be said that it was not the job of a hardlines replenisher to move backstock cage shelves, or insert new

ones, when necessary. In addition, at C7/369/5, it was said that the movement of stock was the job of a "Replenishment Assistant", and that such movement including "moving ... All Hardlines stock back to the warehouse, ensuring that all cages are post-sorted, condensed and placed in the correct warehouse location". The word "condensed" was used by the respondent to refer to the filling of cages, both in DCs (as can be seen by for example what we say in paragraph 73 of Appendix 8, at page 406 below) and stores. On the following page (i.e. number 6) of C7/369, there were said to be some "Post-sort and warehouse standards", which included this one:

> "Where there are two partially full cages of the same product group the stock is condensed onto one cage."

73 We could not see how that could be done without being willing and able to move shelves within a cage.

74 Another relevant factor here was that it was unlikely that the respondent would permit the JH and her replenishment colleagues simply to add cages to the backstock areas. However, the contrary was asserted by the respondent in its closing submissions in relation to **paragraph 45**, where it said this.

> 'There was no requirement to maximise space in a cage. On the contrary JH described that at Christmas she would "add another backstock cage, because, like, we get more dinner services or especially toys, we need an extra backstock cage for toys as well". – Day 6 pp. 88 – 89 § 23 – 1'

75 In fact, the words quoted were in the passage in line 23 of page 87 to line 1 of page 88 of the transcript of day 6. The respondent's submission that there was "no requirement to maximise space in a cage" was contradicted by what was said on page 1 of C7/373, which (as we say in paragraph 26 above) was entitled "Know Your Stuff for Hardlines Replenishment – Warehouse Layout and Organisation". Under the heading "What You Need to Know/Do" (which, incidentally, confirmed the importance of knowledge as well as practice) and the subheading "Warehouse Layout", this was said.

> "It is important to have a tidy and well organised warehouse to help us manage the flow of stock. There are a number of key principles that must be followed in and around the warehouse:
>
> - The warehouse must be well laid out – everything has a place.
> - There must be enough room for working, finding and moving stock.
> - The warehouse must be kept clean and tidy at all times with signage on display.
> - There should be well defined paths in and around the warehouse for moving stock to and from the backdoor, which are kept clear from obstacles.
> - Faster selling products should be located closest to the shopfloor.

- Discontinued products must be stored separately from ranged stock.

All of these impact on the store operation and ultimately the availability to our customers. A badly organised warehouse means more work, more cages and mess, with less space."

76 In addition, in our view the effective use of space (which costs money to buy or rent) is in our judgment a necessary requirement of any well-run business. The fact that the use of additional space was permitted by the respondent only when necessary was confirmed by what was said under the heading "Cards" on page 3 of C7/373, which was this.

> "Provide the merchandisers an area in the warehouse for storing cards, and allow them to use additional cages in the same area at the seasonal times listed above."

77 In any event, the conclusive piece of evidence before us here was the reference to condensing two cages into one, at C7/369/6, which we have set out in paragraph 72 above. We could not see how in practice the contents of two cages could be condensed without the need at least sometimes to move shelves in the cage into which the products were condensed. As a result, we concluded that the moving of shelves was something that was on occasion required of the JH and it was therefore part of her work for the purposes of section 65(6) of the EqA 2010. The proposition that she might on occasion need to move shelves when she was not condensing two cages into one was in our judgment impossible to reject. Therefore we concluded that the substance of the claimants' submissions in regard to moving shelves in cages, which were made in relation to **paragraph 45**, was correct, and we accepted that substance. As for the detail of that paragraph, it seemed (applying a common sense approach) to us to be likely to be true, so, on the balance of probabilities, we accepted that it was true.

<u>Hardlines replenishment generally</u>

78 Given the references to the use of initiative and taking ownership of a display that is short of stock in C7/653 to which we refer in paragraph 108 of Appendix 4 (at pages 208-209 above), we thought that the respondent's proposed additional words for **paragraph 48** were unnecessary and, to the extent that they sought to diminish the importance to the respondent of customer assistants such as the JH using their initiative by being on the lookout for low stock on the shelves on the shop floor, wrong.

79 Similarly, we concluded that the JH had to use her initiative in tidying up cards, as she claimed in **paragraph 51**, and did so in the manner described in that paragraph. That was both the result of the application by us of a common sense approach and because this was said at C7/386/11 (which we regarded as stating in regard to a parallel situation the applicable principles):

> "Ensure magazines are kept neat and tidy and located in the correct facings on the merchandising plan."

80 The respondent's opposition to the opening words of **paragraph 54** ("JH knew which products were most likely to need replenishing depending on the time of her shift and the season") was in our view wrong, given that we found as a fact (applying the principles stated for example in C7/653 to which we refer in paragraphs 107 and 108 of Appendix 4, at pages 208-209 above) that it was part of the JH's work to be aware of which products were most likely to need replenishing, depending on the time of day and the season. Even though it was true that she could not be faulted for doing only what the respondent said in response to **paragraph 54** was all that was required (namely "replenish[ing] according to the product labels next to gaps"), we thought that it was obviously part of the JH's role to be aware of which stocks were the most fast-moving and therefore most likely to need to be replenished. The subparagraphs of **paragraph 54** were, we concluded, useful illustrations of the kind of knowledge which the respondent would (if these claims had not been made) have immediately accepted it was helpful to the respondent for the JH, or any other customer assistant replenishing hardlines, to acquire. In those circumstances, we accepted that if the JH did indeed take into account the factors referred to in **paragraph 54**, then she was in that regard doing her job, but that in any event, it was her job to take into account those factors.

81 The dispute maintained about the content of **paragraph 55** was ultimately about the responsibility of the JH to use her initiative. The principles of C7/653 to which we refer in paragraphs 107-108 of Appendix 4 (at pages 208-209 above), together with the exhortation at C7/656/11 to check the displays of products that are being promoted as they "can run out quickly", showed that the JH was encouraged to use her initiative, and therefore that it was part of her work to do so. Whether or not the JH wrote herself a note to ensure that she did not forget an aisle that looked empty when she walked through the store was in our judgment irrelevant, since that was about how well she did her job rather than her job.

82 **Paragraph 56** was in these terms.

> "When working delivery Cages, one Cage mostly included products for an average of 5 different aisles. Backstock Cages generally contained stock for a specific aisle."

83 The respondent opposed those words, proposing their replacement with thse alone: "Backstock Cages generally contained stock for a specific aisle." The submission in support of that proposition was this:

> "This section is about replenishment of Backstock Cages. There is no need to include information about Delivery Cages in this section. Given reference to Delivery Cages may confuse matters, this wording should be deleted."

84 The respondent was plainly saying by implication that the JH did not need to move between aisles when replenishing from backstock cages and that the JH might need to do that when replenishing from delivery cages. That proposition was explicitly stated in **paragraph 61** in the following words, with which the respondent agreed: "When Cages contained products for multiple aisles (i.e. Delivery Cages)".

85 Both parties appeared to us to have ignored the impact of the things said about pre-sorting at C7/374/3-5, which were about the role of the warehouse staff whose work included "[dealing with] Deliveries and Pre-sorting Stock". The document was one of the "Know Your Stuff For Hardlines Replenishment" series. The following passage at C7/347/3-4 showed that the aim of pre-sorting was to minimise the need to move up and down aisles when replenishing from a delivery.

> "***What Is Pre-sorting?***
>
> When Hardlines deliveries arrive at store they are moved to the delivery holding area. Each cage contains stock but the product groups within each cage may be different, for example there could be Toys, Bedding and Stationery all on the same cage. In order to get all the same type of products together, we need to break each cage down and re-organise the stock so that the same type of products are on the same cage. This process is called pre-sorting.
>
> ***Why Do We Pre-sort?***
>
> Replenishment staff can be more efficient if they can spend more time filling and less time moving from aisle to aisle, they can:
>
> • Work cages for small sections of the shopfloor reducing the distance staff have to travel up and down aisles as they only have to visit one location for every cage they work.
>
> ...
>
> ***How To Pre-sort***
>
> Most cages are delivered into store with some level of pre-sorting already carried out at the depot. This means some cages require less sorting than others. However, we still need to pre-sort all cages with more than three layers so that when they are taken to the shopfloor they need to travel as little as possible."

86 We saw no reason to determine the minute dispute about the extent to which the JH transported goods from the warehouse to the shop floor in cages, as maintained in

relation to **paragraph 57.1**. (The dispute was about whether it was "[a]pproximately 90%" of the time or "more than 90%" of the time.)

87 The difference between using a hand pump pallet truck 2% of the time (as claimed by the respondent) and 5% of the time (as claimed by the claimants) was material, but both of those figures were guesses. The JH's initial recollection, recorded at C3/4/16, internal page 63, was that the proportion would "vary on the time of year", but that at times it would be "weekly" and certainly "more than [a] few times a year". We concluded that that initial recollection was accurate. On that basis, the frequency (applying H31) for the use of the hand pump pallet trucks by the JH (as referred to in **paragraph 57.2**) was "regularly".

88 The dispute in regard to the first part of **paragraph 57.3** was only about the terminology used by the claimants, which was obviously mistaken. They referred to a "flat-top Dolly" instead of to a flat-top trolley. The possibility of the use of a flat-top trolley was mentioned in a several places in the training materials. We saw that at C7/373/5, the trolleys were referred to as "filling trolleys", and that at C7/370/2 (which was part of the "Know Your Stuff for Hardlines Replenishment" series; its subtitle was "Aisle Set Up"), this was said.

> "Filling trolleys are brought out onto the shopfloor and set up within aisles where required. Not all aisles require a filling trolley, it depends on the type of product group being filled or the preference of the individual member of staff."

89 In the light of those words, we concluded that we did not need to decide whether or not the respondent's proposed new words for **paragraph 37.3** were apt and therefore should be taken into account by the IEs.

90 A dispute about the second sentence of **paragraph 59** (which related to the cleaning of aisles by the JH) was maintained by the respondent on the basis that the JH's knowledge that certain aisles tended to be more messy than others was irrelevant. We concluded that such knowledge was not irrelevant. It was relevant because it helped the respondent for the JH to be aware that some were aisles more messy than others. That was because the JH was obliged as part of her work to clean as she went along. As for the proposition advanced by the respondent (also in relation to **paragraph 59**) about the frequency with which the JH cleaned shelves before putting stock on them ("no more than two times a year"), it was based on the estimate of Ms Parkin in paragraph 213 of her witness statement. We found it hard to believe that the JH cleaned shelves before putting new stock on them only twice a year. In our judgment the work of the JH (and that of any replenisher, of anything, for the respondent) in regard to cleaning shelves in the course of replenishment was best encapsulated by what was said at C7/653/7, which was this.

> "Your role is to make sure products are presented in their best light. Check when taking out stock and also when passing displays to make sure they meet

the standards you would expect if you were a customer. Take ownership of any issues – tidy and clean as you go."

91 We failed to see how it could make any difference to the value of the work of the JH that (if it were the case) she "worked" 4-7 cages per shift rather than 5-7 such cages. That was the subject of the dispute in relation to **paragraph 60**. The number of cages which she worked was likely to depend on a number of factors, including the number, size and weight of the things on them. We therefore declined to determine that dispute.

Moving cages

92 The dispute about the first part of **paragraph 61** was best regarded as made unnecessary by what was said at C7/369/1-2, to which we refer in paragraph 23 above. Whether or not the JH used a flat-top trolley, as asserted by the respondent by way of a proposed addition to **paragraph 61**, was in our judgment not something on which we needed to make a finding of fact, given that it was possible for her to do that, as recognised in the documents to which we refer in paragraph 88 above. The number of customers on the shop floor in the evening (which was the subject of a second addition to **paragraph 61** proposed by the respondent) was, as we recognise in paragraph 7 above, less than during the day. We therefore rejected the respondent's proposed additions to **paragraph 61**, on the basis that they were about matters for which we have already catered above.

Frequency of perfume replenishment from the locked cupboard

93 While the JH said in her interview of 13 May 2022 of which there was a record at C3/4 (the relevant pages were internal numbers 77-79) that she replenished perfume from the locked display cabinet on the shop floor "Maybe once or twice" during the "year or 10-month period" in question, she also said that she could not remember how many times she did it, and she said in paragraph 61 of her witness statement that she "had to restock them most often around Christmas, Valentine's Day and Mothers' Day." That was likely to be true. In the circumstances, we concluded that the right word to describe the frequency with which the JH unlocked that cabinet and replenished from it (as described in **paragraph 62**) was "occasionally".

Filling up shelves

94 There was nothing that we could see in the training materials about how, precisely, a shelf should be filled by a replenisher. The following things which were said at pages 5, and 8-10 of C7/386/5 (to which we refer first in paragraph 18 above) were if not obvious then at least very understandable:

94.1 "When filling an aisle or product group there are a number of things you can do to help keep the shelves clear and tidy" (C7/386/5),

94.2 "Fill to the facings on the shelf edge label" (C7/386/8 and C7/386/9), and

94.3 "If you have high volumes of stock, fill the fixture with stock" (C7/386/10).

95 We presumed that there was no need to train, precisely, how to fill a shelf except in those regards because it was obvious how to do it: neatly, and filling the shelves to the full. We also presumed that the respondent would not want its replenishers to be careless about how they did their work, which would in any event in our view be contrary to the obligation to use reasonable skill and care. Despite that factor, the respondent proposed the deletion of the words "placed products carefully, as she" in the following (first) sentence of **paragraph 64**.

> "JH placed products carefully, as she was aware of the safety risk posed to customers and the risk of damage to products if the products were to fall."

96 That opposition was on the basis that '"carefully" is an evaluative word. It is unnecessary and unsupported by evidence from JH.' However, even with the omission of the words to which the respondent objected, the JH's work was accepted by the respondent to include an awareness of the safety risk posed to customers and the risk of damage to products if the products were to fall. The issue here was what were the demands on the JH in terms of skill and responsibility when putting stock out on shelves. It was in our view obvious that it was part of the JH's work to put products out carefully. Whether or not she did so was not relevant here, since that was a question about how well she did her job. If the first part of **paragraph 64** was read as being a statement about the need to take care then it was correct.

97 The second and third sentences of **paragraph 64** were as follows.

> "Approximately one in six deliveries arrived with heavy products stacked at the top. When replenishing from a Delivery Cage that had heavy products stacked at the top JH may have had to reach up and lift the products carefully from the top of the Cage, which could be around or above head height."

98 The respondent's submissions in response included that the issue of "[f]requency should be included". We agreed with that proposition, but not with the next one in the submissions, which was that they had to be dealt with in regard to delivery cages, which were the subject of **paragraph 31**. That was because the fact that a backstock cage might contain heavy items at the top was accepted by Ms Parkin in cross-examination (as noted on internal page 54 of the transcript for day 7), and because that meant that it made sense not to deal with the situations of backstock cages and delivery cages separately in this regard.

99 We could not come to a reliable conclusion on the evidence before us about the precise frequency with which the JH might need to "reach up and lift the products carefully from the top of" a backstock or a delivery cage. That was because plainly only some of those cages will have had heavy (or comparatively heavy) items at the

top, and, understandably, there was no substantial evidence before us on that. We nevertheless accepted that if cages had heavy items stacked at the top then that would make it more difficult to unload and put out the stock in that cage than if the items were light. Whether or not the heavy items were above lighter ones was irrelevant, although it must have been a daily occurrence that heavier items were put on top of lighter ones. Indeed, we thought that the JH was likely at least once a week to have to "reach up and lift the products carefully from the top of the Cage, which could be around or above head height".

100 The dispute in regard to **paragraph 66** (the first sentence of which was this: "Products stocked in the Non-Food department were often heavy and required repetitive physical effort to move from the Cage or Pallet to the shelf.") was about something similar. The respondent objected to the use of the word "heavy", on the basis that it was "an evaluative word", and said that the JH should instead "provide weights". We thought that the word "heavy" was helpful in making it clear that the EVJD was referring to items which were more difficult to lift, but we also thought that the respondent's submissions led to a sensible conclusion about the factual circumstances which were the subject of **paragraph 66**.

101 That was because the respondent proposed the addition of some words to the effect that the JH might obtain assistance from a colleague to move heavy, bulky items such as a television or a barbeque. We accepted the proposition advanced implicitly by the respondent in those proposed words that the JH did not need to lift on her own items which were too heavy safely to lift on her own, and that she was in those circumstances obliged to obtain the assistance of a colleague to lift that item. That was for the following reasons. At C7/823/10, the pictures at the bottom of the page showed that the respondent required staff such as the JH to obtain assistance from a colleague when moving items which were too heavy to be moved safely by the JH. The text at C7/823/16 put it beyond doubt. The whole of the content of that page was relevant. The first half of the page was in these terms.

> "Sometimes you will need to move an object that is too heavy or difficult for one person. As a rough guide, if you believe one or more of the following apply, a two-person lift is highly recommended:
>
> - It involves significant exertion/effort if you were to lift it on your own.
> - It is so large that you have to reach forwards awkwardly to hold it if you were to lift it on your own.
> - You can feel the strain on your back if you were to lift it on your own.
> - Your line of sight is affected by the load.
>
> A two-person lift shares the load between two people. As a rough guide, the capability of two people lifting together is about two thirds of the sum of their individual capabilities."

102 Otherwise, we thought that the content of paragraphs 64 and 66 as proposed by the claimants was borne out by what was said at C7/823/9-18, which bore close scrutiny.

Items left by customers in the wrong place

103 **Paragraph 69** in part stated an obvious aspect of the JH's work, which was the circumstances in which the JH might need to deal with damaged products. However, those circumstances were stated by reference only to the possibility of the JH finding "products that customers had left in the wrong place". The respondent asserted that the fact that the JH said in paragraph 64 of her witness statement that she "sometimes" found "products from other departments in the Non-Food aisles" meant that the word "sometimes" should be inserted into the first sentence of **paragraph 69**. However, **paragraph 69** related not only to products from other departments. It related, rather, to products which "customers had left in the wrong place, damaged products and occasionally half-eaten sandwiches". In any event, we doubted that the frequency with which the JH in fact came across such products was determinative of her work for the purposes of section 65(6) of the EqA 2010. What was important here in our judgment was that she had to be aware of the possibility of products from other departments being out of place and that she had to deal with them if she found them. If we had to decide the frequency with which that occurred then we would conclude that it was (applying H31 and on the basis that the JH worked only two shifts per week) "regularly".

104 The respondent's objection to the full wording of **paragraph 70** (concerning finding "damaged products from another department in the Non-Food aisles") ignored the impact of the respondent's WIBI policy in C7/188, to which we refer in paragraph 83.10 of Appendix 1 (at page 55 above). That policy was expressly referred to in relation to hardlines replenishment at C7/378/6 and the content of **paragraph 70** as proposed by the claimants was in line with what was said at C7/823/47. In addition, as the respondent recognised in its closing submissions, common sense was applicable here. We concluded as a matter of common sense that if the JH knew where to put an item that passed the WIBI test, then she would put it there, but if not then she would hand it to a member of the team which replenished the area to which the item belonged. The accuracy of that conclusion was shown by what was said at C7/403/1 about the "Rumble": "Take products back to their correct location if they have been left by customers." We therefore accepted the claimants' proposed words for **paragraph 70**.

105 The content of **paragraph 71** simply applied what was said in **paragraph 70** to chilled or frozen products. We concluded that the respondent's opposition to what was said in **paragraph 70** was misplaced if and to the extent that it was inconsistent with what was said in C7/188. The final sentence of **paragraph 71** was, it was true, not supported by direct oral evidence, but the JH did say in paragraph 8 of her witness statement (which we have set out in paragraph 133 below) words which had to be read as such evidence. In any event, it was plainly a good idea to attach a note to a chilled or frozen item if it had been found in the hardlines department, stating that

fact, and the respondent did not say that it was a bad idea. Therefore, we accepted the claimants' proposed words for **paragraph 71** in their entirety.

Stated prices for goods on display

106 The issue of prices on shelf-edge labels not being accurate was the subject of **paragraph 73**. The respondent wrongly responded to the content of that paragraph on the basis that "The EVJD should be about JH's role. JH conceded that price integrity was not an aspect of her role." That was wrong because of the respondent's repeated emphasis in its training materials on the need for all shop floor staff to be vigilant about the accuracy of stated prices. By way of example, at page 1 of C7/473 (the document was entitled "Know Your Stuff For Produce – Safe And Legal") under the heading "Shelf Edge Labels" it was said that it was "a legal requirement that we display the correct price for a product", and that as the member of staff in question replenished the shelves, he or she should "complete a 'Four Point Check' to ensure the products match the information on the Shelf Edge Label", and that "As well as price you would make sure the product description, weights or measures and European Article Number are correct." We could not see that the fact that that document related to produce replenishment rather than hardlines replenishment meant that hardlines replenishment team members were permitted to take a different approach.

107 We saw no reason to disagree with the factual propositions stated in the whole of **paragraph 73** about the impact on the respondent's interests of a pricing error, although, given what we say in paragraph 687 of Appendix 8, which we have set out in paragraph 65 of our second reserved judgment (at page 24 above), we concluded that the propositions were irrelevant at this stage. We also saw no reason to doubt that the JH was aware of the impact in that regard of the possible events referred to in that paragraph, but, contrast, we concluded that that awareness might be relevant. It would in our judgment be relevant if it was part of the work of the JH for the purposes of section 65(6) of the EqA 2010 to be aware of that impact. We read **paragraph 73** as a statement that it was part of the JH's work for those purposes to be on the lookout for the possibility of pricing errors of the sort described in the paragraph, and we agreed (without any hesitation, applying a common sense approach but also on the basis of what was said at C7/473 and what was said about the need to "Stay mindful" to "help [the respondent] stay safe and legal" at the bottom of C7/643/1) that it was part of the JH's work for the purposes of section 65(6) of the EqA 2010 to be on the lookout for the possibility of pricing errors.

108 **Paragraph 74** concerned the four-point check. We did not see a material difference between the parties about the words of **paragraph 74** by the time of closing submissions, given that the claimants no longer were contending that the JH would remove a shelf-edge label if it was incorrect. That was consistent with the only instruction that we could find for that situation, which was at C7/823/43, and was this:

> "If you find any Shelf Edge Label that is not correct or doesn't match the product it is next to, contact a member of Price Integrity."

109 We therefore accepted the claimants' words for **paragraph 74** as they were proposed by the time of closing submissions.

Special displays

110 The respondent proposed some words to be inserted into **paragraph 80**. The proposals included the replacement of the words "JH knew" with the words "It was self-evident" immediately before these words: "which products were stored using which display equipment". We agreed with the respondent's proposed amendments to **paragraph 80**, since in our judgment they were more apt than those which they were intended to replace.

111 The words of **paragraph 81** were contested by the respondent on the basis that the JH "dealt with Merchandising Aids" only on a "very rare" occasion rather than "occasionally". That proposed amendment was made on the basis that Ms Parkin said in paragraph 122 of her witness statement that the JH "had very little to do with Merchandising Aids during her shifts in the Evaluation Period." That was in turn said because it was, Ms Parkin said in the same paragraph, "the responsibility of the Price Integrity Team to put up and take down Merchandising Aids". However, the JH's evidence in cross-examination as recorded on pages 33-34 of the transcript of day 6 about putting an empty merchandising aid in the warehouse made sense to us. If we had to determine this dispute (which we doubted), then we accepted the claimants' words for **paragraph 81**. That was because we accepted that the JH might well have had to move the merchandising aids from time to time, and that it was therefore not likely to have been done by her only "very rarely".

112 The replenishment of batteries was the subject of a dispute maintained about **paragraph 83**. The respondent maintained that the JH did not do such replenishment. Whether or not she did so seemed to us to be irrelevant in the light of what Ms Parkin said in re-examination as recorded at page 167 of the transcript of day 7, which was that it was the same kind of work as other kinds of replenishment. We saw, however, that Ms Parkin said in paragraph 125(a) of her witness statement that replenishing batteries was "quite a time-consuming task", which was why they were replenished "early in the morning before the Store opened", and that she (Ms Parkin) "never set [the JH] the task" of replenishing batteries in the off-fixture displays during the JH's evening shift. Ms Parkin did accept, though (as recorded in lines 5-6 of page 62 of the transcript of day 7), that she would have expected the JH to top up a battery display "if it was really, really low and looked quite scruffy-looking". Given what was said at C7/656/6-13, we thought that that understated the JH's responsibilities. She was, we concluded, required at all times to look out for gaps or low stock in all displays, at least in the area for which she was primarily responsible, and to fill those gaps on her own initiative.

113 We noted that the content of **paragraph 84** was contested by the respondent only on the basis that it was a repeat of what was said elsewhere.

114 **Paragraph 85** was in part a repetition also, but in part a contention that the JH decided where promotional and off-fixture displays were put on the shop floor. We found the following passages in the training materials to be the best evidence of the JH's role in regard to such displays. On page 2 of C7/372 (to which we refer in paragraph 25 above), this was said.

> "The Price Integrity team are responsible for putting up and taking down Point of Sale on promotion ends, seasonal space and some ranged space at the start and end of each promotion or event, and when communicated to do so in the store Point of Sale brochure. The Hardlines department are responsible for maintaining the Point of Sale during the promotion or event".

115 On page 3 of C7/377 (to which we refer in paragraph 29 above), this was said.

> "Side stacks, dumpbins and Off Fixture Display locations are agreed for each store following the congestion plan."

116 Those two extracts showed that it was not the role of the JH to decide where to put off-fixture displays. However, she still had a role in regard to such displays, as could be seen from the fact that at C7/377/5, this was said.

> "Setting up and merchandising new promotions and seasonal events is the responsibility of the Space, Range and Merchandising team, but they are not responsible for filling up the space or remerchandising as stock sells out. It is important that both the Space, Range and Merchandising and the Hardlines Replenishment team support and communicate with each other on merchandising and filling the space.
>
> ...
>
> ***Implementation (Side stacks And Off Fixture Display's)***
>
> The Hardlines department have the responsibility for setting up and maintaining side stacks, Off Fixture Display's and dumpbins."

117 We found C7/377 to be a rather clearer and better statement of the JH's responsibilities (such as they were) in regard to promotions, seasonal events and off-fixture displays than the content of **paragraphs 83-85**. Having said that, the only material conclusion which we drew from those documents was that replenishment of an off-fixture display was in practical terms the same as replenishing items on the respondent's shelves, and that it was not the JH who decided where such displays were placed on the shop floor.

Did the JH move promotional displays and mods?

118 After a very careful scrutiny of C7/377, including in particular page 3 of that document, and the things which we have set out in paragraph 116 above, and after taking into account the answers given to questions on pages 1-3 of C7/389 (to which we refer in paragraph 20 above), we concluded that the claimants' proposed words for **paragraph 86** were apt and added something material to the words which we have set out in paragraph 116 above.

119 The things which were described in **paragraphs 87-90** (various tasks relating to promotional shelving areas) were contested by the respondent: it was the respondent's case that the JH did not do them, or did them much less than the JH said she did them. The JH said that she did do them in the manner and to the extent stated in those paragraphs. The key to this dispute was what the JH's role: did it include doing those things? It was not the JH's role to determine where new products were put out. That was something for which the "Merchandising team" was responsible, given what was said at the top of page 5 of C7/386 (to which we first refer in paragraph 18 above), which was this.

> "You should never put the product out on the shelf, or change the merchandise plan yourself to fit the product in. New lines placed on the new lines cage are put on sale by the Merchandising team, who ensure the product is put out in the right location and given the right amount of space."

120 In contrast, it was the role of the hardlines team to deal with gaps in promotional ends. That was clear from the first section of C7/389, which was headed "Implementing Promotions & Seasonal Events". For example, one of the things which was a correct response to the request (number 5, at the top of page 3) to "Name 3 visual merchandising guidelines to consider when re- merchandising stock" was this:

> "Change shelf heights to reduce air gaps and maximise space".

121 In addition, in answer to the question (numbered 4, on page 2) "How would you deal with out of stock gaps on promotions and seasonal space?", the following was stated:

> "Promotions:
>
> - Increase facings of promotional products available in volume
> - Combine stock on two or more similar themed promotion ends, for example, both cook/home ends and launch a promotion end for the next promotion period".

122 On the basis of those training materials, we accepted the JH's evidence about what she did, and how often she did it, as described in **paragraphs 87-90**. She said in cross-examination (as recorded on pages 39-40 of the transcript of day 6) that she did those things (apart from getting spare shelves or hooks, which she did only rarely,

as stated in **paragraph 90**) whenever there was a seasonal promotion or one such as "Back to School". There was no evidence before us about the number of promotions that the respondent had per year. In those circumstances, we concluded that the most apt description of the frequency with which the JH did the things referred to in **paragraphs 87-89** was "occasionally".

Reductions

123 In **paragraph 104** reference was made to the printers that the JH and others used when printing price reductions labels. It appeared that there was by the time of closing submissions no dispute about the printer that might be used, and in any event we concluded that the precise printer which the JH might use was not material. She needed one to give effect to price reductions, and that was both obvious and agreed.

124 The process of reducing the price of an item was described comprehensively as far as we could see in C7/381, to which we refer in paragraph 34 above. The only material issue between the parties in relation to **paragraph 106** was the frequency with which the JH did the things referred to in **paragraph 106**. In paragraph 75 of her witness statement, the JH said that she did them about once a month. Ms Parkin said (in paragraph 319 of her witness statement) that it occurred about once every four months. We thought that the best description, which was more or less in the middle of the two estimates, was "occasionally".

125 We record here for the avoidance of doubt that we regarded the factual issue, which was raised by the respondent in relation to **paragraph 106**, of whether or not the JH asked her manager to say whether or not the JH's proposed price reduction was appropriate not only where the item in question was priced above £30 but also where it was a LEGO product (presumably of a value of less than £30) with minor damage, as being covered by these words on C7/381/2:

> "When reducing products you should follow the department/store guidelines on how much to reduce products by.
>
> ...
>
> [Trainer's Note! Let your trainee(s) know what your guidelines are. Explain if they are ever unsure they should speak to their Line Manager or the Duty Manager.]"

126 We were in addition unable to see why it might affect the value of the JH's work for the purposes of section 65(6) of the EqA 2010 more than minimally that she was in fact obliged (as stated by Ms Parkin in paragraph 321 of her witness statement) in relation to any proposed price reduction of a LEGO product as well as of any product which was originally priced above £30 "to inform the Manager who would then decide the relevant reductions for these products". That was because it was accepted by Ms Parkin in those words that the reduction would be proposed by the JH, so that the JH

would then be exercising some judgement, although (it was clear) she would not be making the final decision on the amount of the reduction.

Clearance

127 While the respondent contended that the JH did the things referred to in **paragraph 109** (described as "assist[ing] when products went into clearance") only once during the evaluation period, the JH said that she did them "occasionally". It was accepted (as it had to be) that it was part of the role of the JH to do those things when asked to do so by the respondent. The only evidence from the respondent on the frequency was this very vague assertion in paragraph 323 of Ms Parkin's witness statement.

> "I expect Rebecca only assisted with this task once, if at all, during the Evaluation Period."

128 What was involved in clearance was described in C7/383 (to which we refer in paragraph 28 above), and we could not see a need, given the detail which was in that document, to determine the factual disputes in **paragraphs 113 and 114**, although in regard to the content of **paragraph 114**, we saw that at C7/656/10, there was this "Top tip" under the heading "Gaps in promotional or clearance displays":

> "Products that are being promoted can run out quickly so check these displays as regularly as you can."

129 So, we accepted that if the JH did what was said in **paragraph 114** then she was doing her job, and that if she did not do that, then she was not doing her job. Accordingly, it was part of her work for the purposes of section 65(6) of the EqA 2010 to do what was described in **paragraph 114**.

Emergency product withdrawals

130 **Paragraph 117** concerned emergency product withdrawals. The claimants asserted that the JH occasionally (about once every three months) assisted with the removal of recalled products. The respondent asserted that that happened only at most once during the evaluation period. We doubted the relevance of this dispute. That was because the work of removing the products was the same as putting products onto a backstock cage. However, if it was claimed by the claimants that the JH was, or might be, given responsibility for ensuring that any product which was to be withdrawn from sale immediately was so withdrawn, then that was a different matter.

131 C7/385, to which we refer in paragraph 34 above, described what was involved in emergency product withdrawals. Given the statement at the end of the document (at the bottom of page 4) that the reader could "Get More Information/Support" from his or her "Line Manager", and/or from "Know Your Stuff For Everyone - Bronze", we concluded that C7/385 was aimed not only at staff in the position of Ms Parkin, but also at staff in the position of the JH. The content of page 3 of C7/385 was such that

it was in our judgment an inescapable inference that the work of the JH included, when she was asked by a manager to do it, following, or applying, the "Emergency Product Withdrawal" procedure as described on that page. The JH said in cross-examination (as recorded on page 48 of the transcript for day 6) that she was involved in one such procedure during the evaluation period. We accepted the JH's evidence as recorded on that page. Thus, we concluded that she was involved in emergency product withdrawals as described at C7/385/3, but only rarely.

Awareness of range changes

132 It was the respondent's position that, contrary to **paragraph 118**, the JH did not need to be aware of range changes. That was in direct contrast with what was said in C7/367/3, which we have set out in paragraph 17 above, about the need for persons in the position of the JH to "tak[e] note of new products and when products move locations" and to "[find] out from the Merchandising Assistant which products are discontinued after range changes". It was also in direct contrast with the aim stated on page 1 of that document, which was that the trainee would, after being trained as described in the document, be able to "describe products sold on [the hardlines] department".

Assisting in replenishment of the health and beauty department

133 It was (or at least we understood it to be) agreed that the JH spent no more than 5% of her shifts replenishing in departments other than her usual one of hardlines, and that in the main she did that replenishment in the health and beauty department. We saw the dispute about the extent to which she did that (maintained by the respondent in relation to **paragraphs 122 and 124**), and we saw that the respondent asserted in its closing submissions in relation to **paragraph 124** that "JH's proposed frequency in the EVJD of once per week is unsupported by any evidence." That submission failed to take into account the fact that the JH's witness statement contained, in paragraph 8, what one might call supporting evidence of all of the assertions in the EVJD. Paragraph 8 was in these terms.

> "I have read my Job Description. It was drafted and updated by my solicitors on my instructions which I gave during many discussions with them. To the best of my knowledge it is accurate. It is hard to recall events which took place many years ago and, in some places, the wording in the Job Description represents my best estimate."

134 The opening part of paragraph 80 of the JH's witness statement was also clear evidence in support of the proposition that the JH did more than merely assist in the replenishment of the health and beauty department when she was specifically asked to do so by her line manager (Ms Parkin). There, the JH said this.

> "During the Evaluation Period I often assisted with replenishment for the Health and Beauty department. Approximately once every 1-2 months I was asked by

the Duty Manager, but at other times, if I had finished my jobs, I checked to see if my colleague working on Health and Beauty needed help. Normally when I helped with Health and Beauty I helped work the delivery cages, but there were also times that I replenished from Backstock. Sometimes I also helped to finish the Rumble in the Health and Beauty aisles. On a couple of occasions the Health and Beauty colleague was off so I worked the delivery by myself."

135 Thus, the paragraph was subject to the flaw (assuming that the issue was a material one; we consider this immediately below) that there was no statement in it of the amount of time that the JH spent assisting replenishing health and beauty products. Ms Parkin's witness statement included a statement in paragraph 166 that she was aware of the JH "helping with replenishment tasks during the Evaluation Period is the Health & Beauty Department." However, Ms Parkin said nothing about the frequency with which that occurred. In the circumstances, we accepted the claimants' proposed words for **paragraph 122** and concluded (a little tentatively given the lack of precision of the evidence) that as a result the JH regularly (within the meaning of H31) assisted with the replenishment of health and beauty products.

136 We initially considered that we might need to do no more than record that fact here, on the basis that the job of replenishing health and beauty products was no different either in principle or in practice from the job of replenishing hardlines, but subject to the caveat that (1) in order to replenish health and beauty products, the JH needed to know enough about them to do that work reliably, and (2) the requirement to have that knowledge consisted of an additional demand on the JH. We then went through the factual disputes concerning the health and beauty replenishment tasks of the JH, and came to the following conclusions.

136.1 What the JH said in paragraphs 80-86 of her witness statement was in part about the additional factors which affected her work as a replenisher but it was also a confirmation that in some of the respects to which the JH referred the work was in substance the same as that of a hardlines replenisher. In fact, we could see a potentially material difference only in paragraph 82, but that was only one of degree (affecting the need to be vigilant in looking out for "use by" dates), and not one of substance. That analysis was entirely in accordance with paragraph 170 of Ms Parkin's witness statement which was expressly agreed by the claimants.

136.2 The minute initial difference between the parties in relation to the application of security tags, maintained in relation to **paragraph 126**, seemed to us to be maintained disproportionately, if only because it was about what the JH did when she could not find a secure box in which to put a product. By the time of closing submissions, the parties had agreed that she would then use a pin tag. In fact, C7/414 (to which we refer in paragraph 39 above) showed in detail how the job of protecting high value health and beauty stock needed to be done, and we could see nothing in the EVJD which added anything material to our finding (which is implied by what we say in paragraph 39

above, and which we now, for the avoidance of doubt, make explicit) that the manner in which the JH had to protect high value health and beauty stock was sufficiently stated by C7/414.

136.3 The dispute in relation to **paragraph 127** (which was about the manner in which the JH assisted in the replenishment of health and beauty products) was in part based on the evidence of Ms Parkin in paragraph 169 of her witness statement. However, the only potentially material factual assertion in paragraph 169 of Ms Parkin's witness statement that we could see was in the second sentence, where Ms Parkin said that the JH "took instructions from" the colleague who normally replenished health and beauty products, alongside whom the JH worked when she assisted with such replenishment. In this regard, the respondent's submissions were cogent: the respondent pointed out that in cross-examination the JH said (as recorded on pages 65-66 of the transcript of day 6) that she "used to dread" her health and beauty replenishment colleague being off because the JH would then know that she was on her own in the health and beauty department. In addition, as a matter of common sense, if the JH usually only assisted replenishing health and beauty products when she, the JH, had finished replenishing hardlines, then she would be relying on her colleague for guidance on the work that she was going to do.

136.4 The dispute about stock rotation (maintained by the respondent in relation to **paragraph 132.3**) ignored the importance of all replenishment staff rotating stock and removing any out-of-date stock, as we record in paragraphs 83.1 and 83.3 of Appendix 1 (at pages 52-53 above). However, **paragraphs 134 and 135** added nothing to the training materials to which we refer in those paragraphs of Appendix 1.

Work in other departments of the store

137 There was a dispute about whether or not the JH worked in any department of the store other than the health and beauty department. The respondent submitted that the evidence of Ms Parkin showed that the JH did not work in the F&F department during the evaluation period. The evidence of the JH (via paragraph 8 of her witness statement, which we have set out in paragraph 133 above, taken together with **paragraph 137**) was that she "was asked to assist the F&F (Clothing) department three or four times and replenished the alcohol aisles during a couple of shifts." Even if what the JH said in that regard was true, we could not see that it could have resulted in the addition of any value to her work if the work was evaluated by reference to what the JH was doing on an hour-by-hour basis. That was because the work of replenishment was in our judgment likely to be of the same value no matter what the product which was being replenished, so that only if there was a material difference between the work of replenishing one kind of product as compared with another could the value of the work differ.

138 Similarly, **paragraphs 139 and 140** were about tagging high-value bottles of alcoholic beverage. We saw no material difference for the purposes of section 65(6) of the EqA 2010 between putting a security tag on a bottle of alcoholic beverage as compared with putting such a tag on at least most (if not all) other items sold by the respondent to which tags were in practice attached.

139 **Paragraph 140** referred to the JH's knowledge that some high-value bottles were high-risk and more likely to be stolen. That was in fact borne out by the reference at C7/147/4 to "Spirits and Champagne" being "Hot Products" as far as shoplifting was concerned. That in itself showed to our mind the importance of that document (C7/147) as a whole when assessing the impact, in terms of the demands and the working environment, on the respondent's customer assistants of working in the respondent's retail stores.

Working on checkouts

140 The parties agreed that the JH worked on mainbank and filling station checkouts. They disputed the precise circumstances in which the JH might be asked to do that and when she might not be asked to do it because of her personal medical circumstances. The latter circumstances were completely irrelevant to the demands, for the purposes of section 65(6) of the EqA 2010, of the JH's work on checkouts.

141 The part of the EVJD which concerned the JH's working on checkouts was **paragraphs 142-227** inclusive. We saw only four factual issues in those paragraphs which either might need, or clearly merited, a separate finding of fact, bearing in mind our findings of fact in relation to working on checkouts and related matters (such as responsibilities concerning age-restricted sales and the respondent's WIBI policy) made in regard to the work of Mrs Worthington, in Appendix 1, and Ms Williams, in Appendix 2. We consider those four factual issues immediately below. If the IEs think that any further finding of fact needs to be made by us in regard to the things which are dealt with in **paragraphs 142-227** then they should make an appropriate application under rule 6(3) of the EV Rules.

<u>Did the JH need a manager's permission to sign off a checkout?</u>

142 One additional factual issue which we concluded might need to be determined by us was whether or not the JH needed to obtain a manager's permission to sign off and leave a checkout. In that regard, the respondent submitted in regard to **paragraph 148** that the evidence of Ms Parkin was to be preferred to that of the JH. However, Ms Parkin was not responsible for managing the checkouts at the relevant time, so her evidence on this aspect of the matter was unlikely to be determinative. As a matter of practical reality, however, we could see that the respondent would not want a customer assistant who had been called to help by operating a checkout to stay at the checkout any longer than was reasonably necessary. We could also see that a person in the position of the JH would probably be expected to liaise with the checkout supervisor in some way about logging off a till. Whether this was a material

matter for present purposes was not clear to us. We had to assume that it was thought by the parties to be relevant on the basis that if the JH decided whether, and if so when, she left a checkout to return to replenishing, then she had a responsibility which added value to her work for the purposes of section 65(6) of the EqA 2010. We were not aware of anything relevant in the training materials. We therefore decided the issue by reference to the balance of probabilities. In carrying out that balance, we found the likelihood of the respondent wanting its staff to work as efficiently as possible to be of considerable weight. We also took into account the fact that the respondent was likely for practical and pragmatic reasons to want its shop floor staff to exercise their discretion and achieve that maximum efficiency. Against those factors there was the aim of not having a queue of more than three people: the "I Don't Have To Queue" maxim of the respondent, as shown by for example C7/184. The latter factor was, however, in our judgment not applicable here, because if the JH proposed to leave, or did leave, a checkout with customers still queuing then she would plainly not be doing her job. For those reasons therefore we concluded that if there was no queue at the checkout which the JH was operating and there were no customers queuing at other checkouts whom she could invite to come to the checkout which the JH was operating, or arriving at the checkout, then it was part of the JH's work for the purposes of section 65(6) of the EqA 2010 to leave the checkout by signing off it and going back to replenishing.

Did the JH carry out a till lift?

143 One issue which in our view clearly did require a determination arose in relation to **paragraph 149**. That was whether or not the JH "performed a till lift if the Team Leader was not around". We refer to the issue of what might have been meant by the term "till lift" in paragraphs 29-30 of Appendix 2 (at page 88 above). Given what we say there and what the documents to which we refer there stated, we rather doubted that the JH was required to carry out a till "lift" when signing off a checkout. If anything like a till lift was required, then it was a till check rather than a till lift. However, there was nothing in either the EVJD or the evidence relating to the work of Mrs Worthington showing that a till check was carried out before or after she started to operate a checkout. Paragraphs 400 and 401 of Mrs Worthington's EVJD (which were agreed) merely referred to her "sign[ing] in to the till". There was no statement there, or anywhere else, of Mrs Worthington carrying out any kind of till check: only a till lift if the till was full of cash. That was stated in paragraphs 535-536 of the EVJD for Mrs Worthington, and both of those paragraphs were agreed by the time of closing submissions.

144 In all of the circumstances, including our conclusions in paragraphs 29-34 of Appendix 2 (at pages 88-90 above), we concluded that the JH was mistaken in thinking that she participated (or needed to participate) in a till lift merely because she was signing off a checkout. Only if there was a need to carry out a till lift for the reasons stated in paragraphs 29-30 of Appendix 2, was it part of the JH's work for the purposes of section 65(6) of the EqA 2010 to carry out a till lift. Even then, that work

was subject to the limitations stated in the documents referred to in those paragraphs.

Removing a security tag from a CD or DVD

145 The third additional factual issue which arose in relation to the work of the JH on checkouts concerned the removal of a security tag on a CD or DVD. In paragraph 98 of her witness statement and in cross-examination (as recorded on page 124 of the transcript of day 6), the JH said in relation to **paragraph 156** that there was a risk of scratching the disc inside the box if the red security tag was removed carelessly. Given that we thought that it was obvious that if there was a risk of damage to a product from the removal of a security tag then the JH was required to exercise care in such removal, the only issue here was whether there was such a risk. We doubted that there was. That was because it would be contrary to the interests of a retailer for there to be such a risk, so that any security tag that was attached was likely to be capable of being removed by a competent member of staff with ease. However, that did not mean that every careful removal will have been problem-free. No photograph of the type of tag in question was put before us (although Mr Epstein did not object to us looking on the internet for a video of one, as he had himself seen a video describing how to remove one of the tags in question). Ms Parkin's evidence in cross-examination (recorded at pages 110-111 of the transcript of day 7) was that she had never known of a part of the red plastic security tag which was used for CDs and DVDs getting inside the disc's box. In those circumstances, we concluded that we should accept the JH's evidence that there was a need to take care to avoid the risk of damage to the disc or discs inside a CD or DVD case from the removal of the security tag attached to the case, albeit that the risk was low.

Privilege (or staff) discount card

146 In **paragraph 196**, this was said.

> 'The Privilegecard (now known as the "Colleague Clubcard") is the discount card for Tesco staff. JH checked that the customer was the cardholder. If the customer was not the cardholder, JH informed them that she could not process the card. JH knew that she could be reported for not dealing with this appropriately. JH would ask the customer if they have a regular Clubcard to use instead.'

147 The respondent proposed the deletion of all but the first sentence on the basis that "JH did not complete a check in respect of a customer using a Privilegecard."

148 Given that the issue was what was the JH's job, or her responsibility, where a Privilegecard was presented to her, that proposition did not bear scrutiny. We saw that at page 82 of C7/163 (which was entitled "Know Your Stuff For Checkouts – Bronze 5 – Operating a Checkout"), this was said.

> "Before processing a Privilegecard make sure that the customer is the card holder. If the card holder is not present you will need to advise the customer that unfortunately you will not be able to process the card. You may wish to ask them if they have a normal Clubcard instead."

149 Given the content of the document at C1/38 (which was a report of an investigation into the possible misuse of Privilegecard), we had no doubt that the whole of **paragraph 196** was accurate factually. However, as for the question of what was the JH's job for the purposes of section 65(6) of the EqA 2010, we concluded simply that it was her job to act in the manner stated in the extract which we have set out in the preceding paragraph above.

Working on the Combined Desk

150 The JH's work on the "Combined Desk" was the subject of **paragraphs 231-263**. The things which JH did or was responsible for doing in relation to lottery tickets and related issues were the subject of **paragraphs 241-263**. Given our findings in relation to the work of Ms Williams concerning lottery tickets (made in paragraphs 83 and 90-93 of Appendix 2, at pages 104 and 106 above), we concluded that there was no need to record separately what the JH was required for the purposes of section 65(6) of the EqA 2010 to do in relation to lottery tickets when she worked on the "Combined Desk". Our findings of fact about the responsibilities of a checkout operator in relation to lottery tickets, made in paragraphs 90-93 of Appendix 2, relied on or incorporated the relevant parts of the training materials. Given that factor and the fact that the JH spent only a small proportion of her time on the Combined Desk during the evaluation period, we concluded that there was no need for us to to make any further findings of fact about the work of the JH in relation to lottery tickets when she worked on that desk.

151 We record here that it was the respondent's submission in response to **paragraphs 233 and 241** that the JH spent only 21 minutes during the whole of the evaluation period working on the Combined Desk and that only during 6 minutes of that period could she have done anything in relation to lottery tickets. Although there was no direct evidence before us to support that submission, we were content to conclude that the proportion of the JH's time spent on the Combined Desk was very small and that the proportion of her time spent doing anything in relation to lottery tickets was even smaller.

152 The JH's work on the Combined Desk other than in relation to lottery tickets consisted in, we concluded from the JH's evidence and the fact that the respondent did not assert that the JH was not required to do these things (although the respondent asserted, as we record in the next paragraph below, that she did not in fact do some of them),

152.1 being available to process refunds either where there had been a pricing error or where a customer simply wanted to return a product (which were the subject of **paragraphs 235-240**), and

152.2 selling such things as cigarettes.

153 We saw no reason to doubt the accuracy of what was said in **paragraphs 233-240** concerning the job of the JH in those respects, and we therefore accepted that they were accurate. The main issue was the frequency with which the JH worked on the Combined Desk and was responsible for dealing with those things. The respondent proposed that we decided that the JH did none of the things referred to in **paragraphs 235-240** inclusive. We concluded that the best way to state the frequency with which the JH did the things described in **paragraphs 232-240**, applying H31 and bearing in mind that the JH spent less than 5% of her time on that desk, was "occasionally".

Paragraphs 264 onwards

154 We concluded that almost all of the other factual disputes maintained by the parties in the relation to the rest of the EVJD for the JH were either about irrelevant things or had been determined by us so far as relevant by our conclusions stated on the same things in our determinations of the relevant factual disputes concerning the work of Mrs Worthington (i.e. in Appendix 1), Ms Williams (in Appendix 2) or Ms Cannon (in Appendix 4). The exception is **paragraph 283**, to which we refer in paragraph 157 below.

155 Just by way of example, and for illustrative purposes only, we point out that the requirements of the JH in regard to personal hygiene (which was the subject of **paragraph 264**) were the same as for every other customer assistant, and were stated in paragraph 174 of Appendix 1 (at page 74 above), which in turn incorporated by reference C7/142/25.

156 We add that there was repetition in the rest of the EVJD for the JH in respect of which there was plainly no need to make a finding of fact. By way of example, **paragraphs 311-317** concerned lottery tickets, and **paragraphs 318-320** concerned "Personal hygiene".

157 There was one aspect of the JH's EVJD which required a mention here. That was **paragraph 283**. The claimants asserted in that paragraph that the JH "took part in a deep clean approximately once every six months [and that the] deep clean was organised by a manager and each member of staff was given an aisle to clean within their department." The respondent took that to be a reference to what the respondent regarded as a job done by contract cleaners. That can be seen from the fact that the first part of the respondent's submissions in response to **paragraph 283** was this:

> 'JH accepted that she did not take part in the "deep clean" as the respondent understood the phrase (and as described in {C7/697/17}) - See Day 6 p91 § 3 - 16.'

158 However, the reality is that the JH's evidence was that she participated in the clean (whether called "deep" or not) as described in **paragraph 283**. The only evidence of the respondent in response was that of Ms Parkin, who, in paragraph 211 of her witness statement, referred only to the "deep cleans of the Store" which "contract cleaners carried out ... on a regular basis", and said merely that she was not aware of the JH "ever assisting with the Store's deep clean" and that it was "certainly not a task" which Ms Parkin ever put on the JH's task list. Ms Parkin also said that she was "not aware that [the JH] ever swept under the aisles and again it has never been a task I set for her on her task list". Ms Parkin studiously avoided saying there whether or not the JH did the kind of cleaning every six months that the JH described in paragraph 121 of her witness statement, which was in these terms.

> "Every 6 months I helped out with a 'deep clean' on the department. This involved the whole department. Everyone was allocated a specific aisle and told to clean it up. I took everything off the shelves on my aisle, cleaned the shelf and then put everything back. I also checked under the shelves and swept up anything that was there if it had not been done by the cleaners. This usually happened during the spring and in the autumn to prepare for Christmas. This may not have been what Tesco would describe as a 'deep clean', because I know there were also times that the cleaners were hired to clean everything."

159 We dealt with a similar dispute in relation to the work of Mrs Worthington in paragraph 164 of Appendix 1 (at page 73 above). The document at C7/234 was applicable there. That document did not apply here, but the thinking behind it did. We saw that in relation to Express stores, it was part of the "clean as you go activities" on C7/220/19 (and specifically not done by the "In-Store Cleaning Team") to "Ensure produce fixtures and display fixtures are clean and free of litter and food debris". There was no comparable document relating to non-Express stores before us, but in our view that was evidentially of no relevance.

160 In those circumstances, we accepted what the JH said in paragraph 121 of her witness statement and therefore the accuracy of **paragraph 283**.

161 If the IEs believe that any further findings of fact are required in relation to the content of the EVJD from **paragraph 264 onwards**, then they should say so under rule 6(3) of the EV Rules, and we will reconsider our position in this regard.

Appendix 6

Toni Oz

THE TRIBUNAL'S DETERMINATIONS OF THE PARTIES' DISPUTES (1) IN RELATION TO THE WORK WHICH MS TONI OZ (TO WHOM WE REFER BELOW IN THIS APPENDIX AS "THE JH") WAS EMPLOYED BY THE RESPONDENT TO DO, AND (2) IN RELATION TO THE OTHER FACTUAL MATTERS WHICH ARE RELEVANT TO THE ISSUE OF WHAT WAS THE VALUE OF THAT WORK FOR THE PURPOSES OF SECTION 65(6) OF THE EQA 2010, AND THE (MAINLY JH-SPECIFIC) REASONS FOR THOSE DETERMINATIONS.

Introduction

1 This document is a continuation of the set of documents in which we set out our conclusions on the legal and factual issues which were before us at the end of the stage 2 hearing which took place in the first half of 2023. As a result, with one exception, we do not repeat here for example (1) definitions for the abbreviations used, (2) the background to those conclusions, or (3) the schematic at H31 used by the IEs stating what words they would prefer for describing frequency and related things. The exception is that we repeat here, for the avoidance of doubt, that unless otherwise indicated below, a reference in bold font to a paragraph number is to a paragraph of the EVJD for the JH as it stood before the stage 2 hearing. This document is the fifth in the series determining the factual disputes relating to a lead claimant.

The place where the JH worked, her working hours and her job title

2 The JH worked for the respondent in the main replenishing non-food goods on the shop floor at the respondent's Wisbech Superstore and, when that store closed and was replaced by the respondent's Wisbech Extra store, the latter store. For the sake of simplicity, unless it is necessary to do so, in this appendix we treat those stores as a single store and refer to them as "the store". The JH worked at the store throughout the relevant period, which was from 18 February 2012 to 31 August 2018.

3 The JH worked normally (ignoring any time she spent working what she called "overtime" shifts) on two days a week, on both days from 10pm to 6am on the following day. Those days were Wednesdays (from 10pm to 6am) and Thursdays (so, from 10pm on the same day to 6am on the Friday). The JH's job title was "Customer Assistant (Nights)". During those shifts, the JH had a half-hour break (which, we understood from the evidence in relation to other sample claimants but were not told expressly, was unpaid.)

Some relevant facts relating to the work which the JH did

(1) The times when customers were present on the shop floor when the JH was working

4 The store was open to customers during the whole of the JH's shifts.

(2) The main implications of the presence of customers

5 The presence of customers on the shop floor, or their possible presence because the store was open for custom, meant the following things as far as the work of the JH was concerned.

5.1 The JH was required to be vigilant to the risk of theft (see the third bullet point in the middle column of C7/135/5).

5.2 The JH was otherwise required to be aware of and take the steps referred to on pages 1-6 of that document.

5.3 The JH was required to apply the principles relating to good customer service stated for example at pages 2-17 of C7/145. We record here that the JH's evidence in paragraphs 28 and 29 of her witness statement was entirely consistent with the proposition that she was required to apply those principles, and was to the effect that she was very much aware of that requirement. We accepted those paragraphs in the JH's witness statement. We return to that passage in the JH's witness statement in paragraph 20 below.

5.4 The JH was required to "[r]emember [to put] customers ... first when tidying or putting out stock". That was stated specifically at C7/616/12 as a "Top Tip!". It was plainly applicable to all customer assistants.

(3) The risks to the JH and others in the working environment, and the steps which she was required to take to mitigate those risks

6 The JH was required to be aware of and apply the guidance and requirements stated at pages 3-23 and 25-33 of C7/142 and pages 7-25, 27-36 and 53-60 of C7/823.

7 The fact that there were risks to the JH from being present on the shop floor is shown by C7/705, which included guidance of which the JH was required to be aware. We acknowledge that the JH worked during what were probably the store's least busy hours.

(4) Clocking in, the existence of CCTV, and the possibility of being searched

8 The JH was required to clock in. There was no reference in the EVJD for the JH or the JH's witness statement to CCTV, but we suspected that CCTV was present throughout the store's shop floor and warehouse. That suspicion was borne out by the fact that in paragraph 22 of his witness statement, Mr Priest, who was a Night Manager at the store, said that "Throughout the Evaluation Period, the Store benefitted from the presence of a 24/7 Security Guard as well as extensive CCTV."

Certainly, as shown by C7/784, at the latest by April 2018 customer assistants in all of the respondent's stores knew that their actions might be monitored via CCTV in the circumstances described in that document. Similarly, there was no reference in the EVJD or the JH's witness statement to the possibility of her being searched, but that was a company-wide possibility (as shown by for example C7/147/10), so we concluded that it applied in relation to the JH.

(5) The physical environment in which the JH worked

9 The environment in which the JH worked was the store's warehouse and its shop floor. It was the JH's evidence (in paragraph 29 of her witness statement) that she spent about 90% of her working time on the shop floor when "working in the Health and Beauty, and Non-Food aisles". Since our determinations are confined to the work done by the JH when replenishing the things in those aisles, we concluded that unless there was any evidence to the contrary, that was the proportion of time that the JH spent on the shop floor as opposed to in the store's warehouse.

10 The respondent adduced no evidence in response to that evidence, but in **paragraph 4** it was said (and this was agreed) that "Over 60% of JH's time during her contractual shifts were spent on the shopfloor, when the store was open to customers." However, the figure of 60% was given on the assumption that what the JH did in overtime hours was relevant, and as we say in paragraphs 79-81 of our second reserved judgment, at pages 28-29 above, we have concluded that what the JH did in overtime hours was not relevant. Nevertheless, the figure of 60% appeared to have resulted from the fact that, when doing overtime work, the JH was on the shop floor for less of her working time. That was because the JH's overtime shifts were spent, it was the claimants' case, working in the F&F, i.e. clothing, department of the store. Ms Cannon's work was done purely in that department, and our findings about that work are so far as relevant stated in Appendix 4 above. They showed that she spent a certain amount of her time in the Watford store's warehouse rather than on the shop floor. In paragraph 29 of her witness statement, the JH said that she spent only about 10% of her time on the shop floor when working in the F&F department, which provided strong support for the proposition that the figure of 60% which the parties agreed in regard to **paragraph 4** was arrived at after taking that figure of 10% into account. In those circumstances, we concluded that the proportion of the JH's time spent on the shop floor when she was working in her normal shifts was 90%, and not 60%.

The work which the JH was employed to do

Introduction; an overview of the JH's work and some factors which were relevant to our determinations of that work

11 The parties agreed (by reference to **paragraph 6**) that "the main purpose of JH's role was to replenish shelves from deliveries and backstock". The parties disagreed about

the rest of the JH's work. The dispute in regard to **paragraph 9** was central in that regard. In paragraph 11 of her witness statement, the JH said this.

> 'I recall that at the start of the Evaluation Period [i.e. what we are calling "the relevant period"], I was formally part of the Non-Food department at Wisbech Superstore. After the Superstore was closed, I was transferred to the Wisbech Extra where I worked in the "General Merchandise and the Rest of Non-Food" department. In 2016 I was transferred to the Health & Beauty department.'

12 The JH then explained what she meant by those words. She did so in the next paragraph of her witness statement. From 2012 to 2014, it was the JH's evidence, she mainly replenished the things which (we could see) were of the same sort as those which Ms Thompson replenished as her main work as a "hardlines" replenisher. Like Ms Thompson, the JH also assisted in replenishing health and beauty products of the sort which the JH described in detail in paragraph 12(b) of her witness statement. In that paragraph, the JH said that she did that assisting in replenishing health and beauty products "approximately 20 times a year" during that period (i.e. up to 2014). From 2014 to 2016, the JH said in paragraph 12(c) of her witness statement, she replenished

12.1 "general merchandise (e.g. pots, pans, oven trays, mixing bowls, cooking utensils, measuring jugs, plates, bowls, cutlery, mugs and glassware); and"

12.2 "garden tools, outdoor lighting, and décor."

13 We could see no justification for distinguishing for the purposes of section 65(6) of the EqA 2010 between different kinds of non-food product unless there was a difference in terms of the demands made on the replenisher as a result of the difference in the products. The distinction drawn by the JH in the passage which we have just set out was, we concluded, a potentially valid one if it showed a difference in the demands made on her in replenishing. However, we could not see how we could properly conclude that it did show such a difference. That was because the size, weight and shape of the things being replenished were as far as we could see the only material factors, and it was impossible for us to conclude from the JH's description of the products which she replenished how heavy, bulky or problematic to move they were.

14 In any event, the JH said also (in paragraph 12(d) of her witness statement) that from February 2014 to February 2016 she was "sometimes (approximately 10 times a year) asked to replenish, for the whole shift, Health and Beauty products." From February 2016 to 2018, the JH's main role was (she said in paragraph 12(e) of her witness statement) "to replenish Health and Beauty products".

15 The respondent's witnesses who gave direct evidence about the work of the JH were Mr Priest and Mr Rouse. Mr Rouse was also a Night Manager at the store. In paragraph 33 of his witness statement, Mr Priest described the JH's work in this way.

"33.1 Between 2012 and 2016, when working on Health and Beauty and General Merchandise, on each shift Toni spent roughly:

33.1.1 20 minutes pulling out deliveries (or 4.5% of a total 7.5 hour shift);

33.1.2 370 minutes filling (or 82.5% of a 7.5 hour shift); and

33.1.3 60 minutes tidying and resetting the department (or 13% of a 7.5 hour shift).

33.2 From 2017 onwards, when working Health and Beauty, on each shift Toni spent roughly:

33.2.1 30 minutes pulling out deliveries (or 10% of a total 7.5 hour shift);

33.2.2 360 minutes filling (or 77% of a 7.5 hour shift); and

33.2.3 60 minutes tidying and resetting the department (or 13% of a 7.5 hour shift)."

16 Those figures of Mr Priest were relied on by the respondent in relation to **paragraph 9**. The claimants' submissions in response were these.

"2. As set out in the rest of the JD, the jobholder's work was subject to enormous numbers of variables including those set out in this JD text.

3. The evidence of the jobholder should be preferred over that of Mr Priest.

4. It is only possible to estimate times on a rough approximate average basis. The best evidence of how much time the jobholder tended to spend doing each task is the jobholder's own evidence.

5. The amount of time spent doing each task is set out throughout the JD where it is possible to do so. Those times should be accepted and adopted. If the Tribunal or the IEs feel that a 'table' of the sort proposed by the Respondent here would assist, it should be populated based on the jobholder's evidence which is set out in the rest of the JD, not upon the unreliable and speculative evidence of Mr Priest and/or pure assertion by the Respondent. In addition, it should use the task 'categories/labels/groupings' used by the jobholder in this JD, not the labels used by the Respondent here which tend to diminish what the jobholder did and obscure the range of different activities."

17 Throughout his witness statement, Mr Priest sought (we concluded, as can be seen from what we say below) to downplay the complexity of the JH's work. He was the

JH's direct line manager throughout the relevant period. By way of example, he said this in paragraph 32 of his witness statement.

> "Toni's tasks were consistent and regular, requiring very little in the way of initiative or independent thought. I do not mean that in any derogatory sense, it is simply the nature of the task that was done."

18 For the reasons which we state elsewhere, for example in paragraphs 78-81 of Appendix 5 (at pages 270-271 above), relating to the work of Ms Thompson, the JH in our judgment plainly was encouraged by the respondent to use her initiative, including by taking "ownership" of gaps in displays, looking out for products which were damaged and were either not fit for sale or should be reduced, and by being alert to hazards and unclean surfaces. Similarly, as we state in paragraphs 15-17 and 22 of Appendix 5 (at pages 252-253 and 255 above), a hardlines replenisher needed to be inquisitive and to acquire knowledge about the products sold at the store at which the replenisher worked. In paragraphs 35-37 of Appendix 5 (at page 259 above) we make similar findings about the role of a health and beauty replenisher. We return to that role below, since it is proportionate to do so in the case of this JH. In any event, we found it impossible to accept that the respondent simply wanted its customer assistants to be automatons, or machine-like. That is not the nature of modern retailing, in our judgment, applying our own experience and what we will call common sense.

19 Mr Priest also gave evidence which we rejected about one material aspect of the conditions in which the work was done. That evidence was in paragraph 19 of his witness statement, where he said this.

> "Whilst there was definitely a job to do, in my experience there was plenty of time within a shift for staff to have a chat and the situation was the same during the Evaluation Period. Particularly on a night shift, when there was not many customers about there was plenty of opportunity for staff to socialise during the course of their shift. As above, there could be anywhere from 15 to 25 Customer Assistants on shift (depending on the time of year) and so staff did socialise while they were working."

20 In paragraphs 28 and 29 of her witness statement, the JH said this.

> "28. I understood from training and from my managers that being the 'face' of the company to customers was a really big and important part of my work. When I joined Tesco, the handbooks provided this information. From time to time, I was also reminded of this by managers. For example, my colleagues and I were having a conversation around our aisles as we replenished on a shift, the Night manager came over and told us that as the face of the company we had to be seen as busy and available to assist customers as opposed to discussing in a group.

> 29. Both the Wisbech Superstore and Extra were open 24 hours 7 days a week. I carried out almost all of my work (around 90% while working in the Health and Beauty, and Non-Food aisles, and 10% whilst working in F&F) in areas of the stores where there were customers. The areas of the Wisbech Superstore in which I worked were very close to the entrance of the store and so my section was often one of the first places that customers would come to and could get very busy. In both stores I was nearly always on show to the customers and that was considered by Tesco and by me to be a very big deal. I knew that I could be approached by a customer at any time when I was on the shopfloor and, no matter how I happened to be feeling that day, or what was going on at work or in my personal life, I would need to be ready to immediately greet the customer, do my best to help them, give them excellent customer service, and leave them feeling pleased and happy with me and with Tesco. This didn't affect me only when I was speaking to a customer; it affected me for the whole of the time that I was on the shopfloor (which was the vast majority of my shift). I had to be ready to interact with customers with no warning and I had to make sure that I was always approachable and aware of what was going on around me so that customers would feel comfortable to approach me and speak to me, and so that I could identify customers who I should approach myself. I had to acknowledge a customer before they approached me which meant smiling at them."

21 As we say in paragraph 5.3 above, we accepted that passage. As a result, we found what Mr Priest said in paragraph 19 of his witness statement (which we have set out in paragraph 19 above) to be unrealistic, i.e. untrue. Like the passage of his witness statement which we have set out in paragraph 17 above, it was contrary to common sense and our understanding of the way in which retailing in the modern world works.

22 Having said that, we agreed with the respondent that the claimants in some ways were themselves guilty of the same failing, although on the other hand, we thought that both parties failed to draw our attention to training materials which were potentially helpful to their cases, and therefore in that way underplayed their cases.

23 In those circumstances , we concluded that what Mr Priest said in paragraph 33 of his witness statement (which we have set out in paragraph 15 above) was helpful, and that in the absence of any reliable contrary evidence, we should accept it as a statement of the proportion of the time spent by the JH during her normal working hours on the tasks summarised by Mr Priest on a broad brush basis. But it was only part of the picture. The rest of the picture was shown by the content of the training materials to which we refer in Appendix 5 in relation to the work of Ms Thompson and the training materials which applied to the work of a replenisher of health and beauty products which in our judgment showed what that work consisted of, or involved, to which we now turn.

Our determinations of the factual disputes maintained by the parties which we thought needed to be decided

The relevant training materials relating to the replenishment of what the respondent referred to as health and beauty products

One particular document: "Know Your Stuff For Health And Beauty – Department Overview And General Points"; C7/399

24 The helpful introduction to C7/399, whose title was "Know Your Stuff For Health And Beauty – Department Overview And General Points", included this passage on its first page.

> "Being familiar with the products in the department and where to find certain items is important for two reasons. Firstly, for your own confidence in a new area and secondly, so that we can help customers quickly and efficiently.
>
> After the session, it is important that you take time to explore the department and recognise how it is set out into the product groups. Once you are confident where the key areas are, finding products for customers becomes a lot easier."

25 On page 3, there was this statement.

> "There are certain products which are described as high risk, which means that they are particularly vulnerable to theft. The nature of that theft is not limited to the store floor as unfortunately a high percentage of a store's shrinkage (unknown loss) is due to internal theft. These high risk products are stored in a secure area with restricted access."

26 We thought that that suggested that the JH was in a trusted position and had responsibility for ensuring the security of the high-value stock in the department.

27 The rest of that document was informative, and relevant.

The rest of the documents which we regarded as showing the work of the JH in regard to health and beauty replenishment, and its demands

28 We have already referred (in paragraph 36 of Appendix 5, at page 259 above) to C7/400, entitled "Know Your Stuff For Health And Beauty – Silver Information Cards". It was an 85-page document stating much detailed information about the kinds of products sold in the Health and Beauty department, and their purposes, which the JH was expected to seek to assimilate. That expectation was illustrated by for example these words on C7/400/3:

> "Trends such as self-tan products, nail-care, various creams and treatments are all areas of high customer demand and we must therefore understand the customer need to be able to deliver the best shopping trip for them.
>
> We must also be aware of factors such as the weather which boost sales of certain lines. Unless we are aware of these, we can be caught out and disappoint our customers who will definitely go elsewhere and buy, rather than go without."

29 Given that document, if nothing else, we rejected the evidence of Mr Priest in paragraph 155 of his witness statement, which was in these terms.

> "Toni was also not expected to maintain a good knowledge of the different products stocked by Tesco or their locations as the EVJD suggests in paragraph 100. For example, if a customer approached her for a particular product, she might be able to direct them to the relevant aisle, but I wouldn't expect her to know where that product was (or if Tesco sold it). That was why we had the Tesco Inform App or, she could check with another colleague."

30 While that passage was wholly inconsistent with for example C7/400, it was also internally inconsistent. If the JH was not required to have product knowledge, then there was no requirement for "another colleague" to have it, and it would be a matter of pure chance whether or not that colleague was, or other colleagues were, able to assist. In fact, that passage in Mr Priest's witness statement was directly contradicted by the text of C7/427 which we have set out in paragraph 35.19 below.

31 The document at C7/402 entitled "Know Your Stuff For Health And Beauty – Customer Favourites" was also inconsistent with the proposition that the JH "was ... not expected to maintain a good knowledge of the different products stocked by Tesco or their locations". So was the document at C7/404, entitled "Know Your Stuff For Health And Beauty – Introduction to Specialist Areas". We thought that those documents, and the one at C7/400, showed what the respondent's aim was, and that was to become, or remain, a leading retailer with staff who were (1) knowledgeable about the products sold by the respondent, (2) friendly, (3) assiduously helpful, and (4) polite. The following passage on the first page of C7/412 ("Know Your Stuff For Health And Beauty – Introduction To The Health And Beauty Department") supported that conclusion:

> "Health and Beauty continues to be a growth sector for our business and has a particularly dense product to space ratio. This means that the number of products in the department is extremely high in relation to the number of shelves or aisles. As a result of this growth and the specialist nature of the products, there is a greater demand for colleague knowledge.
>
> Our customers in the Health and Beauty department have varying needs, yet the constant fact is that the vast majority want to look good and feel great. We

> are not just competing against other supermarkets where Health and Beauty is concerned, but also Boots, high street chemists, Holland & Barratt and more recently Pound shops. We need to ensure that we deliver excellence in every way so that we give our customers a great experience. By being better than the competition, our customers will come to us!
>
> The nature of the products within the Health and Beauty department will lead to customers requiring our help. Regardless of the advice they may need, by completing this training you will be able to provide them with a confident professional service which will Make Moments Matter for our customers.
>
> Research has shown that there is more brand loyalty across Health and Beauty than any other department in our stores. This means that our customers will have very firm expectations around the availability of their desired products. If we can provide more knowledge and help that is readily available for our customers – we will continue to deliver a great shopping trip for them."

32 The document at C7/401 entitled "Know Your Stuff For Health And Beauty – Backdoor, Warehouse And Pre-sort", contained much information which was consistent with the rest of the respondent's training materials relating to working on replenishment in a physical sense. We found the following passage on page 4 to be of considerable interest.

> "A series of cages with stock from all different parts of the store could, in the absence of an efficient system, take hours to process. Understanding and using a productive process for breaking down a delivery can save a huge amount of time. The number of colleagues a store has working at any one time is based upon it using Tesco processes and routines. If we don't carry out the pre-sort routine as the guidelines suggest, we may not have enough hours to finish the task."

33 What we say in paragraphs 36 and 37 of Appendix 5 (at page 259 above) was relevant here too.

34 We found the above training materials and the ones which we refer in the subparagraphs of this paragraph to state comprehensively what the job of a health and beauty replenisher was. While there was in those training materials some overlap and repetition, and some of the content was a repeat of the substance of training materials relating to other product areas, we thought that content was an invaluable statement of the work of a health and beauty replenisher and of the product and related knowledge which the respondent required of such a replenisher, including, of course, the JH.

34.1 C7/399 (repeated at C7/411) ("Know Your Stuff For Health And Beauty – Department Overview And General Points").

34.2 C7/405 (“Know Your Stuff For Health And Beauty – Beauty”).

34.3 C7/406 (“Know Your Stuff For Health And Beauty – Baby”).

34.4 C7/407 (“Know Your Stuff For Health And Beauty – Hair Care”).

34.5 C7/408 (“Know Your Stuff For Health And Beauty – Health and Wellbeing”).

34.6 C7/409 (“Know Your Stuff For Health And Beauty – Effective Sales Techniques”).

34.7 C7/410 (“Know Your Stuff For Health And Beauty – Standards, Cleaning and Ways of Working”).

34.8 C7/412 (to which we have already referred in paragraph 31 above).

34.9 C7/413 (“Know Your Stuff For Health And Beauty – Standards, Cleaning and Ways of Working”).

34.10 C7/414 (repeated at C7/415) (“Know Your Stuff For Health And Beauty – Restricted Fill And Product Protection”).

34.11 C7/416 (“Know Your Stuff For Health and Beauty”), which, although aimed at trainers, made explicit that which we say here about the training materials showing almost comprehensively what the work of a health and beauty replenisher was, since it said on the first page:

> “This training will cover the activities and tasks that are the responsibility of a Health and Beauty Assistant. It will cover all aspects of the store floor duties and tasks they also complete in the warehouse.”

34.12 C7/417 (“Know Your Stuff For Health And Beauty – Toiletries”).

34.13 C7/418 (“Know Your Stuff For Health And Beauty – Waste, Damages and Availability”).

34.14 C7/419 (“Know Your Stuff For Health And Beauty – Personal Hygiene”); it was not about the personal hygiene of a customer assistant but, rather, about products relating to customers’ personal hygiene.

34.15 C7/420 (“Know Your Stuff For Health And Beauty – Promotions and Promotional Space”).

34.16 C7/422 (“Know Your Stuff For Health And Beauty – Nutri@Tesco”).

34.17 C7/425 ("Know Your Stuff For Health And Beauty – Replenishment"), which incidentally showed how a customer assistant could "request a shelf edge label from a store floor workstation"; the whole of the document was highly informative about the manner in which replenishment of health and beauty products was required by the respondent to be done.

34.18 C7/426 (which was a question and answer sheet which was surprisingly informative).

34.19 C7/427 (the respondent's "Health & Beauty Colleague Guide"); apart from stating on page 2 that the respondent encouraged "multiskilling across all areas", on page 7 the document stated the role of a health and beauty replenisher helpfully, in this way.

> "**Your Role**
> Your roles and accountabilities:
> - To be a presence on the store floor for customers, to support them with locating and choosing products.
> - Have a good product knowledge to support the customer shopping experience.
> - To replenish the stock when it sells through or runs low.
> - To maintain cleaning and standards across the department.
> - To take part in department rumble at 12pm and 4pm.
> - Maintain legalities of labels and point of sale throughout the department.
> - Maintain the Health & Safety of the department for customers and colleagues.
> - To maintain the warehouse principles and help pre-sort the stock into product groups for ease of filling.
> - Follow the security protocol's when filling high value stock, make sure that product protection routines are followed."

The disputes maintained by the parties by the time of closing submissions

A particular dispute the resolution of which led to a change of approach by us

35 **Paragraph 12** was in these terms.

> "JH knew the deliveries schedule for her store, and what arrived in what delivery. If JH spotted any missing products from the delivery, she reported this to her manager, irrespective of the value of the products. The manager then took the Ticket off the Cage to investigate."

36 We found it highly likely, or alternatively on a balance of probabilities we concluded, that the JH would know the usual times when goods were delivered to the store, and what was usually in them. In addition, if the JH spotted that something was missing

from a delivery and she did not tell her manager, then she would probably not be doing her job. The manager would then be likely to investigate the situation. Nevertheless, the respondent objected to the paragraph. We ourselves regarded it as inappropriately written, since the question was not what the JH did but what was her work for the purposes of section 65(6) of the EqA 2010. However, as we say in paragraph 28 of our second reserved judgment, at page 12 above, the documents which both parties here called EVJDs were in reality pleadings. The likelihood of **paragraph 12** being factually true was high. The respondent might have opposed it on the basis that it was not relevant, but if one read it as a statement that it was part of the JH's work to be aware of the possibility of items which were stated in the respondent's internal documents to have been delivered not in fact being delivered, then it both made sense and was apt.

37 The respondent's opposition to **paragraph 12** was stated in the following way.

> "Irrelevant and factual correction –
>
> 1. The JH accepted in [XX] that she did not need to know what deliveries had arrived and, further, that she simply worked any deliveries that had arrived in accordance with the instructions of her manager [Day 15, page 60 / 1 - 5].
>
> 2. Under [XX], the JH also corrected the impression created by the second and third sentences (that she checked every delivery for missing products and reported it to her manager) - in reality, as accepted under [XX], JH could not know what products were on each delivery [Day 15, page 63 / 16 - 20] and that she does not conduct any such checks at the point the deliver arrives [Day 15, page 64 / 3 - 15].
>
> 3. As such, the Respondent submits that this paragraph ought to be deleted in its entirety - it is, on the JH's own evidence, wrong."

38 In fact, as the claimants pointed out in their closing submissions, in cross-examination, Mr Priest said this (as recorded on pages 110-111 of the transcript of day 16, which was 29 March 2023).

> "Q. ... I think there may have been a bit of misunderstanding about what was meant by checking for or spotting missing products. I think where we got to was that if when dealing with cages, splitting, presorting, whenever, Miss Oz spotted that I think the example was hairdryers, if you have a box that's meant to have six hairdryers in it and it only has five, that would be something that you would expect her to notice and do something about.
>
> A. Yes, I agree with that.
>
> Q. There has certainly somewhere – again, I'll be corrected if this isn't in issue any more. It was suggested somewhere that there was some sort of financial

> level below which that sort of thing would not require reporting to anyone. So if, for example, you had a box of tubes of toothpaste and there were meant to be 52 in them and there was one missing and it costs £1.50, that would not be something that she would be expected to report to anyone.
>
> A. No, I believe she would report that as well."

39 It was in those circumstances difficult to see on what basis at least the thrust of **paragraph 12** was opposed. It was in our view obvious that if the JH spotted something missing from a delivery then it was part of her work to report that.

40 After the exchange recorded in paragraph 38 above, Mr Epstein was recorded, at lines 9-12 of page 112 of the transcript of day 16, to have said this.

> "Just for the transcript, our understanding is that it's paragraph 12 of the RoD and this is no longer in issue between the parties."

41 However, the respondent's written closing submissions which were sent to us on 22 May 2023 contained the passage set out in paragraph 38 above. Either Mr Epstein's instructions changed after 29 March 2023, or he was mistaken in saying that **paragraph 12** was no longer opposed.

42 We refer to this dispute because it was about something which was obvious but also because it was wrongly maintained in written closing submissions on the basis of the respondent's own oral evidence. By the time that we got to considering the parties' submissions on **paragraph 12** we had carried out the analysis set out above of the training materials relating to the work of Ms Oz, which included those which related to the work of Ms Thompson, and concluded that most of the work of both of them was discernible most clearly and most reliably from those training materials.

43 In those circumstances, we came to the conclusion that we should either (1) say nothing about a particular dispute maintained by the parties in relation to the work of Ms Oz, i.e. the JH, on the basis that it was about something which we concluded was irrelevant, or (2) where we could not in our view safely conclude that it was about something irrelevant, state as briefly as possible our conclusion on such a dispute. However, in order to comply with our duty to give sufficient reasons for our conclusions, we found it necessary to deal with the parties' submissions on a number of disputes, as can be seen from what we say in the rest of this appendix.

The other aspects of the JH's work which were not agreed by the parties via the EVJD and which we determined by reference to the disputed parts of the EVJD

44 **Paragraph 14** stated the obvious in that if the JH was taking cages of newly-delivered products from the loading bay to the shop floor, she would take them to an appropriate place. We agreed, however, with the respondent's submission that it was not part of the JH's work to agree with her colleagues the order in which the cages

would be taken and who would take them. That was because, as the respondent submitted, the JH's own evidence in cross-examination (at pages 68-69 of the transcript of day 15) showed that she did not do that, and in any event common sense suggested that the staff of the respondent's stores would initially just take the cages to their appropriate places in the warehouse and only then would the cages be taken onto the shop floor for replenishment purposes. The problem was that if we merely concluded that the second sentence of **paragraph 14** was inapt, then we would miss out of the factual picture the thing described by the JH at line 25 of page 68 to line 9 of page 69 of the transcript for day 15. But even that was probably sufficiently obvious not to need to be stated: the JH and her hardlines replenisher colleague(s) would have to agree who would replenish first from a cage which had both health and beauty and hardlines products on it. Nevertheless, we record here that that was what happened, as we accepted that evidence of the JH.

45 **Paragraph 15** was about the way in which the JH replenished: whether by just taking a newly-delivered cage to the shop floor and putting out all of the stock in it that would go out, or by pre-sorting. The former was said by the claimants to have been done in relation to the "Non-Food aisles". The respondent proposed the change of "Non-Food" to "General Merchandise" and proposed the insertion of these words in relation to the replenishment of such merchandise: "(50% of her contracted hours between 2014 to 2016)". Otherwise, the paragraph was agreed. We could not see how the description of the goods replenished, whether as "non-food" or "general merchandise" could be relevant in this context. We also failed to see why, in relation to the cages pulled out and replenished from during 2014-2016, it mattered that she did not pre-sort them.

46 **Paragraph 18**. For the avoidance of doubt, we concluded that the respondent's proposed new text at the end of the paragraph was unnecessary given C7/823/21, where this was said: "When moving heavy roll cages, or moving a roll cage up a slope, ask for help if needed." The first proposed amendment was apt if the JH only wheeled cages with health and beauty products on them from late 2016 onwards, and only if the cages moved by the JH at other times were not comparable. We were not persuaded by the evidence before us that there was a need to distinguish between the periods before and after late 2016 for the purposes of **paragraph 18**. We accept that this is something on which the IEs might need a finding of fact by us, but we could not see a basis for such a finding on the evidence before us.

47 **Paragraph 19**. We rather doubted that the precise time it took for this JH to move a cage from one location to another was going to be relevant to the IEs' assessment of the demands of the job. The same was true of the precise amount of any incline on the route which the JH had to follow.

48 **Paragraph 22.** For the avoidance of doubt, the number of times that the JH fetched a "fix me" (i.e. a "faulty") sticker etc seemed to us to be unlikely to be material. So did the question whether or not the JH informed a manager about a damaged cage, although in fact it was a requirement of C7/823/21 to inform "a member of the

backdoor team" if a roll cage was found to be damaged. What was material was that the JH was required to obtain and use a "faulty" sticker whenever there was a faulty cage, as shown by C7/142/9. We have already decided (in paragraphs 63-64 of Appendix 1, at pages 48-49 above, and paragraph 71 of Appendix 4, at page 198 above) what was the responsibility of a person in the position of the JH in regard to cages which were faulty. We refer there to the content of paragraph 235 of the EVJD for Mrs Worthington. In relation to that paragraph, the respondent agreed that there was a responsibility to inform a manager of a faulty cage. In fact, we doubted that there was such a responsibility, given the training materials to which we refer in this paragraph (and in paragraph 63 of Appendix 1, at page 48 above). Given that (1) the respondent disputed that responsibility in relation to **paragraph 22** and (2) we had found only a responsibility to inform a member of the "backdoor team", we agreed with the respondent that there was no duty to inform a manager. The main dispute in relation **paragraph 22** appeared to be whether or not the JH was required to check cages to see whether they were damaged. She was not employed to do that: we agreed with the respondent that while she was required to do something if she found one (and that thing was in our judgment what was said in the second column of C7/142/9), she was not required to go and look for damaged cages. But we doubted that the claimants were asserting that the JH had a specific responsibility for checking cages. In any event, C7/142/9 was a complete answer to the dispute about the content of **paragraph 22**.

49 **Paragraph 32**. The JH was plainly required to communicate in some way to for example her line manager that she had been unable to find tags for items which needed to be tagged. There was no prescribed way for doing it, but if she did it in a handwritten note then that was surely part of her work. That was put beyond doubt by the final sentence of paragraph 110 of Mr Priest's witness statement, which was this.

> "Toni was only required to leave the products [for which the JH could not find tags] in the Health and Beauty lockup and let a manager know what was left over."

50 **Paragraph 45**. The disputed part of that paragraph, which concerned overfilled displays, was best regarded as resolved by the need to comply with the instructions given on C7/425/4. That page showed that if the JH found "a facing error on a product [she was] filling", then she was required to "not change it", but instead to "inform [her] line manager or a member of the "Stock Control Team". Those words supported the respondent's proposed changes. The complexity of the situation was, however, helpfully shown by what was said under the heading "Merchandise Plans and Product Facings" on C7/425/4, and we concluded therefore that that passage stated a material aspect of the JH's work.

51 **Paragraph 46**. While we have already stated (in paragraphs 22-27 of Appendix 3, at pages 158-160 above) that we saw the documents in the series of which C7/656 was a part as being of considerable evidential value, it was in relation to **paragraph 46**

that the respondent referred to this aspect of the matter in its submissions. The submission was this.

> "As the document shows, it was delivered in 2019 and there is no evidence to support the proposition that the JH received that training prior to that date. This wording has been deleted as it does not describe a task of the JH."

52 For the avoidance of doubt, we concluded that C7/656 was a very important document describing how the respondent expected customer assistants to do their jobs, and therefore as being evidentially very helpful to show the demands of those jobs. The fact that it was formally produced in 2019 did not mean that the respondent did not require its staff to adhere to its principles before then. The respondent's dismissal of its relevance on the basis that there was no evidence to show that the JH was trained in accordance with it was in our judgment wrong in principle. In practice, that dismissal meant that the respondent did not address either in its evidence or its submissions to us specifically the question whether the principles in the document were applicable to the sample claimants. That may well have been because the respondent did not suddenly in 2019 start requiring its staff to replenish with pride, for example, and that the document merely codified the principles which the respondent had, both before and during the relevant period, applied to its customer assistants. In the absence of evidence to the contrary, on the balance of probabilities, C7/656 and the other documents in the series of which it formed a part were reliable evidence that the respondent required all of the sample claimants to act in the ways described in those documents so far as applicable to each sample claimant.

53 **Paragraph 58**. "Hot spots" were referred to in C7/420, on page 5 of which there was evidence of the importance of the JH being aware of the hot spot and ensuring that it was replenished. The contrary would not have made sense, in fact, but the "Key Point!" in the right hand column of C7/420/5 helped to put it beyond doubt that the assertion of the claimants that the JH "was required to look out for new Hot Spot displays, [and] take note of the product on the display" was correct. So did the first bullet point in the answer to question 6 on C7/420/8, which was this.

> "Replenishment teams need to know where dual located products are so we can ensure that they are always full."

54 **Paragraph 64**. While we did not agree with the respondent's submission in relation to **paragraph 64** that the JH's knowledge or otherwise of the respondent's reasons for the establishment and maintenance of promotions was relevant, we concluded that what was relevant was that the respondent required the JH to be alert to the need to keep promotional areas replenished, which was the subject of **paragraph 58**.

55 **Paragraph 66**. We concluded that the JH did not herself decide, at her discretion, where to put what the respondent called OFDs. That was because of the content of

C7/420/4, where the "Pocket Planner" was said to show "where [the] various offers [to be made as part of the forthcoming promotional offers] should be located".

56 **Paragraph 69**. We could not know, without input from the IEs, whether or not the parties' dispute about the length of time for which the JH was required from 2014 to 2016 to move heavy items needed to be resolved. The respondent's evidence was that it was 20-40 minutes per shift (so twice a week), and it was the JH's evidence that it was on average once a week, but without any indication of the length of time that it took. We thought that the respondent's evidence was helpful here, and that there was no reason to reject it. Assuming that it was a dispute about something which was relevant, we resolved the dispute by accepting the respondent's evidence.

57 **Paragraphs 76-78**. The respondent asserted that the parts of **paragraphs 76-78** which stated what was done when a stock count occurred, were "irrelevant". The respondent argued that only the things that the JH herself did were relevant, and that since she was not involved in the stock counting process herself, what was involved in that process was irrelevant. Thus, the respondent submitted in effect that the things which the claimants had included in **paragraphs 76-78** were not material facts. The respondent implicitly submitted that the JH did not need to know what was involved in a stock count: only to do what she needed to do in advance of one.

58 We accepted that it was part of the JH's work for the purposes of section 65(6) of the EqA 2010 to be aware of which products were going to be counted for stock-taking purposes, as stated in the opening words of **paragraph 76**. That was not least because Mr Priest accepted in cross-examination (as recorded at line 15 of page 136 to line 14 on page 137 of the transcript of day 16) that the JH could then prioritise the backstock cages of the things which were going to be counted, and that he had himself given the department a list, which they kept in the department and used for that purpose. So did Mr Rouse (as recorded from line 21 on page 183 to line 10 of page 184 of the transcript of that day; he called it a rota, not a list). Both managers accepted that the list or rota was given to the department once only, so that it was part of the job of the JH to remember what stock was due to be counted and when. The document at C7/375 ("Know Your Stuff for Hardlines Replenishment – Getting Ready to Count") showed that there was in fact a duty on the part of the "Night Manager" to inform night-time "Hardlines" replenishers "at the start of the shift what is to be counted", and that there were certain things that were required to be done by such replenishers before a count was completed. Those things were on page 1 of C7/375 and were completely consistent with the proposed words of the claimants for the subparagraphs of **paragraph 76**.

59 What happened when a count occurred was, in our view, something which the claimant needed to know if and to the extent that as a result of that knowledge, she could more easily understand why she was doing what she was doing. In our view that was almost, if not actually, obvious. In any event, the documentary evidence before us showed, we concluded, that the respondent required the JH to acquire that knowledge. The evidence was in the health and beauty department "routines" training

document at C7/403 from which we have set out the key introductory passage (which was at the top of C7/403/1) in paragraph 36 of Appendix 5 above (at page 259 above). That document was six pages long. Four of its pages contained text, and the final two pages contained on one page a series of questions to check that the trainee had learnt what was required, and on the final page the answers to those questions. The text was in two columns on each page, so there were eight columns of text. Over a quarter of the document (two and a half columns) was devoted to describing the purpose of counting stock. Under the heading "Counting", at C7/403/3, this was said.

> "Counting our stock is one of the most important routines we complete in store. Counting stock accurately will ensure our stock record accuracy is maintained. Inaccurate counting would mean you either have too much or not enough stock - which will impact the customer. Stores follow a count schedule that is centrally produced. A wall chart displaying the department count areas for each week and each day should be on display in the Stock Control area."

60 Therefore the "list" or "rota" to which Mr Priest and Mr Rouse referred was probably the "wall chart" referred to in the final sentence of that extract.

61 There was in the rest of the two and a half columns of text a description of how the count was carried out which was rather more detailed than the detailed parts of **paragraphs 76-78**. So, not only was the detail in those paragraphs relevant as evidence of what the JH was required to be aware of, it was best regarded as a slightly pale shadow of the substance at C7/403/3-4, which we concluded the JH was required by the respondent to know about. In addition, for the avoidance of doubt, the JH was required to do what was described on the first page of C7/375.

62 **Paragraph 81**. The job of the JH was not as simple as the respondent asserted in response to **paragraph 81**. The JH was not, as the respondent submitted, "significantly overstat[ing] the task" described in **paragraph 81**, which concerned following the shelf-edge labels and doing related things. What the JH was required to do was discernible for the most part from the training materials, but what was said in **paragraph 81** added to what was said in those materials. The extent to which the JH was required to take "care not to cover the gap with other products or products of a different size/combination" as claimed in **paragraph 81** was in our judgment evident from pages 3-4 of C7/425 and C7/656/2-22. As a result, **paragraph 81** as contended for by the claimants did not ""significantly overstat[e] the task", and we accepted that its words were apt.

63 **Paragraph 97**. We have already considered and determined a dispute about the requirements of a checkout operator to know about and promote the benefits to customers of the respondent's Clubcard. We do that for example in paragraphs 112-114 of Appendix 2 (at pages 111-112 above). The main responsibility of a customer assistant who was not operating a checkout was, we concluded, on a balance of probabilities and applying what we will call common sense in the context of our understanding (gained from all of the evidence before us) of the respondent's

business, simply to know about the benefits of a Clubcard and be able to promote the Clubcard by referring to those benefits if the occasion arose. We saw no reason therefore to disagree with the claimants' proposed words for **paragraph 97** and concluded that the respondent itself would, if asked outside the scope of this litigation, whether it wanted its customer assistants to promote the benefits of its Clubcard, unhesitatingly have said: "Yes".

64 Given that conclusion, we accepted that what the claimants proposed for **paragraph 98** was apt. We record here that we did not understand the respondent to be contending that the JH was not required to "give accurate information to customers (e.g. about how services such as Clubcard worked, how to give feedback, recommendations, deals)".

65 **Paragraph 100** was of general application. We have already referred (in paragraphs 29 and 30 above) to that paragraph. We record here that we recognised that the JH was not required to know everything there was to know about all of the products stocked by the respondent. That was obviously far too much to require of the JH and any other customer assistant. However, the passage from page 7 of C7/427 which we have set out in paragraph 34.19 above used words which could be interpreted as such a requirement, i.e. if read literally. Nevertheless, as with all documents, it had to be read in its context, and that context was that it was a statement of the role of a health and beauty replenisher. We therefore read it as a statement that it was the role of the JH to know about the products in her own department(s), and to be able to help customers to locate products in that department (or those departments). If a question were asked by a customer about something in another department, then the respondent's general customer service requirements applied. We refer to those in paragraph 5 above. By way of illustration here, we thought that the principles stated at C7/145/11 applied if a customer asked for help about something in another department.

66 The dispute maintained about **paragraph 101** was in essence about the requirement of the JH to know about and apply to such extent as was necessary the respondent's "Think 25" policy, which related to age-restricted sales. Here, the relevant training materials included C7/16, which was entitled "Age-Restricted Sales Skills – Refresher Training For Everyone". On the first page, there was this statement.

> "**Trainer's Note!** This training card is to be used as the Legal Age-Restricted Refresher twice a year to refresh all colleagues."

67 On page 3, there was a row containing information about the sales of "Paracetamol, ibuprofen, aspirin, laxative". The information was in these terms.

> "Tesco operate a voluntary **16** age restriction on these products as some medicines can be prone to misuse. There is also a restriction on the number of boxes than can be sold through main bank/not by a pharmacist. **Products may**

> **be sold to under 16's at the pharmacy under the supervision of the pharmacist as they can explain more around safe use.**"

68 In our judgment, on the balance of probabilities, given that

68.1 the relevant training documents, including C7/16, referred to "everyone", and not just those who might operate a checkout, being required to have refresher training on age-restricted sales every six months,

68.2 customer assistants were (as we record in paragraph 34.19 above) encouraged to be multi-skilled, and

68.3 it was obviously consistent with good customer service for the JH to be aware of and to apply, with discretion, the respondent's policies on age-restricted sales whenever the need to do so arose,

we accepted the claimants' proposed words for **paragraph 101** and rejected the respondent's submission that "JH was not required to apply 'Think 25' as she did not work on the checkouts."

69 **Paragraph 102** was in these terms.

> "JH took care when providing advice that she was qualified to give it and only provided advice which was within her remit, for example making sure that she did not give medical or pharmaceutical advice if asked about products in the medicine aisle. If JH was asked for this type of advice, she pointed the customer in the direction of the pharmacy."

70 The respondent objected to that paragraph and proposed instead these words.

> "If asked about products in the medicine aisle, JH pointed the customer in the direction of the pharmacy".

71 We have already (in paragraph 31 above) referred to C7/412 ("Know Your Stuff For Health And Beauty – Introduction To The Health And Beauty Department"). The passage from C7/412 set out in that paragraph 31 above pointed in favour of the claimants' proposed words for **paragraph 102**.

72 On page 2 of C7/416 ("), under the heading "Information Cards", this was said.

> "The information Cards hold a lot of content that is relevant to the product area, product itself, or perhaps the customer. They are designed to be both a starting point for further knowledge and a source of further information. The purpose of the information, figures and background is to generate interest and provide knowledge that you can decide what to do with. More knowledge about a particular area should inspire you and give you more confidence. It will generate

> interaction between you and the customers and increase your job satisfaction. You will probably never enter in to a conversation with a customer about the structure of the human hair – however you will be able to make a link between hair structure and what conditioner does and how hair dye works. A customer may ask you a question to which you do not know the answer. You can later refer to the Information Cards and see if the answer is there for the next occasion."

73 We have already (for example in paragraph 28 above) referred to C7/400, which contained what appeared to be all of the relevant "Information Cards". Information card 24, concerning "Cold and flu" (at C7/400/79), information card 25, concerning "Pain Relief" (C7/400/80), information card 26, concerning "Stopping Smoking" (C7/400/81-82), information card 27, concerning hay fever (C7/400/83), and information card 29, concerning "Digestive Aids" (C7/400/85), all read in the light of information card 22 (C7/400/71-73), containing an "Introduction" to the "Health and Wellbeing" series of information cards, pointed firmly in favour of the claimants' proposed words for **paragraph 102**.

74 In addition, there was before us the JH's own evidence. In paragraph 33 of her witness statement, she expanded slightly on the content of **paragraph 102**.

75 In those circumstances, we came to the conclusion that **paragraph 102** was apt, i.e. it stated one aspect of the JH's work for the purposes of section 65(6) of the EqA 2010 correctly.

76 **Paragraph 104** among other things concerned promotions and customer favourites. Those things were the subject of C7/420 and C7/402 respectively. We refer to those documents briefly in paragraphs 34.15 and 31 above respectively. In fact, **paragraph 104** did more than just refer to promotions and customer favourites. It was in these terms.

> "JH was expected to know about the promotions and star-lines (customers' product favourites) available at the time. JH was aware of and understood the four elements of the Customer Contract: (1) I can get what I want; (2) I don't have to queue; (3) The staff are friendly; (4) the aisles are clear. She understood the importance of delivering high standards to maintain customer loyalty and that Tesco's aim was to provide exceptional customer service to every customer who visited its store."

77 The respondent objected to that paragraph on this basis.

> 'Factual correction and irrelevant -
>
> 1. Firstly, in relation to star lines, the JH explained in [XX] that star lines made no difference to her role in the sense that she would simply work delivery, whatever that delivery happened to be (see, in particular, [Day 15, page 151

/ 23 - 25]). The Respondent therefore submits that the existence of star lines was not something that had any impact whatever on the JH's work and therefore reference to it ought to be removed.

2. Similarly, in relation to the Customer Contract, whilst it is accepted that the concept of a Customer Contract existed at certain times during the Evaluation Period, its inclusion here does not describe a task performed by the JH and therefore ought to be removed.

3. In any event, the EVJD should contain a description of the JH's tasks and matters relevant to the draft Factor Plan. The matter of what the JH "knew" is not relevant.'

78 The documents at C7/402 and C7/420 showed that the first sentence of **paragraph 104** was wholly apt. The requirement of a non-food replenisher to know about the "customer contract" was almost self-evident, or obvious, but it was confirmed if only by question 5 and its answers on page 2 of C7/388, showing that customer assistants in the department in which the JH worked were required to know of the general principles stated there, namely "I don't queue", "The aisles are clear", "The prices are good", and "The Staff Are Great". While those were not quite in the same terms as the four elements of the claimed "Customer Contract" of the respondent, there was a reference to that contract in C7/191 (repeated at C7/208) ("Pride In Express – Delivering Retail Excellence"). In the first column on the first page of that (2-page) document, under the heading "What You Need To Know/Do", this was said.

> 'We want to create stores that we can be proud of so that we know the standards are great, and customers and colleagues love us. Our customers have told us what they expect when they shop in our stores. This has formed our contract to our customers.
>
> ***NOTE:*** *Ask the trainee(s) "Can you tell me what the four elements of the Customer Contract are ?"*
>
> Answers:
>
> – I can get what I want
>
> – I don't have to queue
>
> – The staff are friendly
>
> – The aisles are clear
>
> If we are able to deliver this consistently then we are able to maintain the loyalty of our customers.'

79 Thus, we accepted that the whole of **paragraph 104** was apt.

80 The respondent opposed the content of **paragraph 123**. That paragraph described what the JH did if she found misplaced items as she replenished. Unsurprisingly, it was said in **paragraph 123** that

> "JH recalled the proper aisle location of misplaced products around the store. At the end of the night between 5am and 6am, JH filtered all misplaced products back to their correct aisle locations in one go as part of her tidying up routine. JH used her judgment and returned items to backstock if she thought the shelf was too full."

81 It would not have been surprising if the respondent had accepted that that was what the JH did, and welcomed it. What the respondent did, however, was to contest the paragraph on the basis that it did not accord with the JH's own evidence, and then made an unsupported assertion about the facts. The full response in closing submissions was this.

> "Factual correction -
>
> 1. Firstly, the JH agreed in [XX] that she may encounter a misplaced item approximately once per shift [Day 15, page 161 / 19 - 20]. It is essential that this task is set in that context.
>
> 2. Second, the JH confirmed in [XX] that she was not required to remember the proper location of each product but could either ask another colleague working on that section [Day 15, page 161 / 22 - 25] or hand it to that colleague to return to its proper place [Day 15, page 162 / 1 - 7]. The JH therefore plainly did not, in every or even most cases, recall where the product should be located and return it.
> 3. The JH also agreed that the items would be returned as part of the tidying and resetting part of the shift, which took place between 5 a.m. and 6 a.m. [Day 15, page 118 / 1 - 3].
>
> 4. Finally, there was no role for backstock or discretion in this process. If an item had been misplaced by a customer, it follows it had previously already been placed on a shelf (and therefore that there was room for it on that shelf) and so there would never be a need to return it to backstock.
>
> 5. The Respondent's amendments to this paragraph therefore simply seek to align it with the JH's own evidence."

82 The final paragraph of that sequence was inconsistent with the preceding one, which (i.e. paragraph 4) was an assertion based on an assumption. That assumption was that backstock had not already been used to replace the newly-discovered misplaced item. That which the JH was recorded to have agreed as stated in the third paragraph

did not mean that the JH was not required as part of her job to put the item back into place if she knew the place. The first paragraph of the submission was a potentially helpful point, in that it referred to the issue of frequency. It was helpful if it was necessary for the IEs' purposes to know that the JH frequently came across misplaced items. The second paragraph assumed that the JH's actual knowledge and what she actually did were determinative, but in our judgment they were not. The first relevant question here, in our view, was whether the JH would, in knowing a misplaced item's proper location and returning it to that location, be doing her job. Plainly, she would. The only material issue here in our judgment was what the JH was required to do as part of her job. We concluded that it was to be as aware as was reasonably possible of the proper location of misplaced items and to put them back there, or in a location where they would be shortly be found by a member of the team responsible for replenishing that department, but if there was no such location then she would have to give the item to a member of that team. Those things were, however, in our view obvious.

83 The only dispute maintained by the respondent about **paragraph 126** was whether or not "JH was aware that buying an Out Of Code product would likely upset a customer and could put them off returning." The respondent's submission in response to that sentence was this.

> "Irrelevant -
> Final sentence of this paragraph does not describe a task done by the JH or something that is part of her work. As such, it is irrelevant and ought to be removed."

84 Quite apart from the fact that it was obvious that buying an out of date product would be likely to put off a customer, whether from returning or otherwise, at C7/656/27, there was this passage.

> "When you unpack your products at home, how do you feel if you find an item that is really close to its Use By date or, worse still, is past its Use By date?
>
> Would you want to shop at that store in future?"

85 That was put before the JH and her customer assistant colleagues on (it was the respondent's case, but it was not shown by evidence or evident from the document itself) 1 July 2019. That did not in our judgment mean it was irrelevant, for the reasons which we give in paragraphs 22-27 of Appendix 3 (at pages 158-160 above) and paragraphs 51 and 52 above. Far from it. In fact, words to a similar effect, if not in substance to the same effect, as those set out in the preceding paragraph above were at C7/454/3: the whole of the page up to and including the first three of the four blue boxes with text in them at the bottom of the right hand column of that page.

86 So, it was in our judgment an inescapable conclusion that the respondent did expect its customer assistants to be aware of the potential effect on customers of buying an

out of date product. Indeed, that would in our view have been an obviously necessary finding unless the respondent had put before us evidence that it did not care whether or not its staff knew of the likely effect on customers of buying out of date products.

87 We add in case (which is rather unlikely) there is any doubt about it, what the JH did in regard to out of code products as described in **paragraphs 127 and 129** was not important for present purposes. What was important is what she was required as part of her work to do. So far as relevant, it was to be on the lookout for such products and if she saw one to take it off the shelf and, as stated at C7/142/28:

> "• Place the product in the 'not for sale' area for wasting.
> • Inform [her] Manager".

88 Similarly (and we say this in relation to **paragraph 128** because the claimants thought that its final sentence was disputed, although we saw that the respondent did not refer to **paragraph 128** in its closing submissions), if the JH checked the products on the capping shelves in the grocery department when she was working in that department while she was replenishing from those shelves, i.e. putting stock on them onto display shelves, then she was in our judgment doing her job, as shown by the following statements of principle at C7/697/24, under the heading "Stock Rotation and Coding":

> '• **Out-of-code** products (either **"use by"**, **"best before"** or **"display until"**) must not be found on the shop floor or in back stock
>
> ...
>
> • All colleagues involved in shelf replenishment / stock rotation are trained to check date codes of stock already on display, remove any **out-of-code** products from sale and report it to their line manager.'

89 We thought that it was not the JH's job to check the date codes of product on capping shelves in the grocery department unless she did that in the course of replenishment. Thus, the final sentence of **paragraph 128** was an overstatement, but not completely wrong.

90 While it is not strictly necessary, as it should be discernible from what we say in paragraphs 30 and 34 of Appendix 5 (at pages 257-259 above), and paragraph 34.13 above, the respondent had clear statements of what needed to be done if products were, or might be, damaged, and those statements applied to the work of the JH. We could see in **paragraphs 131-132** nothing additional by way of a description of the work of the JH in that regard. Although it was as a result not strictly necessary to do so, we record that, like the respondent, we doubted the logic of **paragraph 132**. We add that we also saw nothing relevant in the respondent's proposed additional text for **paragraph 131**.

91 **Paragraph 188** referred to a scheduler of which we had not before heard by the time we read that paragraph. Given our conclusions stated in paragraphs 50-55 of our judgment of 12 July 2023, we did not need to decide whether or not such a document existed.

Appendix 7

Roxanne Garrod

THE TRIBUNAL'S DETERMINATIONS OF THE PARTIES' DISPUTES (1) IN RELATION TO THE WORK WHICH MS ROXANNE GARROD (TO WHOM WE REFER BELOW IN THIS APPENDIX AS "THE JH") WAS EMPLOYED BY THE RESPONDENT TO DO, AND (2) IN RELATION TO THE OTHER FACTUAL MATTERS WHICH ARE RELEVANT TO THE ISSUE OF WHAT WAS THE VALUE OF THAT WORK FOR THE PURPOSES OF SECTION 65(6) OF THE EQA 2010, AND THE (MAINLY JH-SPECIFIC) REASONS FOR THOSE DETERMINATIONS.

Introduction

1 This document is a continuation of the set of documents in which we set out our conclusions on the legal and factual issues which were before us at the end of the stage 2 hearing which took place in the first half of 2023. Therefore, with one exception, we do not repeat here for example (1) definitions for the abbreviations used, (2) the background to those conclusions, or (3) the schematic at H31 used by the IEs stating what words they would prefer for describing frequency and related things. The exception is that we repeat here, for the avoidance of doubt, that unless otherwise indicated below, a reference in bold font to a paragraph number is to a paragraph of the EVJD for the JH as it stood before the stage 2 hearing. This document is the sixth in the series determining the factual disputes relating to a lead claimant.

The places where the JH worked, her working hours and her job title

2 The respondent's closing submissions contained this helpful passage at their start, about the JH's work and workplaces during the relevant period.

> '2. The JH's job falls into three main different periods, Danbury, Broomfield Road where she did not do bake-off, and Broomfield Road where she did do bake-off.
>
> 3. The JH undertook a Set Routine, with little variance day to day. That Set Routine included a combination of bake off activities, cleaning and replenishing the coffee machine, pulling in deliveries, replenishment of stock (first frozen and then ambient) and checkout cover. These were her five Core Tasks. The time spent on each of these core tasks varied according to which store JH worked in, whether or not she undertook bake off activities and frozen replenishment (which she did not for the Broomfield Six Months) and whether the store had a coffee machine.
>
> 4. At both stores, JH routinely worked the morning shift, Monday to Friday, which began before the store opened to customers. This meant that for the

first part of her shift, there were no customers in store. She was not contracted to work evenings or weekends.

5. Although JH never undertook the dedicated "gold"/"step-up" programme for customer assistants who are working towards becoming shift leaders, in a number of respects JH acted in a step-up role: (1) on two occasions she opened Broomfield Road for trade in the absence of a shift leader (2) she called Costa to order coffee machine supplies though there was no need to do so; (3) on occasion JH accepted milk deliveries at Danbury, and helped the driver reverse from the forecourt.'

3 The parties agreed that the JH started working at the Broomfield Road Express store on 7 July 2015 and that before then she worked at the Danbury petrol station Express store.

The work which the JH was employed to do

Introduction

4 However, the next section of the respondent's submissions, to the effect that the EVJD contained "exaggeration", was not so helpful. We concluded that in the case of this JH, Ms Garrod, given the content of the preceding appendices, it was right simply to address the detailed submissions in regard to the EVJD for the JH in sequence, in so far as we judged it was necessary to address those submissions. We now do that.

Liaison with colleagues

5 **Paragraph 13**. It was obviously part of the JH's work to liaise with colleagues as necessary, to co-ordinate work when necessary, and to assist colleagues when necessary, such as when a cage was too heavy to be moved by one person (as required by C7/142/9; we summarise the contents of C7/142 in paragraph 83.1 of Appendix 1, at pages 52-53 above). If and to the extent that the claimants rely on the fact that the JH left what they called handover notes in regard to the baking aspect of the JH's role, we concluded that the evidence of Mr Diment in paragraphs 66-68 of his first witness statement (which we accepted) compelled the conclusion that the leaving of those handover notes was not part of the JH's work. That was because Mr Diment specifically required the JH not to leave such notes.

Helping new starters

6 **Paragraph 14**. Similarly, it was in our judgment uncontroversial (that is to say it was obviously justifiable, especially given the implied term of trust and confidence, as we say in paragraph 241 of Appendix 4, at pages 245-246 above) for the claimants to assert via **paragraph 14** that it was part of the JH's work for the purposes of section 65(6) of the EqA 2010 to assist new starters in the manner described in that paragraph. As far as we could see, the only issue which required determination in

relation to that paragraph was the one of frequency. The claimants said it occurred "a few times a year" and the respondent "once every six months". We rather doubted that it could reliably said that it occurred only every six months, or even (comparably) twice a year. Even twice a year just about fitted within the definition of "occasionally" in H31, but in any event we concluded that the safest description of the frequency, applying H31, was "occasionally".

The JH's shift patterns

7 **Paragraph 16**. As we say in paragraphs 79-81 of our second reserved judgment (at pages 28-29 above), we could not see how the precise time of the day (which would include the precise shift patterns of the JH) when work was done could affect the demands and therefore the value of her work for the purposes of section 65(6) of the EqA 2010. However, we concluded that we should, for the avoidance of doubt, record the amount of hours that the JH worked during the relevant period.

8 The parties agreed that the JH worked from the start of the relevant period until 6 July 2015 from 6am to 2pm at Danbury on Monday to Thursday and on Friday from 6am to 1pm. She had a right to a half-hour unpaid break during those shifts, so her shifts were 7.5 hours long except on Fridays when they were 6.5 hours long. The respondent said that the JH worked those same shifts after she transferred to Broomfield Road on 7 July 2015 until 31 August 2015, after which she worked the same number of hours on all of the days of the week (Mondays to Fridays) but starting and finishing half an hour earlier.

Multi-skilled?

9 **Paragraph 17**. Contrary to the respondent's submissions, we accepted that the JH was encouraged to be multi-skilled. That was in part because of what was said on page 2 of C7/427, which was that the respondent "encourage[d] multiskilling across all areas". That document applied, it is true, nominally to health and beauty replenishers. However, we saw that at C7/131/29 (C7/131, entitled "Know Your Stuff For Everyone", was the same document as C7/141), under the heading "Till Training", this was said.

> "All new starters learn how to use a till. We call this multi-skilling."

10 One factor which bore on our analysis here was that we thought that it would have been contrary to the respondent's aim to be, or remain, a leading retailer for it to discourage multi-skilling. In those circumstances, even without the application of a little common sense, we concluded that the respondent did indeed encourage multi-skilling. However, what was the relevance of that here? As the term "multi-skilling" was purely descriptive, at this stage (before the IEs provide their report under rule 7 of the EV Rules) we thought that it was irrelevant.

The overall pattern of the JH's work

11 **Paragraphs 18 and 20**. We saw no documentary evidence from the respondent about the amount of time that the JH spent on the various activities described in particular in **paragraph 20**. The claimants had plainly done their best to say how long the JH typically spent doing the things which she did at work, and the respondent's response was based on no more than estimates, mostly of Mr Diment. For example, in paragraph 159 of his first witness statement, he said that while **paragraph 74** stated that the JH "spent two to three hours on Bake Off activities each day", in his view, "she probably spent around three hours on Bake Off activities", but it was "difficult to say for sure because [the JH] carried out other tasks around Bake Off activities". We return to **paragraph 74** below, in paragraphs 107-111. The fact that we had to do that suggested to us that the content of **paragraph 20** and therefore the dispute about its content was an unhelpful distraction because the content of **paragraph 20** was no more than a summary of other evidential assertions. What we say in paragraph 13 below confirmed that tentative conclusion. In any event, the evidence on which reliance was placed in support of the figures in **paragraph 20** showed that the positions of both parties about the amount of time that the JH spent on the various tasks which they agreed she undertook were no more than estimates based on memories of events which had occurred long ago, arrived at for the purposes of litigation, and that we should treat both parties' positions with caution. While, for the reasons stated in paragraph 14 below, we doubted the purpose of **paragraph 20** in any event, given the schematic at H31, we saw that the dispute about its contents incidentally showed that there was a measure of agreement between the parties in relation to the estimates of time spent on the various activities of the JH which were grouped together in the paragraph. For example, in paragraph 518 of Mr Diment's witness statement, he said this.

> 'The EVJD states that it took "about 20 minutes" (in the "Task Overview" tables in the EVJD) to clean and replenish the Coffee Machine. I think it took Roxy around 25 minutes to clean and replenish the Coffee Machine (excluding the automated process in relation to which, Roxy carried on with other tasks).'

12 In paragraph 80 of his first witness statement, Mr Diment said this.

> "The time spent on the different Core Tasks within the different time periods is roughly set out in the tables below. We only have Till Log On Data for Broomfield and not Danbury but I have estimated the time spent on checkouts in Danbury based upon Roxy's Set Routine and the Till Log On Data that is available for Broomfield and that Roxy probably spent longer on checkouts at Danbury because there were no self-service checkouts."

13 There were four tables in paragraph 81 of that witness statement, and the times stated in those tables were all, adapting the word used by Mr Diment in paragraph 80 of that statement, "rough" ones. The only data on which the estimates were based that might be regarded as being concrete was the "Till Log On Data that is available for Broomfield". Table 1 related to the period from 18 February 2012 to 7 July 2015,

and the time spent on checkouts was said in that table to be 2 hours. The same figure of 2 hours was given in table 2, which related to Broomfield for the period from 7 July 2015 to "around 1st January 2016". Table 3 was for the period from "around 1st January 2016 to around 8th September 2016". The time spent on checkouts was said to have been 1 hour 15 minutes during that period. Table 4 was for Broomfield for the period from "around 9th September 2016 – 31st August 2018", and the time spent on checkouts during that period was said to have been 1 hour and 25 minutes. In all of tables 1, 3 and 4 the time spent on "Bake Off activities" was three hours. In all but the first table, the time spent by the JH on "Pulling in deliveries" was said to be one hour. In the first table, it was said to be 35 minutes. In table 2, the only additional task stated was "Replenishment (no frozen)", and that was said to have taken up 4.5 hours of the JH's time. Replenishment in the other tables respectively was said to have taken up

13.1 (table 1): "30 minutes" on "Replenishment (frozen)" and "60 minutes (1 hour)" on "Replenishment (other)";

13.2 (table 3): "30 minutes" on "Replenishment (frozen)" and "105 [minutes] (1 hour and 45 minutes)" on "Replenishment (other)"; and

13.3 (table 4): "30 minutes" on "Replenishment (frozen)" and "70 minutes" on "Replenishment (other)".

14 We could not see how for example either (1) Mr Diment's estimate of two to three hours as compared with the JH's estimate of three hours, for "Bake Off activities" or (2) his estimate that it took the JH 25 minutes rather than 20 minutes to "clean and replenish the Coffee Machine", could affect the assessment of the IEs of the demands of those aspects of the JH's work for the purposes of section 65(6) of the EqA 2010. In addition, in the light of the schematic at H31, we doubted that it would make a difference for that purpose if the JH spent 1 hour 15 minutes instead of two hours a day on checkouts, bearing in mind that she spent the rest of that nominal two hours doing other work and bearing in mind that whether or not she was actually on the checkouts, she was required to drop what she was doing and go onto the checkouts at any time that there was a need to do so.

15 In the circumstances, we decided that we would accept the claimants' proposed figures, as set out in **paragraph 20**, subject to the possibility of the IEs saying that their assessment of the demands of the work would have been different if we had accepted the respondent's proposed figures. If that happens, then we will reconsider our conclusion on the relevant figure, or figures.

Time pressures

16 **Paragraph 22** as proposed by the claimants was, we concluded, factually accurate. We came to that conclusion because we accepted what the JH said in paragraph 27 of her witness statement.

What the JH did in relation to the store's keys

17 Having heard the JH's and Mr Diment's oral evidence and considered the WhatsApp text messages referred to in the latter's second witness statement, we came to the inevitable conclusion that the claimants' proposed words for **paragraph 23** were at least partly factually correct. The factual assertions made in that paragraph had to be assessed against the background of the JH's responsibilities as a customer assistant in general. The issue here as far as we were concerned was whether or not the fact that the JH was on at least one occasion (and, we thought, on the balance of probabilities several occasions: we preferred the JH's evidence on this to that of Mr Diment) trusted to operate the store at which she was working without a manager present, was material at this stage. We could not say that it was irrelevant, but we also wondered how, if we found in favour of the claimants on the point, it might affect the cases of other claimants. We concluded that it could not affect their cases unless they too were trusted with the keys to the store at which they worked. However, we also thought that there was a real possibility that the holding of keys was "not of practical importance in relation to the terms of their work", applying the words of section 65(2)(b) of the EqA 2010 by analogy. In any event, we accepted that the claimants' proposed words for **paragraph 23** were factually well-founded.

Deliveries

18 **Paragraph 25** concerned what the claimants referred to as a deliveries table, which was the subject of disagreement as shown (we were eventually able to see from the text in the main part of the spreadsheet containing the claimants' closing submissions in regard to the work of the JH) in two separate "pages" of the Excel spreadsheet in which the claimants' closing submissions were stated. The respondent made detailed closing submissions about the content of the table. We could see that the table contained information which was capable of being relevant, because of the statement of the times which the claimants estimated the JH spent on dealing with the various kinds of delivery and because different physical effort will have been required to deal with the different things delivered. However, we were unable to see how the detailed objections made by the respondent could affect the IEs' assessment of the demands of the JH's work for the purposes of section 65(6) of the EqA 2010, especially bearing it in mind that the respondent did not contest most of the claimants' estimates of the approximate times taken by the JH to deal with the various kinds of deliveries. We concluded that the objections of the respondent in relation to the claimants' assertions about frequency were best determined by reference to the description of frequencies in H31. The fact that the claimants' statements of the "Unit types" were agreed (with relatively minor exceptions) was helpful, as it would mean that the IEs would be able, we thought, to assess the demands of the JH's work on deliveries relatively reliably, if they applied the frequencies stated in H31. We did, however, have some difficulty with the respondent's submission on the frequency with which the JH received deliveries of milk when she was working at Broomfield Road, as the respondent asserted via its table that the JH did not receive such deliveries when she

was working at that store at all, and said that its submissions on that issue were in its response to **paragraph 26**, as set out in its closing submissions, but then it said nothing in those submissions about such milk deliveries. The respondent opposed the claimants' formulation of the JH's involvement in milk deliveries, namely that she spent 5-15 minutes "5 times per week at Danbury; very rarely at Broomfield Road", on the basis that we should conclude that the JH was "not at all" involved in the deliveries of milk at Broomfield Road.

19 We rather doubted that the question whether or not the JH tended to deal with milk deliveries which were made to the Broomfield Road even only "very rarely" was material, given that, as it was said (by the claimants; this was opposed by the respondent, but not, as far as we could see, for substantive, or at least cogent, reasons) in **paragraph 26**,

> "With a varied schedule, JH was required to be flexible. If a delivery arrived later than expected or did not arrive, she worked backstock around her other tasks until new stock came in."

20 We did see, however, that in paragraphs 551-559 of his first witness statement, Mr Diment referred to milk deliveries in detail and said (in paragraph 551) that he did "not believe that Roxy was involved in the milk delivery in Broomfield at all because it did not arrive when she was there". Given that the claimants proposed instead the words "very rarely", which appeared to be even less than "Annually or less" (which were the words for "Rarely" at H31), and given that the JH was at Broomfield Road during the relevant period for less than three years, we thought that we and the IEs should work on the basis (and we therefore concluded) that for the purposes of section 65(6) of the EqA 2010, the JH did not do anything in regard to the receipt of milk deliveries when working at Broomfield Road.

21 As for the receipt of newspapers, the respondent said that the JH was never involved in the <u>return</u> (our emphasis) of newspapers. The justification for referring to returns was stated by the respondent in its response to the table by saying this:

> 'It is implied by the wording in the column headed "Returns", that JH was involved in the return of unsold newspapers to the supplier.'

22 There may well have been a column headed "returns" which justified that assertion, but we could not see it.

23 We were unable to understand the implicit assertion (made via the respondent's proposed amended table consisting of **paragraph 25**) of the respondent that the JH was not involved in the receipt of newspaper deliveries while working at Broomfield Road, since that was not the subject of any evidence given by Mr Diment. In addition, if, as it was said by Mr Diment in paragraphs 536 and 537 of his first witness statement, "Whoever took in the delivery of newspapers generally replenished the shelves; it was all part of the same task", but "The newspapers were normally

delivered by the Third-party supplier, Menzies, before the store opened and left outside in around 10 bundles", then there was nothing that could be done by the JH in regard to receipt of the delivery. All that could be done was to put out the newspapers on display, which was, surely, part of the task of replenishment (although the word did not really apply to the putting out of the day's publications at the start of the day). In cross-examination on day 8, the JH said (as recorded at line 8 of page 101 of the transcript of that day to line 8 of the next page, 102) that, while there was "another CA at Broomfield who dealt with newspapers ... [p]rimarily", she, the JH, did "replenish newspapers at Broomfield ... [during holidays and when she was] on light duties at one point". We accepted that evidence, but doubted that it added anything in respect of the demands of the work of the JH for the purposes of section 65(6) of the EqA 2010.

24 In any event, the real dispute in relation to newspaper deliveries as far as we could see related to what the JH did in regard to the return of the newspapers. The JH said nothing in her witness statement evidence about that specifically (i.e. in addition to what she said in paragraphs 5-8 of that statement, which in effect incorporated the EVJD except and to the extent that it was the subject of a specific reservation in her witness statement or an agreement by the claimants with the respondent), but she did accept that newspaper returns were done at the end of the day and that she would therefore not have done them. That was recorded at lines 7-11 of page 151 of the transcript of day 8. That meant that the respondent was right to say that the JH did not do anything in regard to newspaper returns.

25 The question whether the JH spent 5 minutes on most shifts at Danbury and once every week or every two weeks at Broomfield Road dealing with third-party bread deliveries was disputed. The respondent's resistance to that part of **paragraph 25** was based on (1) what the JH said in cross-examination as recorded at line 15 on page 17 to line 3 (which was probably intended to be a reference to line 6) on page 18 of the transcript of day 9, and (2) what Mr Diment said in paragraphs 655-656 of his first witness statement. It was true that that evidence showed that the JH did not normally have anything to do with the bread delivery, but it did show that if she was in fact available to deal with a bread delivery in the absence of the shift runner or a manager to do so, then she might deal with it. In those circumstances, assuming that it was material to do so, we concluded that the JH occasionally spent 5 minutes dealing with a bread delivery.

26 The dispute in regard to **paragraph 25** relating to what the JH did in connection with deliveries of coal, charcoal and logs was best resolved by reference to **paragraph 44**, and is resolved accordingly below.

27 The claimants claimed that the JH was involved in receiving deliveries of cigarettes from the company by the name of Palmer and Harvey at the same time as receiving deliveries of frozen food from that company. The assertion that the JH could be said to have had a role in regard to the receipt of cigarettes was resisted by the respondent (although this was said in submissions in response to **paragraph 43**

rather than in response to **paragraph 25**) on the basis of what Mr Diment said in paragraph 546 of his first witness statement, which was this.

> "From the beginning of the RP up until around November 2017, P&H delivered cigarettes. When it was P&H delivering cigarettes, there would be limited involvement with the delivery from any Customer Assistant in the store. The Third-party Delivery driver took the stock off the lorry and came into the store with the cigarettes in a plastic sleeve and they would be handed to the nearest available colleague who locked them in the office because they were a high value item. P&H delivered the cigarettes at the same time as frozen stock and so I believe Roxy was unlikely to have put the cigarettes into the office because she was required to unload the frozen stock from the P&H cages and put it into the Warehouse Freezer."

28 The JH accepted the third sentence of that extract ("The Third-party Delivery driver took the stock off the lorry and came into the store with the cigarettes in a plastic sleeve and they would be handed to the nearest available colleague who locked them in the office because they were a high value item") when its substance was put to her in cross-examination as recorded in lines 18-22 of page 153 of the transcript of day 8. However, it was not put to her that she "was unlikely to have put the cigarettes into the office because she was required to unload the frozen stock from the P&H cages and put it into the Warehouse Freezer", although at lines 15-18 of page 86 of the transcript of day 8, the JH agreed that she put frozen items from a delivery into the freezer. In those circumstances we accepted that the JH did not normally at least formally receive deliveries of cigarettes from Palmer and Harvey.

29 The only remaining disputes about **paragraph 25** that we needed to determine related to issues of frequency raised by the respondent in relation to the extent to which the JH was involved in receiving deliveries of fresh and grocery deliveries. However, those disputes were based on statistics that were put before us only via the evidence of Mr Black, and as stated in paragraphs 56-61 of our judgment of 12 July 2023, we could not fairly accept those statistics, or alternatively they were not reliable. But even more importantly, we could not see why they were relied on by the respondent, since the respondent accepted in its closing submissions in relation to **paragraph 25** that "Deliveries was one of the JH's Core Tasks and the JH assisted with 90% of the Tesco deliveries that arrived when she was in store (see MD's Witness Statement, paragraph 204". Applying H31, that meant that the JH was "frequently" engaged in receiving deliveries of what the respondent called fresh produce and groceries. We thought that that was all we had to decide. If the IEs disagree then they can make an application for the determination of one or more further findings of fact under rule 6(3) of the EV Rules.

30 Paragraphs **26 and 27** were in part about the physical environment in which the JH received deliveries at the Broomfield Road store. We ourselves visited that store, and saw that environment. In fact, the environment of Express Stores was such that deliveries were likely to be slightly problematic for all or most of them if they were not

sited at a petrol filling station. That was because the area where a delivery lorry could deliver was likely to be confined. We could not tell without input from the IEs whether it was material that there was a slope at the Broomfield Road store. If it was material, then we found as a fact that there was one. That was because (1) there was a photograph of it at C1/10.48, (2) we had seen it ourselves, and (3) Mr Diment acknowledged that there was one. He did that in the passage from lines 11-21 on page 18 of the transcript of day 10.

31 **Paragraph 26** concerned in part also the pattern of deliveries to both Danbury and Broomfield Road stores. We could not see how that could be relevant to the value of the work done by the JH as it seemed to us that for example the order in which the JH did her various tasks was irrelevant to the demands of those tasks.

32 **Paragraph 28**, which related to the return of UoDs, waste and materials to be recycled, was disputed for several reasons, but mostly on the basis that (1) it appeared to overstate what the JH was did given that cages and dollies in which produce had been delivered and which were to be returned via the delivery lorry were in practice prepared for return during the course of replenishment, and (2) in fact the JH was not able to do anything more than simply receive deliveries, given that she would in practice be fully engaged in bake-off and coffee-machine cleaning tasks in the period before the deliveries arrived.

33 Both of those points of the respondent were good ones, in our judgment. In addition, it was Mr Diment's evidence in paragraph 204 of his first witness statement that

> "The Shift Runner was responsible for overseeing the delivery process from start to finish. Roxy [i.e. the JH] pulled in around 90% of the deliveries that arrived whilst she was on shift with the Shift Runner. If Roxy was not pulling in deliveries, she was carrying out other Core Tasks in her Set Routine like Bake Off activities and Coffee Machine".

34 We did not understand the first two sentences of that passage to have been challenged, and in any event we could see that the respondent would have wanted the JH to concentrate on her bake-off and coffee machine-cleaning duties during the mornings, when deliveries were expected. We therefore concluded on the balance of probabilities that those two sentences were true.

35 Mr Diment also said this in his first witness statement about **paragraph 30**, which was to the effect that the JH "sometimes needed to ready the backstock areas to receive stock by rearranging the load of Cages or Dollies".

> "202 Regarding re-adjusting stock on Dollies (paragraph 30 of the EVJD), I do not believe that this would have been done at all in Danbury because deliveries would arrive later in the day and so, generally, any Backstock was worked through by the time the delivery arrived and so there would have been nothing to condense (the same when we had Back Door

> deliveries in Broomfield). Roxy may have done this task in Broomfield but it would have been infrequently and I would estimate a maximum of five times per year.
>
> 203 It was necessary to pull any empty Unit of Delivery from the yard to the front of the store after Front Door deliveries came into effect (in Broomfield) however, I disagree with the statement that Roxy did this because she was carrying out Bake Off activities and attending to the Coffee Machine. Roxy may have carried out this task during the Broomfield Six Months whilst not carrying out Bake Off activities and probably she would move a few Cages a day at most to clear the Bake Off area."

36 As for adjusting stock on dollies or working backstock, that was work of the same sort as was done when replenishing, so we saw no reason to make a specific finding on whether or not the JH did that work in connection with deliveries. The work of the JH had to be determined by reference to the tasks and their demands, not the labels which were put on the various activities by the parties, including for example "replenishing", "unloading deliveries", or "working deliveries".

37 Having said that, **paragraph 30** was in terms which implied that the JH would routinely "[re-adjust] stock on Dollies", when, if she was already busy, it was likely that she would do such re-adjusting for only a relatively brief time. The whole of **paragraph 30** was in these terms.

> "JH sometimes needed to ready the backstock areas to receive stock by rearranging the load of Cages or Dollies. For example, if someone had replenished the milk in a rush and not condensed the milk dollies, there might be an excess dolly taking up space. JH would readjust the stock so the excess dolly could be taken away."

38 The evidence given by Ms Garrod in cross-examination (recorded from line 17 on page 80 to line 11 on page 81 of the transcript of day 8) was quite close to that of Mr Diment but indicated that doing a bit of (as she put it) "condens[ing] down" happened more frequently than (as claimed by Mr Diment) a maximum of five times per year.

39 In line with what we say in paragraph 36 above, we doubted that there was here a need to make a specific finding of fact on this issue, but if there was, then we preferred the evidence of the JH to that of Mr Diment. That was because it made perfect sense for her to do the things stated in **paragraph 30** whenever necessary. We concluded, however, that doing those things would not take more than a few minutes. We decided that she would do them (applying H31) regularly.

40 We were surprised (1) that the claimants claimed (as they did in the first sentence of **paragraph 31**) that it was part of the job of the JH to greet the delivery driver, and (2) that the respondent objected to that claim on the basis that it was not part of her job

to do that. We say those things because (1) we could not see how it could be relevant to the demands of the job that the JH had to, or did, greet the delivery driver, if only because the JH had to greet customers, so that greeting the delivery driver was unlikely to be so momentous an event or task that it added anything material to the demands of a replenisher/till operative at an Express store, but (2) she plainly would be expected in practice to greet the delivery driver.

41 As a matter of fact, however, while the JH would necessarily have spoken to the delivery driver when she was assisting with the unloading of a delivery (including in all probability by saying "Hello" to him), we found Mr Diment's evidence (in paragraphs 204-260 of his first witness statement) in regard to the responsibilities of the "Shift Runner" as compared with those of the JH to be compelling, both because what he said there was cogent and because it made obviously good business sense for the shift runner (who might be the store manager but would necessarily be at least a supervisor) to be responsible for dealing with a delivery driver and accepting or (rarely) rejecting a delivery.

42 The JH accepted that it was the shift runner's "overall responsibility" to accept deliveries, as recorded at pages 77-78 and 83-84 and lines 17-24 on page 87 of the transcript of day 8. However, she said (as recorded at pages 86-87 and the top of page 88 of that transcript) that about half the time she was asked to do something in that regard on behalf of the shift runner. That seemed to us to be likely, since the JH appeared to us to be a highly competent member of staff, which was consistent with her having been "actually shadowing shift leaders previously to learn the step-up role", as she put it as recorded in lines 16-18 of page 21 of the transcript of day 8. She appeared to have chosen not to seek promotion, as was evident from the discussion she had with Mr Epstein noted at the top of that page. We accordingly accepted that she was for about half the time asked to do things on behalf of the shift runner in regard to deliveries. Nevertheless, she did not have the responsibility of a shift runner as a result of doing those things. So, as a matter of fact, as part of her job she was required to exercise skill and care in doing things in relation to the receipt of deliveries which would have been done by a shift runner if the shift runner had not asked her to do them. We accepted, though, that the JH did not normally reject deliveries such as deliveries of frozen foods the temperature of which was too high to be accepted. Yet the evidence before us, both from the JH via in particular **paragraphs 37 and 39** and Mr Diment in cross-examination (as recorded in the passage from line 20 on page 20 to line 19 on page 24 of the transcript of day 10), was that on at least one occasion the JH took the decision to reject such a delivery.

43 In fact, C7/215 ("Bronze 5 (Card 5) – Backdoor and Warehouse – Accepting Deliveries") showed that the respondent did expect staff in the position of the JH to accept deliveries and as part of that role to check them, as recorded on the first page of the document. There, this was said, in the "Accepting Deliveries Guidelines" box.

> "When deliveries arrive at the backdoor, there are guidelines you must follow:

- If present, the yard gate must be kept shut when there are no vehicles leaving or arriving.
- High value products must be stored in a secure location before being stored or put on sale.
- Ensure that walkways from the loading bay to the delivery holding area are clear of obstructions.
- Remember to check everything when accepting a delivery – for example, check the number of cages or cases, temperatures, receipt notes and seal numbers.
- Ensure that deliveries that require pre-sorting are moved to the correct area of the warehouse.
- Never sign for goods that have not been received.
- Complete any relevant Safe and Legal Record activities, for example temperature checks."

44 The third of those bullet points showed that the respondent was wrong to oppose **paragraph 29**. The fourth of the bullet points showed that the respondent was wrong to oppose the content of **paragraph 33**. Indeed, C7/215 showed that even though a shift runner would (as we have accepted) have overall responsibility for what happened in relation to a delivery, a customer assistant in the position of the JH also had responsibility for "accepting deliveries". That was clear from the "Introduction" box on the left hand side of the first page, which had in it this text.

> "One of your responsibilities will be accepting deliveries. All Tesco depot and most direct from supplier deliveries are accepted through either the front or back door. These include:
> - Tesco Fresh and Grocery deliveries
> - Milk deliveries
> - Bread deliveries
> - Courier deliveries
> - Newspapers and Magazines
> - Palmer and Harvey Frozen Food
> - Postage stamps
> - Cards
> - Palmer and Harvey tobacco."

45 We therefore concluded that the number of times that the JH in fact dealt with a delivery of over-temperature frozen food (which was the subject of debate in relation to **paragraph 37**) was irrelevant. The key factor here was that the JH was responsible for checking and at least raising with the shift runner the possibility of a delivery being rejected. We came to that conclusion on the basis that it was obviously the case, but we saw that C1/41 (stating the policy and procedure for "Deliveries Made 'Out of Temperature'") confirmed that it was the case. There, at C1/41/3, under the heading "Store Temperature Checking and Escalation", the first step was said to be the responsibility of the "Backdoor Customer Assistant", and was this:

> "Stock 'out of temperature' is identified and checked during the unloading process and any issues are escalated to the Store Duty manager".

46 The next step was the responsibility of the "Store Duty Manager", and was this.

> "Stock 'out of temperature' is checked and verified and the Driver is informed of any stock that is being rejected".

47 The following three steps were to be taken by the driver and the "Transport Service Team Manager", presumably at the DC. Reference was then made to the process of "Stock Rejection", which as far as the store was concerned was a task for the "Store Duty Manager" to do.

48 It was helpful too that on page 1 of C1/41, there was a box at the start of the document entitled "Rejecting a Delivery/Stock" which showed whose responsibility it was to reject a delivery of "out of temperature" stock. The box contents were these.

> "• Temperature checks should be carried out by the store if:
> - o The temperature control settings on the trailer do not match the Retail Delivery Record
> - o There is evidence and reason to expect product temperatures have not been maintained
> - o An unit of delivery [sic] has been loaded in the wrong temperature chamber or not shrouded correctly
>
> • Store Duty Manager must complete a 'core' temperature check to verify the products are outside the 'accept delivery' range for the product group and verifies the results with the Driver prior to rejecting any units of delivery
>
> • Store Duty Manager must call Distribution Service Helpline and follow options to your servicing DC to reject the delivery whilst the trailer and Driver are still at the store
>
> • The Distribution Centre investigate to establish if the stock being rejected represents a part or full invoice and also identify the assembling and delivering sites to ensure the correct course of action is taken".

49 The manner in which temperature checks of produce which was in a delivery had to be carried out was shown clearly by what was said at C1/40/4. That page was part of the "TESCO express STORE MANAGER Safe & Legal Record" for a particular four-week period of 2017. In addition it was helpful that at page 6, the acceptable temperatures at which "Frozen", "Raw meat, fish and poultry", "Chilled food (including red and blue label produce)" and "+12^{o}C produce & plants" could be received or, as the case may be, should be rejected, were stated.

50 Before returning to the role of the JH in regard to the receipt of deliveries generally, we record here that we concluded that if and to the extent that **paragraphs 37 and 39** were inconsistent with the training materials and other documents to which we refer in paragraphs 38-44 above, then those materials and documents were determinative of the JH's role in regard to the receipt of deliveries of the products referred to at page 6 of C1/40, which we have set out in the preceding paragraph above. We saw **paragraph 38** as adding nothing material to what was stated on that page. For the avoidance of doubt, we also concluded that, given the evidence of Mr Diment, the JH's role did not go beyond what was stated in the documents referred to in paragraphs 43-49 above.

51 **Paragraph 40** was opposed on the basis of Mr Diment's evidence in paragraphs 211-214 of his first witness statement. Those paragraphs focused on the extent to which in practice deliveries arrived with damaged goods on them. While the situation in practice might be relevant as far as the IEs are concerned, we thought that the key thing here was the extent to which it was the JH's responsibility to look out for and report the existence of damaged products in a delivery. In practice, we concluded, the JH was not required to carry out an inspection of newly-delivered stock, but she was required to be on the lookout for damage to that stock. That was borne out (if it needed to be borne out: it appeared to us to be obvious) by what was said in passing at C7/197/1 (part of the "Know Your Stuff For Express: Waste" series and entitled "Recording Waste, Storage and Disposal") under the heading "What You Need To Know/Do" about the possibility of coming across "damaged products we may find when sorting a delivery".

52 We were told that the respondent had told the claimants that C7/215 (the main part of whose heading was, as indicated in paragraph 38 above, "Backdoor and Warehouse – Accepting Deliveries") applied to Express stores. It did not say that on its face, but it plainly did apply to Express stores. We say that in part because of its reference (set out in the paragraph 44 above) to deliveries being received through both the front and the back doors, and we rather doubted that that would have been said about superstores or Extra stores. The "Good Neighbour Policy" section on the first page of C7/215 was also plainly applicable to Express stores, and also showed that the document was aimed not at the managers of such stores. The text of that section was this.

> "The noise from taking a delivery or moving roll cages must be kept to a minimum. At times during the day or night, where disturbance of neighbouring residents is likely, arrangements should be made to avoid any activity that creates loud noise or disturbance. Your Operations Manager and your Regional Trading Law and Technical Manager must be consulted by your Store Manager if issues arise that mean additional measures may need to be taken."

53 The document at C7/215 stated fairly comprehensively the JH's responsibilities, i.e. her job, in so far as it related to the receipt of deliveries, although we doubted that by 2018 carbon paper documents (referred to in the right hand column of page 2) were

still in use. C7/215 was dated "12/13", however, so it was current in the middle of the relevant period. In **paragraph 33** it was said that when the JH worked at Broomfield Road, so after 6 July 2015, she used a PDA instead of paper in relation to milk deliveries.

54 We saw, incidentally, that C7/215 referred at page 3 to it being the driver who would have to make him/herself known to the store's staffs. At the top of C7/215/3, this was said.

> "When a Tesco delivery vehicle arrives at the store the driver will make themselves known to a colleague."

55 We saw that the colleague did not need to be the shift supervisor. But in any event, it was not the responsibility of the store staff to greet the driver; it was the other way round.

56 We noted too that at the bottom of the right-hand column on C7/215/1, this was said.

> "Two people must be present to assist unloading".

57 As far as we could see, the respondent nowhere referred to C7/215: not even in closing submissions (including in relation to the JH's training; we searched that document also for references to the disclosure number printed at the bottom of C7/215, i.e. 24649), despite the fact that the document was put to Mr Diment in cross-examination. We were unable to understand that approach. That was because the document was an informative statement, emanating directly from the respondent, of at least most of the tasks and responsibilities of a customer assistant at an Express store in regard to the receipt of deliveries.

58 So, for the avoidance of doubt, the respondent's submissions to the effect that the JH had to get the agreement of the shift runner to do the things which C7/215 showed were her own responsibilities (albeit that she could of course check anything relevant with the shift runner, and if necessary obtain authorisation from the shift runner for anything problematic in relation to the acceptance or rejection of a delivery) were inconsistent with C7/215 and, partly for that reason but also because we could see that it was in the commercial interests of the respondent for customer assistants in the position of the JH to take as much responsibility as they reasonably could, we rejected them. We therefore rejected the respondent's proposed additional words for **paragraph 35**.

59 There was a dispute about the content of **paragraph 36**. That paragraph was in these terms.

> "When a delivery of newspapers and magazines arrived, JH would take a Flat top from the rear of the store and either place the stock on top of it or ask the delivery driver to do so. She opened the Menzies app on a PDA, checked that

> she had the correct delivery, and checked the goods in, and double-checked that the right amount of stock had arrived."

60 The dispute about those words was based on this passage in paragraph 539 of the first witness statement of Mr Diment.

> "My recollection is that the PDA was used later on in the RP when Roxy was in Broomfield and that she did not put the delivery out in Broomfield. In Danbury there was paper delivery paperwork, which required a quick visual check to determine if the correct volume of papers were delivered.

61 We rather doubted that there was a difference in terms of the demands of the work and therefore its value for the purposes of section 65(6) of the EqA 2010 between (1) using a PDA and (2) using delivery paperwork to (a) check that the right amount of stock had arrived and (b) check the stock in. If and in so far as it was necessary to do so, we accepted the evidence of Mr Diment on this, which was in fact not challenged.

62 We saw that the respondent opposed the content of **paragraph 36** also on the basis that the JH herself said in cross-examination, as recorded in lines 4-16 of page 30 of the transcript of day 8, that she was not responsible for dealing with "the papers", i.e. newspapers and magazines. It was certainly true that the JH was not primarily responsible for dealing with newspapers and magazines and that if the person who was so primarily responsible were at the store then he or she would be likely to have been primarily responsible for accepting deliveries of those things. Thus, **paragraph 36** had to be read as a reference to the JH receiving deliveries of newspapers and magazines whenever necessary, which might have been only, say, once a month. If and in so far as it added anything material to the demands of the JH's work for the purposes of section 65(6) of the EqA 2010 (which we doubted, given that the JH was agreed to be responsible at least in some way for the acceptance or rejection of deliveries of other goods), we concluded therefore that the JH's work included accepting deliveries of newspapers and magazines about once a month and in that regard doing the things which were described in **paragraph 36** read in the light of the evidence of Mr Diment in paragraph 539 of his first witness statement, which we have set out in paragraph 60 above.

63 **Paragraphs 41-43** were a narrative of what the JH did in regard to the receipt of deliveries generally. They added nothing to the responsibilities of the JH in that regard, which were in our view stated sufficiently by what was said at C7/215/1 which we have set out in paragraph 43 above.

64 **Paragraph 44** was in large part about deliveries made by third parties, i.e. not made via one of the respondent's vehicles. The only relevant part was the middle sentence, referring to the JH's role of moving "stock off the shopfloor and into the backstock area in the rear of the store" if necessary. The final sentence was a reference to overstock of coal, charcoal and logs, which was said to be kept in a cage in the yard.

That final sentence was opposed on the basis that "the Shift Runner dealt with the deliveries", so, implicitly, it was said that it was irrelevant.

65 It was not irrelevant if the JH had responsibility for the receipt of deliveries of coal, charcoal and logs from time to time, which was at least possible, and certainly was the JH's evidence, as given in cross-examination from line 11 on page 35 to line 7 of page 37 of the transcript of day 9. We accepted that evidence. Thus, what the JH did as indicated in **paragraph 44** as expanded in that cross-examination in relation to deliveries of coal, charcoal and logs, i.e. (1) help to unload the stock and put it in the places for it in a "bunker at the front of the shop", and (2) put any backstock into a cage in the yard, was done by her (applying H31) occasionally.

66 **Paragraph 45** added nothing material to what was said on C7/215/2-3 and 5-6.

67 **Paragraph 46** was factually correct, as far as we could see, and the respondent's objections to it related in part to the relevance of parts of it. However, the fact that the JH slipped over once when unloading a delivery of frozen food (and, contrary to the respondent's submissions, we saw no good reason to reject the JH's evidence in that regard) was not opposed by the respondent on the ground of relevance, but nevertheless seemed to us to be irrelevant here. That was not least because the JH slipping on that occasion appeared to have had nothing to do with the fact that she was unloading frozen food. Thus, that slip appeared to have been co-incidental for present purposes.

68 Still in regard to **paragraph 46**, we saw that the respondent proposed the addition of words showing that the JH "three times a week" put away frozen stock and that that proposal was supported by what Mr Diment said in paragraph 234 of his first witness statement. That was useful if it was correct in that it showed that the JH did that task (applying H31) frequently. The content of paragraph 234 of Mr Diment's first witness statement appeared not to be contested, as the claimants in that regard merely referred back to their general submissions on **paragraph 26** which, as far as we could see, were not an answer to the proposition that about three times a week the JH unloaded frozen items.

69 **Paragraph 47** concerned what the JH did in regard to the return of empty cages and dollies and other things which needed to be sent back to, or to, the DC. In that regard, we concluded that the job of the JH was stated effectively in the right hand column of C7/215/6, in the following terms.

> "Your role is to move the delivery to the correct holding area of the warehouse once it is unloaded, and have any returns ready and available. You are also allowed to assist the driver on the back of the Tesco vehicle by helping to pull cages off and on the vehicle, with the driver's permission."

70 **Paragraph 48** was about what the JH did at the Danbury store when she assisted with a milk delivery. It was that the JH "helped the driver reverse his lorry out of the

forecourt" once the delivery had been made. The respondent's final submissions were to the effect that the JH did do that "occasionally" but that when doing so she "remained in view of the driver (not behind the lorry) and wore a Hi-Viz jacket or vest". Given the content of C7/215/3-4, that was an apt statement of what was done. We found those pages to be more helpful as a description of what was involved. The only issue that arose in regard to paragraph 48 was therefore eventually that of the frequency with which the JH assisted the milk delivery driver to reverse the delivery vehicle. The terms of paragraph 45 of the JH's witness statement suggested that it was a fairly frequent occurrence; certainly more than "occasionally" within the meaning of H31. Doing the best we could on the evidence before us, we concluded that the right description of the frequency was "regularly".

71 We failed to see how putting the paperwork behind the tills, as referred to in **paragraph 49**, could be relevant except as a statement that the JH took care with documentation relating to deliveries which she had received. We thought that that was an obvious requirement of her job: losing the documentation or putting it where it might be blown away or lost, would obviously be a bad way of doing the work which she was required by the respondent to do, which was to take reasonable care of such documentation.

Pre-sorting

72 **Paragraph 50** was a simple statement that the "JH spent 15-20 minutes per shift pre-sorting goods". That was resisted on the basis that "there was no requirement to pre-sort".

73 That resistance was shown to be wrong by C7/186 (repeated at C7/206), which had the title "Know Your Stuff For Express: Replenishment", and was entitled "Backdoor, Warehouse and Sorting Stock". In the left hand column on the first page, in the box headed "What You Need To Know/Do", under the words "NOTE: Walk the trainee(s) around the back areas of the store using the following to explain what they are for:" there were these bullet points.

> "• Pre-Sorting: where we sort stock into cages based on their location on the shop floor.
> • Delivery holding: where delivery stock is held before it is worked or pre-sorted.
> • Stock to be worked: where pre-sorted stock ready to be worked is held."

74 In the left hand column on the second page of C7/186 (the document was in fact only two pages long), this was said.

> "**Product Grouping**
>
> We sort stock into product groups to make it:

- easier to fill by reducing the distance you travel on the shopfloor;
- easier when we are trying to find products for customers
- more accurate for gap scan and counting routines as all the stock for one product group will always be in one location.

Delivery stock is pre-sorted for replenishment and backstock is post-sorted. All stock in the warehouse is sorted into product groups.

We sort onto slimline cages which can be used on the shopfloor for replenishment. Use wire shelf dividers to help separate stock into the right product groups.

It is important to remember that by sticking to the product groups you are helping the Stock Assistant, your colleagues and yourself."

75 The steps on the right hand side of that page included these:

75.1 "The Stock Marshall pre-sorts delivery by aisle starting with priority cages."

75.2 "The Stock Marshall passes the pre-sorted stock to fillers or places in an area ready to go."

76 We thought that C7/186 was a good and sufficient description of what the JH did in relation to newly-delivered stock. We heard nothing about a "Stock Marshall" at the store, so we assumed that the work of that marshall would be done by whoever was dealing with the newly-delivered stock, and that that included the JH.

77 We noted that in paragraphs 671-674 of Mr Diment's first witness statement he gave evidence to the effect that "pre-sorting" was not part of the JH's work for the purposes of section 65(6) of the EqA 2010. Most prominent for present purposes was what he said in paragraph 672, which was this.

'I do not agree that "pre-sorting" is a requirement of replenishment and there is no requirement to spend any time "pre-sorting" stock (paragraph 50 of the EVJD). When we had Slim-line Cages (after 2014), these were taken straight out onto the Shop Floor and replenished from there and generally stock items are grouped together anyway (for example crisps came together). Prior to Slim-line Cages, items of stock were put onto a Flat Top and wheeled out onto the Shop Floor.'

78 The JH, in contrast, said this in paragraph 46 of her witness statement.

"Incoming stock had to be stored sensibly. I had to move cages into the right bit of the warehouse (freezer, chiller or stock room). I spend a total of about 15 – 20 minutes per shift sorting out newly delivered stock. For example, if I came across products that had been mixed together and needed to be kept at

different temperatures (e.g., bread and fresh), I'd put them in the right place; if I came across a product in a delivery that we already had, I'd try and put the older stock on top. If I came across a damaged product, I'd clean it up, including cleaning anything it had leaked onto. We couldn't wheel cages into the freezer at Broomfield Road, so I'd have to put the stock in item by item, presorting as I went. Some of the boxes were heavy and it was a fairly small space into which to put the stock, particularly when there was a lot of stock in there to start with."

79 We saw that even in what Mr Diment said there was an element of pre-sorting: putting stock onto a flat top trolley was pre-sorting. In any event, what the JH said made perfect sense on a practical level, and we accepted it.

80 We saw no need in the light of those findings of fact to make specific determinations about the assertions in **paragraphs 50-54**, although in case we are wrong about that, we record here for the avoidance of doubt that we accepted the claimants' proposed words for those paragraphs in so far as they related to pre-sorting as described in C7/186, but that we made no findings on the assertions relating to other tasks, such as dealing with damaged products, or that she "cleaned as necessary" as described in **paragraphs 238-242**, about which we have already made findings of fact in relation to the work of Mrs Worthington (see paragraph 83.1 of Appendix 1, at pages 52-53 above) and Ms Williams (see paragraph 268 of Appendix 2, at page 149 above), which in our judgment applied here.

Tagging

81 The parties agreed that, as stated in **paragraphs 57 and 58**, the JH would apply security tags to items that required them and that she would spend an average of 15 minutes per week tagging or adding security stickers to items. Perhaps surprisingly in the light of that agreement, they disagreed about whether or not that was done as described in **paragraph 57** in relation to "DVDs or video console games". We thought that the role of the JH was sufficiently described as being to apply tags to items which required it, and that the tagging of such items was best seen by the IEs by reference to pages 13-17 inclusive of C7/653. There, reference was made to "the Product Protection Guide on the Help Centre". We did not have that "guide" in the bundle, but it was clear that it was the location where the necessary information about tagging would be placed. It was probably sufficient for present purposes to say that the role of the JH in regard to tagging was best encapsulated by what was said on page 17 of C7/653, which was this.

"WHAT IS YOUR ROLE IN TAGGING?

Your role in tagging is to:

1. Know which products are tagged in your store and which need tags attaching on the shop floor as you replenish.

2. Know the different tag types and how to attach them."

82 We saw too that on the same page of C7/653, this was said.

> 'To see some examples of tagging in action, when you have finished this module, search for the General Merchandise video called "Protecting Our Products".'

83 That video was not available to us via Opus, i.e. it was not part of the digital bundle.

Coffee machines

84 In relation to **paragraph 59**, the parties agreed these things.

84.1 The JH "replenished, cleaned, and ordered supplies for the coffee machine in her store."

84.2 "The Danbury store coffee machine was supplied by Simply Coffee."

84.3 "The Broomfield Road store was supplied by Costa."

84.4 "The machines were very similar."

85 The respondent proposed the addition of the words at the start of those which we have set out in paragraph 84.1 above: "Except during the period 7 July 2015 to 8 September 2016". That was because of Mr Diment's evidence (in paragraph 511 of his first witness statement) that the machine was installed at Broomfield Road only on 9 September 2016, and that he recalled five colleagues, including the JH and him, being trained to use it (and being required to sign the sheet at C1/31) on that day. Logically, the fact that a Costa machine was installed on that day did not mean that a coffee machine was not present at the store before then. The fact (which was implicit in the agreement of the parties that the JH when at Danbury did the agreed things stated in **paragraph 59**) that there had been a coffee machine at Danbury from at least 2012 onwards meant that coffee machines were not new to Express stores generally in 2016. As a result, and given that (1) the JH's evidence was to the effect that she dealt with coffee machines throughout the relevant period, and (2) Mr Diment's evidence was inaccurate in one verifiable respect (namely in relation to pre-sorting, to which we refer in paragraphs 72-80 above), we concluded on the balance of probabilities that there was a coffee machine at Broomfield Road throughout the relevant period when the JH was working there.

86 The parties agreed that (as stated in **paragraph 60**) "Costa monitored the usage of the machine remotely and ordering was automated". However, it was the JH's evidence (and this was stated in **paragraph 60**) that she nevertheless "rang Costa to check and amend the weekly order." It was Mr Diment's evidence that she did not need to do that. In his first witness statement, he said this.

> "524 In Broomfield, the Costa Coffee order was automated; the machine monitors usage and the order was an automatic process. There was no requirement for any colleague to have any involvement in the ordering process. If no one did anything, the stock turned up and, if there was too much of any particular item, we asked the Third-party Delivery driver to take the excess stock away. The Coffee Consumables were not Tesco's stock and so whatever stock arrived or was sent back had no consequences for the store, as such.
>
> 525 I agree that Roxy did used to ring up Costa Coffee but the purpose of her call was, not to place an order, but to check what was due to be delivered on the automated order and sometimes to adjust it. This was completely unnecessary and there was no requirement for her to do so but she liked to control the process. If Roxy was on holiday, nobody telephoned Costa Coffee and I have never rung them up about the order.
>
> 526 It would not take very long to have the conversation with Costa Coffee but it could be difficult to get through to their staff on the phone. Roxy walked around with the phone on speakerphone and the hold music playing whilst waiting for the phone to be answered and whilst getting on with her Set Routine."

87 It was noteworthy from that evidence that Mr Diment did not stop the JH from contacting Costa Coffee in the manner he described. It was also noteworthy that the time which she spent doing so was minimal and that she carried on with other work while she waited for the call to be answered. Nevertheless, we concluded that his silence did not necessarily amount to condonation. Rather, we concluded, Mr Diment and the respondent tolerated it because it was something which the JH did as she wanted to feel to an extent in control of the process, and the respondent was keen for her to have a sense of ownership of the task of maintenance and replenishment of the coffee machine. Was that condonation, with the result that it became part of the JH's job to call Costa Coffee in the manner in which she did in fact call them? After careful consideration, we concluded that it was not.

88 **Paragraph 61** concerned what the JH did when a coffee delivery arrived. The respondent contended that it arrived during the JH's shift only about 50% of the time. That was on the basis of what Mr Diment said in paragraph 532 of his first witness statement. In addition, the respondent contended that the JH was not responsible for accepting the delivery, as it was not the respondent's stock. Mr Diment's evidence in paragraph 533 of his witness statement was that the JH only may have "carried out a quick visual check of the delivery" to check that the number of boxes delivered was what was stated on the "delivery paperwork". We accepted that evidence of Mr Diment, and concluded that what the respondent proposed for the content of **paragraph 61** was a more accurate description than the claimants' proposed words for that paragraph.

89 Unnecessarily, given the existence in the bundle of the manual for the Costa coffee machine which was used at Broomfield Road (the manual was at C1/32), the EVJD contained (in **paragraphs 63-68**) a description of how the JH cleaned and restocked that coffee machine. Cleaning of the machine was dealt with at C1/32/6-10. Replenishment (the claimants used the word "Restocking", but the Costa manual itself used the term "Replenishment") of the machine was dealt with at C1/32/11-15.

90 The following words in **paragraph 63** were opposed by the respondent.

> "Coffee was popular at the start of the day and the store would lose trade if the machine was not in operation. Also, JH could not leave the machine unattended during its cleaning cycle after the store opened, as this might leave customers exposed to steam and hot water."

91 Those words constituted a justification for the JH doing the cleaning before the shop was open, and an explanation of how it affected her work if she was unable for some reason to do the cleaning before the store opened. The final sentence of paragraph 63 was an explanation of when that might happen.

92 If the JH was unable to clean the machine before the store opened and she was right in saying that it could not be left unattended during its cleaning cycle during opening hours, then she would have been unable to leave it unattended. We saw that Mr Diment said in paragraph 516 of his first witness statement only that the JH cleaned the machine before the store opened "The vast majority of the time", and not that she was in fact able to leave it unattended. So, the contested words were true, but the impact of the need sometimes to stand by the machine while it was in its cleaning cycle was limited. The claimants did not suggest a frequency for that need. What they did say, however, in **paragraph 63** was that the JH "would always attend to the machine at some point during her shift". That was accepted by the respondent. We doubted that having to stand by the machine while it was in its cleaning cycle added anything significant. But in case it did, we concluded (doing the best we could on the evidence before us) that it occurred more than annually or less, but not regularly within the meaning of H31. Thus, we concluded that it occurred occasionally within the meaning of H31.

Baking/the bakery

93 The importance to the respondent of the job of baking was summarised neatly by C7/199, which was part of a series called "Know Your Stuff For Express: Bakery" and started, under the heading "What You Need To Do/Know" with this passage.

> "The Bakery is described in Tesco as a Hero Department because it plays a key role in how our customers feel about the store. If customers are happy with their perception of cleanliness, service and quality they get from the Bakery, they will return."

94 The type of bakery operated, the steps required to be taken in keeping it clean and safe, the hazards associated with doing the baking, required dress standards and the personal hygiene requirements of customer assistants who operated the bakery were neatly and succinctly stated in the rest of that two-page document. The title of the document was "Safe and Legal In The Bakery".

95 C7/204 was another document in the "Know Your Stuff For Express: Bakery" series. Its title was "Date Coding and Presenting Bakery Products". The highly informative text showed what was required by way of (1) date coding, and (2) presentation. While the whole of that document should be read by the IEs since it showed definitively what the parts of the work of the JH in regard to baking to which it related were, we noted in particular this passage on the right hand side of the first page.

> "By 8:00 (or 1 hour 45 minutes after starting the process) all products should be baked and on sale. This is an average bake time. A Moment of Certainty check will need to be completed to ensure the bakery is fully ranged, stock levels reflect expected trade patterns and all shelf edge labels and legal notices are displayed."

96 The words above that passage showed the importance of the application of some skill, or flair, in the course of "Presentation" of the bakery products.

97 C7/166 was entitled "Know Your Stuff For...Bakery – Bake-Off". Its objectives, stated at the start of the (8-page) document were these.

> "**Objectives** – by the end of this training session you will be able to:
>
> - describe the different types of product that require bake-off;
> - explain where the different types of products are located;
> - demonstrate how to prepare bake-off products;
> - demonstrate how to use the bake-off oven;
> - demonstrate how to safely load and unload an oven."

98 The document contained detailed instructions on how to do the work of a bake-off baker, and the reasons why those instructions had to be followed. While the whole of the document was relevant, we saw (and this was particularly important because it showed that the work of the JH included exercising some judgement) that this was said on page 7 (although we guessed that the word "not" was missing before the word "achieved" in the following sentence).

> "Occasionally you may need to use extra time in the ovens if the product does not look completely finished or has achieved the correct colour."

99 C7/212, part of the "Know Your Stuff For Express: Bakery" series, entitled "What To Bake", was highly informative about the bake-off process. For example, on the first

page of the 2-page document, under the heading “What You Need To Do/Know”, this was said.

> “**Merchandise Plans**
>
> All areas of the store use Merchandise Plans to layout fixtures. The Bakery is no different and you should refer to this when laying out the bakery fixtures.”

100 There was then a note to the trainer. After that note, the whole of the rest of the text of the “What You Need To Do/Know” box was of particular relevance given the disputes which were maintained before us, during the course of which no reference was made to C7/212. Ignoring the text of the second note to the trainer and the part at the end about the trainee’s chance to practise, the text was as follows.

> “There are a number of things that have been considered when the bakery Merchandise Plan was designed. Each of the following are used to create effective displays of bakery products:
>
> - **Product Grouping** – placing similar products together, such as rolls or French bread.
>
> - **Blocking** – arranging products by colour and size, giving structure to a display.
>
> Although there is little colour difference amongst bakery products, you could still block by placing white breads together and brown breads together.
>
> - **Pack Sizes** – display different pack sizes together, to give the customer a choice.
>
> Larger packs are usually displayed lower down.
>
> ***Production Planners***
>
> Within the Bakery, there is a tool called a Production Planner, which uses sales data to predict your daily requirements. This enables you to then split your daily requirements into a morning and afternoon wave of baking, to ensure customers can buy a range of fresh products throughout the day.
>
> All stores should bake a minimum of twice a day, starting their first bake half an hour before the store opens, and the second bake for 1pm.
>
> Twice every day, Production Planners will print automatically in your store; at 2am and 2pm. Each planner details the expected daily requirements which then needs to be split between the morning and afternoon wave.

- The planner that prints off at 2am will contain the information for that day

- The planner that prints off at 2pm will contain the information for the following day, to allow you to tray up for the following day.

The Production Planner itself is set to use your expected daily sales and therefore should be used as a guide on what your store should bake. If you think you need to bake more for a busier day then be aware of the impacts of over-baking to the stores waste.

For the planner to be accurate, waste needs to be recorded on correct SELs and sales put through the tills on the correct PLU."

101 We noted that there was scope for the customer assistant responsible for the bake-off to "think" that there was a "need to bake more for a busier day" and by implication to bake more for what the assistant thought was going to be a busier day, but bearing in mind the possibility of waste being generated as a result. In other words, the respondent accepted that there was a need for a customer assistant to exercise some judgment about the number of products to bake, but bearing in mind the resulting risk of waste. However, given what was said at the end of the document (under the heading "The Afternoon Routine"), it seemed that that judgment was intended to be exercised by whoever was at work in the afternoon. In any event, we could see that the JH's role included an element of judgment about the precise quantities to be baked, but on the basis that she could not be criticised if she simply complied with the production planner. In that regard, it was of interest, and relevant, that at the end of C7/212, under the heading "The Afternoon Routine", as the second and third bullet points (the first being to do with the 2pm "Rumble"), this was said.

"• Review the out of stocks and low-lines and bake off a minimum top-up to meet expected demand without causing unnecessary waste.

- The production planner needs at least 3 weeks worth of accurate data through the tills to give a correct estimate of daily sales."

102 C7/201 was part of the "Know Your Stuff For Express: Bakery" series and was entitled "How To Bake It". The content of the box at the top of the right hand column of the second page showed that there was a "correct programme on the oven for the product being baked". The steps to be followed in doing the bake-off were then stated. It is relevant to what we say below that on the first page, this was said about the kind of products which were the responsibility of an Express store customer assistant who was responsible for bake-off baking.

"The different types of products sold in a bake off store are:

- **Thaw And Serve** – these are items which have been fully baked and finished at the supplier's and then frozen to maintain quality and shelf life.

They require defrosting and displaying on shelf. The defrost time is approximately one hour.

- **Ambient Bake-Off** – these are part baked at the supplier's bakery and delivered into store in green trays at ambient temperature. They require final baking in the oven and displaying on shelf.

- **Frozen Bake-Off** – these are part baked at a supplier's bakery and delivered into store with the frozen food delivery. They require further or final baking and displaying. Some products like croissants and cookies will develop in the oven - when frozen they are smaller than when fully baked. Others will only colour in the oven."

103 At C1/21 (to which both parties referred in cross-examining, to which Mr Diment was referred in re-examination, and on which the respondent relied nine times in closing submissions), there was a 29-page document dated April 2016 and entitled "Convenience Bakery – Operations and Finance Reference Pack". It was informative about a number of things, and its content added something material to content of the documents to which we have already referred above in regard to baking. We saw that on page 2, there were some words which meant that the respondent's objection to the claimants calling the JH a baker (with a recognition that she was "only" a bake-off baker) was at least possibly unfair:

> "The type of bakery we have is called a 'Bake-Off', which will finish and bake a full range of products, some of which will require defrosting only."

104 At C1/21/23 there was a page showing a sequence of actions to be followed with precise start and finish times, starting at 06:00 and finishing at 07:21. While the respondent referred to C1/21 as showing that the JH did not have any discretion and (we inferred) that there was no room for creativity in the baking process at an Express store with a "Bake-Off" bakery, if it did indeed show that, it also showed what was required of a person doing that baking. For example, the second half of page C1/21/24 was a good overall statement of the role of the bake-off baker after the baking had been done, i.e. when freshly-baked produce was on sale, which was to be "by 8am every day". However, C1/21/26 was probably not about the JH's work, as it related to keeping the "checkouts up to date with the current range of products". Similarly, the following page was a "Store Manager Weekly Checklist". We concluded that the relevant pages of C1/21 were those numbered 5-25, although not all of every page was relevant directly to the work of the JH. To the extent that those pages were not so directly relevant, they were informative about that work, and therefore capable of being material to the assessments of the IEs.

105 What, then, were the disputes maintained by the parties about the JH's work as a bake-off baker, and why were they maintained? We now turn to those disputes.

106 While there was disagreement about the words of **paragraph 71**, the paragraph was descriptive and added nothing material. We therefore declined to determine the dispute about those words.

107 **Paragraph 74** was about relevant things, but the justification for the dispute maintained by the respondent about the time taken to do the work of baking off was difficult to see. The claimants claimed that it took between 2 and 3 hours and the respondent proposed instead that it be recorded as up to 3 hours. The possibility of being interrupted was agreed (which is hardly surprising), as was the fact that the interruption might be to assist with receiving a delivery or to assist on a checkout. However, the respondent proposed the addition of the words "or more rarely" before the word "checkout". This was a dispute about something which in our judgment could not conceivably affect the demands on the JH of the work of being a bake-off baker or the value of that work. We therefore declined to decide whether or not the words "or more rarely" were apt.

108 There was also a dispute about the purpose of the "audible timers". No purpose was ascribed to them by the claimants. However, the respondent proposed the addition of these words after the words "audible timers":

> "to alert her or other colleagues when products were ready to be taken out of the oven".

109 The purpose of an audible timer, namely a timer which causes a sound to be generated when the programmed time has elapsed, is to alert the person who is using it to the fact that the time has elapsed. The timer here might have been relied on to alert the user to the fact that the oven should have reached its intended temperature, for example. We inferred from the respondent's proposed additional words ("to alert her or other colleagues when products were ready to be taken out of the oven") that the respondent was suggesting that the work of the JH as a bake-off baker was not skilled and that anyone else could have done it. We readily accepted that any other customer assistant could have been trained to do the work, but the issue here was not whether or not someone else could have been trained to do it. The issue was what was the work of the JH. The fact that anyone else might hear the sound generated by a timer to inform the user of the timer that the programmed time had elapsed was in our judgment irrelevant for present purposes, namely to the question of what was the work of the JH for the purposes of section 65(6) of the EqA 2010.

110 The reality was that the time spent on bake-off varied, and the parties realistically agreed that fact. The parties also agreed that the JH did not do the work of a bake-off baker for a relatively short period of time during the relevant period; we saw that in **paragraph 20** there was a reference to "a 6-month period at Broomfield Road where [the JH] was not working the bakery". The respondent asserted that from 7 July 2015 to 31 December 2015, the JH worked at Broomfield Road without having responsibility for the bakery. The respondent agreed that from 1 January 2016

onwards the JH was again doing bake-off work. Thus, we concluded that it was for a little under six months that she was not doing bake-off work: 7 July 2015 to 31 December 2015.

111 We then sought to apply the schematic in H31 to the facts that (1) it was the respondent's case that during the rest of the relevant period, the JH spent up to 3 hours per day doing bake-off work but also when required other things, and (2) it was the claimants' case that it was between 2 and 3 hours per day that the JH did that work. Since (see paragraph 8 above) the JH worked 7.5 hours per day on four days per week and 6.5 hours on Fridays, applying H31 she spent overall (we decided) 25-40% of her shifts doing bake-off tasks. We were by no means confident that that conclusion would be of any value to the IEs, given that the bake-off tasks themselves varied, as was evident from the factors to which we now turn.

112 A dispute was maintained in relation to **paragraph 75**, which was under the heading "Defrosting". The claimants proposed, and the respondent opposed, this as a fact to be found by us via that paragraph.

> "JH knew which goods needed to be defrosted and how many of each to remove from the Freezer each day to maximise sales and minimise Waste. For example, The number of goods was a process of trial and error and JH used to discuss this with her Shift Runner."

113 Reference was then made to the "production planner" to which we refer in paragraphs 100-101 above. We agreed with the respondent's objection to the words which we have set out, since they did indeed in our judgment, as the respondent implicitly submitted (as part of its overall submissions relating to the work of the JH as a bake-off baker), suggest that the JH had responsibility for deciding how much to bake per day, when the production planner told her how much to bake per day and the issue was whether or not she could justify departing from the amounts which were stated by that planner. In fact, however, reading the words of **paragraph 75** as a whole, the claimants were not claiming that the JH had such responsibility, because they included this sentence.

> "If JH thought that defrosting and baking a different number of items would prevent customer disappointment and lead to higher sales, she raised this with a Shift Runner who made the ultimate decision about quantities."

114 The claimants therefore recognised that the JH did not make the decisions about the number of items to bake every day. Rather, it was the shift runner who did that, but only as a departure from the production planner numbers and in the circumstance that the staff of the store would have been less likely to be criticised for baking too few items than if the store baked more items than were required. That was because baking more items than could be sold would have led to the generation of more waste than would normally have been expected.

115 The content of **paragraph 76** was contested on the basis that it was not necessary for the JH to exercise judgment in regard to defrosting bake-off products. As can be seen from the part of C7/201 which we have set out in paragraph 102 above, it was likely that most of the respondent's Express store bake-off products required defrosting. The respondent proposed the inclusion of words to reflect the following facts which the respondent asserted: that there were "guidelines provided, which provided detail regarding how long to defrost products". Here, the respondent relied on page 19 of C1/21, where this was said.

> "**Thaw And Serve**
>
> Products that are fully baked and finished at our suppliers, then frozen to maintain quality and shelf life until required by stores. They require defrosting and displaying on shelf. The defrost time is approximately one hour."

116 That was helpful, and the material part of it was repeated in C7/166 (to which we refer in paragraph 97 above) which, however, on pages 1 and 2 expanded on what was involved in defrosting bake-off products. One thing that the first part of the passage at C7/166/1-2 did was to highlight that what might have been thought to be a key document was missing: at the bottom of C7/166/1 there was a reference to the "Baking And Finishing Guide", which was said to be "in the Bakery", and to which trainees were required to be taken by the trainer, as that guide "describe[d] how long a Thaw and Serve Product should be defrosted for". That suggested that there were different thaw times for different products, but that they were made known to the JH. However, just above that note, this was said.

> "Thaw and Serve products require de-frosting prior to packing. The de-frost time is approximately one hour. Remove products from their outer case and place on a clean baking tray to de-frost."

117 That suggested that the differences between the thaw times for different products were minor.

118 We found that the search mechanism on Opus was not comprehensive, as when we searched on Opus for the "Baking and Finishing Guide", no results appeared. However, when we used some different words for a search for that guide (just "baking and finishing"), we found that the guide was referred to on the first page of C7/201, where, in the first note to the trainer, this was said.

> "You will need the Express Baking and Finishing Guide poster."

119 Mr Diment was asked about that poster in additional questions in his evidence in chief, as recorded in the passage from line 12 on page 90 to line 5 on page 91 of the transcript of day 9. There, in addition to describing the poster, he said that "on each individual box for each product on the label it would have had individual baking instructions as well". We could well believe that. We certainly accepted that evidence,

and we concluded on the balance of probabilities that each product had on its packaging information concerning the length of time for defrosting and instructions for baking the product.

120 Those findings of fact determined the disputed assertions of fact which arose in regard to **paragraph 76**.

121 However, we thought that the assertion of the claimants in **paragraph 79** that "In practice, ovens varied from store to store" was correct. That was because it accorded with our own experience of domestic ovens: they vary. In addition, even the respondent's training materials recognised (as we describe in paragraph 101 above) that there was a need to exercise some judgment in the course of doing the bake-off baking which the JH did. We therefore rejected the respondent's submission made in response to **paragraph 79** that "the JH is over-exaggerating the true level of engagement with this task to portray a level of complexity that did not exist". As a matter of fact, we found, the JH was required to exercise some judgment, illustrated by the factors to which we refer in this paragraph and paragraph 101 above.

122 We saw that the respondent submitted that a reference to the audible timer should be added to **paragraph 79** (and that of course was not necessary, as the fact that there was an audible time was already agreed), that the bulk of the words of that paragraph should be deleted, and that these words should be used instead.

> "Where the JH identified that the programmed cooking times were in her opinion too short or too long she discussed this with the relevant Manager for their agreement before altering the cooking time for that product in future."

123 However, there was no evidential basis for that assertion, or, at least, if there was one, (1) we were not referred to it, and (2) while we looked for one, we could not find one. Thus, those words were not accurate.

124 **Paragraph 80** was an assertion that the JH did not receive formal training to be a baker, and was trained only in person by the person from whom she took over the job of being a bake-off baker. In one sense, that was irrelevant. That was because there was much training in the materials before us, to which we have already referred in paragraphs 93-104 above, so that it was clear what training was required to be a bake-off baker. In one sense the assertion that the JH was not formally trained was contrary to the claimants' case about the value of the JH's work, since it implied that no formal training was required. But in any event, we regarded it as being incidental, or co-incidental, in the sense that we regarded it as having no bearing on the demands of the JH's work as a bake-off baker or the amount of training actually required to be such a baker.

125 **Paragraph 81** described the gloves which the JH used when baking (there were two types, long ones which went up over the elbow and short ones) and referred to the fact that she had once received a burn on her forearm when baking as a result of

using the short ones. We failed to see on what basis we could require the IEs to take into account the fact that the JH received that burn. That was because it was obvious that there was a risk of being burnt when using an oven, so that it was sufficient to state that there was such a risk, without having to show that the risked thing had in fact happened. In addition, the left hand column on page 2 of C7/199 (to which we refer in paragraph 93 above) stated a series of "Health and Safety Issues in the Bakery", which included this bullet point.

> "Always assume that oven doors, baking trays and racks are hot until proven otherwise. Use approved oven gloves when handling hot equipment."

126 At C7/166/4, in relation to the series of steps shown there to follow when "baking Ambient Bake-Off Products (Using Rack Oven)", using as an example the baking of bread, there was a "Key Point!" relating to the use of the correct oven programme (which was unsurprisingly stated to be "essential"), at the end of which there were the words in capital letters "REMEMBER TO TAKE CARE WITH HOT SURFACES!!".

127 So, the work of a bake-off baker required care to avoid the obvious risk of being burnt, and to use the respondent's "approved oven gloves when handling hot equipment". We saw that Mr Diment described in paragraphs 145-158 of his first witness statement the situation as it developed after the JH received a burn to her forearm, and that he said there that long gloves might have become available only after the burn, but that the JH (and we point out that she was best placed to remember this accurately) thought that they were available at the time. We took that as evidence of the need for long oven gloves.

128 **Paragraph 83** concerned what the JH did while "the bakery items were cooking", and described how the "JH used the time to clean trays, place new paper on trays, carry out some replenishment on the shopfloor, or start the process of writing labels." The respondent opposed the proposition that the JH during that period might have carried out some replenishment on the shop floor, as it was contrary to what the JH said in cross-examination as recorded in lines 13-15 of page 40 of the transcript of day 10. We thought that that opposition was mistaken since the respondent plainly was able to require the JH to do some general replenishment work while items were being baked.

129 In **paragraph 83**, it was also said that the JH "was aware of the 'best before or use by' dates for each bakery item" and the reasons for those dates were stated. The respondent opposed those words on the basis that they were irrelevant. We agreed with that opposition. That was because the JH's knowledge of the reasons for putting "best before" or "use by" dates on the labels for the products was in our judgment co-incidental. The key factor here was the requirement to put those dates on the bake-off products for which the JH was responsible, and the requirement to be vigilant to ensure that products were, as stated in the right hand column on page 2 of C7/204 (to which we refer in paragraph 95 above), "rotated during replenishment, with no 'out of code' products on display." The date coding requirements were stated, with a

helpful accompanying photograph, on the left hand side of that page. That training document was therefore a better statement of the things referred to in **paragraph 83** than what was said in that paragraph. For the avoidance of doubt, what was said on the first page of C7/204 was relevant in that it helped to show what knowledge the JH was required to have as a bake-off baker and what she had to do in that role.

130 Reference was made in **paragraph 83** also to the JH understanding "the impact incorrectly labelled items may have posed on the health of customers, particularly for those with allergies". The inclusion of those words was objected to by the respondent on the basis that

> "7. JH agreed in XX that there was a sheet of information regarding allergens provided by Tesco and if a question arose about allergens on Bake Off products, JH could refer to that sheet (Day 8, page 167, lines 8-13).
> 8. JH agreed that allergen information was available on pre-packaged products (Day 8, page 167, lines 14-16).
>
> 9. JH agreed in XX that the allergen information was not printed on the SEL (Day 8, page 167, lines 17-23).
>
> 10. JH agreed in XX that during the whole Relevant Period in both stores, she was only asked a few times about allergens (Day 8, page 167, lines 24-25 and Day 8, page 168, line 1)."

131 The relevant facts here were in our view, these.

131.1 There was a need to make it clear what allergens were in which products on sale. If from nothing else, that was clear from the "Allergen Checklist – Bakery" at C1/20.

131.2 There was in that document a detailed list of the allergens which were in bakery products. There were five pages of lists of products with allergens in them, stating the allergens. We counted 56 on the first page. The number varied on each page, but without counting the other four pages, we guessed that the number was at least 250 products which had allergens in them.

131.3 The risks to customers were stated helpfully and fully in C7/430 ("Allergens And Our Customers"), as were the requirements to diminish those risks, which included, as stated on page 1 of that document the fact that "As of 13th December 2014, the EU Food Information for Consumers Regulation No. 1169/2011 makes it mandatory for allergen information to be provided for customers on all foods, including prepacked foods and also foods offered for sale to our customers or colleagues loose, or where foods are packed on the store premises." That training document was stated (on its first page, in the column on the left hand side) to be required to be used to train

"the following colleagues involved in selling loose food to our customers:

- Counters and Food To Go.
- Scratch Bakery and Bake Off.
- Tesco Run Colleague Rooms.

And also to:

- Team Leaders for Counters, Scratch Bakery, Bake Off and Tesco Run Colleague Rooms.
- All managers."

132 In the light of (1) C7/204, including the parts of it to which we refer in paragraphs 95-96 above, (2) C1/20, and (3) almost all of C7/430, i.e. the parts which we set out in the preceding paragraph above and the rest of that document except for page 7 (noting that the final page of the 12-page document was blank), we saw no need to determine the disputes maintained in relation to what was said in **paragraph 83** about allergens and related matters and about "use by" or "best by" dates.

133 The respondent asserted that the second sentence (of two) in **paragraph 84** "should never have been included in the EVJD". That sentence was:

> "Putting items in bags while they were still hot would cause them to go soggy."

134 The first sentence was "Once cooled, JH placed the relevant goods in bags and added the label." We saw that at C7/204/1 it was said under the heading "What You Need to Know/Do" that there were in 2012 (the document was dated "12/12") "nine products that require[d] hand written date codes", and that "bread and muffins" came "with a label on the product packaging" for the bake-off baker to complete. Nothing was said there about the need to avoid goods being put in bags too soon, but if there was a risk of sogginess from bagging produce while it was still hot (as we could see there was) then that was a factor which the JH and other bake-off bakers had to bear in mind. At C7/203 (another in the "Know Your Stuff For Express: Bakery" series; its heading was "Quality In The Bakery"), there were pictures on the second page of nine products stating what was right about them, and thereby indicating what might be wrong with those products. In relation to five of them there was a reference to the product being "crisp" (that was said in relation to the Jumbo Almond Croissant) or as having a "Crisp crust", which was unsurprisingly said in relation to four kinds of bread. At the end of C7/201 ("How To Bake It"), this was said.

> "Once cool, the products are ready to be packed and merchandised."

135 Given the factors to which we refer in the preceding paragraph above, we concluded that it was a relevant fact that the JH had to judge the risk of sogginess when putting newly-baked products in bags to be put out on display. In fact, we thought that it was necessary here to record that C7/203 stated the risks against which the JH had to guard in putting out bake-off products on display and that C7/203 was a material part of the evidence before us of the demands of the JH's bake-off work.

136 **Paragraph 85** contained a description of what the JH did by way of the decoration of "the goods that were required to be finished", such as icing "the vanilla crowns and cinnamon swirls with a piping bag". The respondent objected to the words "in a cup of hot water" in the following sentence.

> "JH had to put the bag into a cup of hot water or the microwave (for 10 seconds) to thaw it out."

137 That objection was based on the fact that Mr Diment referred in paragraph 131 of his first witness statement only to the use of a microwave, not a cup of hot water. The reason for the objection was not stated. It could have been justified on the basis that the JH overstated the risk to herself since putting something in the microwave for 10 seconds might be less risky than putting it in a cup of hot water for 10 seconds, but that was not stated as a justification for the objection.

138 In fact, both the JH and Mr Diment were wrong about the requirements of the job with regard to icing. The correct analysis was that there was no need to take specific steps to defrost the icing if it was taken out of the freezer sufficiently far in advance. That was shown by what was said at the top of C1/21/24, which was this.

> "Some products will need to be iced once cool. Take your icing bag out of the freezer in plenty of time to make sure it is warmed to room temperature before use. This will allow the icing to flow out of the bag easily
> - Make a small cut at the tip of the icing bag approximately 0.5cm wide
> - Squeeze the icing bag at the base so the icing is ready to be used to decorate.
> - Whilst gently squeezing the icing bag, use a zig-zag motion, moving across the pastry, going slightly past the edges to give the finish shown here [there being a picture of an iced Danish pastry on the right hand side of the page]."

139 The content of **paragraph 86** was contested by the respondent on the basis that it overstated the difficulties of getting bake-off products from the bakery to the shop floor. The nature of the dispute is best seen by reference to the content of paragraphs 132-133 of Mr Diment's first witness statement, which were in these terms.

> "132 Once any required finishing of the Bake Off Products was completed, Roxy put the baked stock out onto the Shop Floor. In Danbury, the Bake Off area was behind the bakery display and so Roxy could just reach

through the shelves to put the items on the Shop Floor; there was no requirement to walk any distance out onto the Shop Floor.

133 In Broomfield, Roxy used an empty milk dolly, which was a small cage for putting milk on (see item 65 on the Equipment List for a picture ("Milk Dolly")) and took four trays of baked stock out, at a time, to put out on the Shop Floor. Paragraph 86 of the EVJD states that Roxy made eight to ten trips out to the Shop Floor with the baked stock. I believe this is an over-estimate. I estimate that Roxy should have been able to put all the items out in no more than six to eight trips to the Shop Floor. If Roxy was making as many trips as she states in this paragraph, she was making it more difficult than it was in reality. It would take less than a minute to walk from the Bake Off to the bakery display area on the Shop Floor and each trip would take between three to five minutes (in total), including putting the baked stock out onto the Shop Floor. I estimate that putting the baked stock out onto the Shop Floor in Broomfield took between 18 and 40 minutes in total."

140 In reality, the work of putting the bake-off products on display was one of replenishment, since the products would not have been put out on display when they were still hot or on hot trays, so the reference in **paragraph 86** to the JH knowing "to be mindful of colleagues and customers as she went" stated the obvious, which applied whenever stock was brought out onto the shop floor. In any event, we could not see how the precise manner in which the JH carried out the task of putting out baked products on display could affect the demands of her work for the purposes of section 65(6) of the EqA 2010, and we therefore concluded that the dispute about that precise manner was about something which was irrelevant. We therefore declined to determine that dispute.

141 In fact, we thought that there was something relevant here which was not fully catered for in the EVJD. That was the extent to which care needed to be taken and skill needed to be exercised in putting bakery products out on display. The need for those things was shown by C7/191. That was part of the "Know Your Stuff For Express: Replenishment" series. It was entitled "Pride In Express – Delivering Retail Excellence" and had on its second page six photographs showing "as it was said on the first page of that document) "key ways of delivering Retail Excellence". One of the photographs was of "Bake-off" and had below it this checklist with all of the items ticked as shown.

"° Every item is of high quality and is baked to the correct specification

° All gaps have a Temporary Out Of Stock label and are faced across from the left

° Legal allergy shelf edge labels are in place in all Bake Off locations

- All shelving is clean

- The preparation area has been cleaned after use."

142 Finally in regard to the bake-off tasks of the JH, we record that there was a dispute in connection with **paragraph 90**. That paragraph as originally written was in these terms.

> "There were contract cleaners employed to clean the floor in the Bake-Off area. JH picked up any cleaning of the Bake-off area that the contract cleaners did not get to (which might include the floor, although she would not use the industrial floor cleaning apparatus). She wiped down the ovens daily."

143 The respondent objected that:

> '3. The cleaning tasks of the Contract Cleaners in relation to the Bake Off area are identified on page {C7/220/44}.
>
> 4. The "Clean as You Go" tasks of the Tesco colleagues carrying out Bake Off are identified on page {C7/220/43}.
>
> 5. It was the job of the Contract Cleaners to clean sweep and mop the floor in the Bake Off area in both stores {C7/220/44}, as identified by JH in the EVJD.'

144 C7/220 was entitled "Your Store Cleaning Guide – Express Stores". At C7/220/43, it was said that it was the job of the bakery staff as part of their duty to "Clean As You Go" to (1) "Clean spillages as they occur" and (2) "Pick up all loose litter/rubbish and food debris around the bakery area" and to do both of those things "Immediately". It was also, as stated on the same page, the job of the bakery staff to "Remove litter and food debris from freezer floor", on an "On-going" basis. It is correct that on the next page, C7/220/44, it was said that it was the job of the "In-Store Cleaning Team" to "Scrape, sweep, mop and / or machine scrub" the store's floor. But did that mean that it was not the JH's job to clean the part of the floor which (as she claimed) the contract cleaners did not get to?

145 We thought that the obvious answer to that question was "no". Not only was it obvious from what we say in the first two sentences of the preceding paragraph above that it was part of the JH's job to keep the bake-off area scrupulously clean, but it was obvious from the facts that the respondent also required the JH

145.1 to pick up hazardous items as she went along (which was stated as part of the duty to seek to prevent slips and trips at C7/142/13),

145.2 to clean as she went as stated at C7/142/14, and

145.3 to minimise the risk of pest invasion, which in the case of a bakery was higher than many other places in the respondent's stores because of the risk of dropped food or ingredients attracting for example mice or rats. That duty was most clearly stated on page 2 of C7/214 (which was entitled "Cleaning and Hygiene – Backdoor and Warehouse"), where, under the main heading of "Pests" and under the subheading "2. Don't feed them!", this was said.

> "Good cleaning and hygiene standards are key in keeping pests out. It is your responsibility to ensure that all cleaning is completed to ensure cleaning standards are maintained and debris is not allowed to build up."

The rest of the disputes maintained in relation to the JH's work; paragraphs 91-342

Introduction and overview

146 We believed that we had by the time of considering the rest of the disputes arising in relation to the rest of the JH's work resolved most of those disputes in one way or another. By way of illustration, we saw that in relation to **paragraph 124** (which started with this sentence: "JH removed any Out Of Code products she came across immediately and took them to the Waste area in the warehouse."), the respondent submitted this (by way of the proposal that that paragraph was amended to include the following additional words).

> "With the exception of coffee consumables, JH was not required to check for Out of Code products, this was the responsibility of the Stock Controller."

147 We had already resolved this dispute, most clearly in paragraphs 83.1 and 122 of Appendix 1 (at pages 52-53 and 64-65 above), and then again in paragraph 210 of Appendix 2 (at page 136 above). However, we returned here to our conclusion in regard to this critical aspect of the job of a customer assistant because it was illustrative of the extent to which the respondent had (except when it suited its submissions, as shown by what we say in paragraphs 103, 115 and 143 above) ignored its own documents which were, in our view, inescapably probative of what was required. The most clear passages in the training materials to which we refer in those paragraphs of Appendices 1 and 2 were these.

147.1 Under the heading "Rotation" at C7/454/3, this was said.

> "You should check date codes at every point you come into contact with a product ensuring that the shortest code life is displayed first."

147.2 Under the heading "Code Checks", at C7/249/3, this was said.

> "When working a new delivery you should not assume that the 'new' stock will have a longer date code, you must still check the dates on the

> ‘new’ and existing stock and rotate them to ensure the shortest date code is at the front of the shelf or closest to the customer.
>
> Special attention should be given to any products that are in more than one location (for example, on the shelf and in a promotional space) to ensure that the product is rotated within each shelf location.”

148 Similarly, at the top of page 2 of that document, this was said.

> “**Rotating Stock**
>
> On the arrival of every delivery and when every product is filled on the shopfloor, rotation must take place. This will ensure that at all times we sell products with the shortest code life first, limiting the need for reductions and the potential for incurring waste.
>
> Having good awareness can help with the rotation process. As you are working you should at all times be aware of and check the date codes on products, and you should have good daily communication with your manager, the other people working in your department and your colleagues in Stock Control.”

149 While it was far from the only place where the respondent referred to the reason for checking of dates and the rotation of stock, on the first page of that document, so at C7/249/1, this was said under the heading “Key Point!”.

> “All products must be rotated as they are filled.
>
> The sale of ‘out of code’ products is an illegal offence which we can be prosecuted for.
>
> Longer life fresh products are checked using the Rotation Planner and Date Code Diary system. Short life products are checked using the ‘Potential Reductions’ process.”

150 C7/179 (“Know Your Stuff for Express – Silver Food Safety And Hygiene”) stated on page 17:

> “**What The Law Says**
>
> - It is an offence to sell or offer for sale:
>
> - food that has been made harmful by the addition or removal of certain substances;
> - food that is unfit to eat;
> - food that is so contaminated that it would be unreasonable to expect people to eat it;

- food that is not of the nature, substance or quality expected by the customer."

151 As for the words to which the respondent objected in **paragraph 123** (which was "JH was aware that buying an Out of Code product or a product that had gone off might upset a customer and put them off returning, and that selling it might be illegal") what we say in paragraphs 83-86 of Appendix 6 (at pages 317-318 above) showed that that objection was wrongly maintained.

152 We have not so far recorded this expressly, but it may be apparent from what we have said about the evidence before us relating to rotation and out of code products: no witness for the respondent gave evidence of any sort to the effect that any of the sample claimants had been told that they did not need to check the dates on products as they replenished. Indeed, we would have been very surprised if they had been told that, not least because it would have been directly contrary to the respondent's repeated instruction to its staff to check date codes (which was given both to maximise profits and to avoid acting unlawfully) and because the respondent would have been very unwise to rely purely on the stock controller being infallible.

153 We did, however, come to some conclusions about the disputes maintained in relation to paragraphs, which we now record. For the avoidance of doubt, we refer below only to the disputes maintained about the facts relating to the work of the JH which we had not already determined in one or more of the appendices preceding this one. Also for the avoidance of doubt, we found the respondent's contentions to the effect that if the JH did not refer specifically in her witness statement to a particular part of the EVJD then it was not supported evidentially, to be wrong. That was because of what the JH said in paragraphs 5-8 of her witness statement, which started with the words (which were the whole of paragraph 5): "I have read my Job Description. To the best of my knowledge, it is correct."

Replenishment

154 The disputes maintained in regard to **paragraphs 91-97** seemed to us to be about things which could not affect the demands of the JH's work and therefore its value for the purposes of section 65(6) of the EqA 2010. That is because it seemed to us that the disputes were about things which were of no significance in that regard. We found some support for that proposition in section 65(2) of the EqA 2010, although that support was not the foundation of our decision on this issue. If the IEs disagree with our conclusion in that regard then they can make an application under rule 6(3) of the EV Rules for a relevant determination. For the avoidance of doubt, we thought that the only potentially material factual assertion made in **paragraph 93** related to the time spent replenishing frozen foods, and the parties agreed that part of that paragraph. Otherwise, we failed to see how the precise kind of goods which were replenished could make any difference to the demands placed on the JH by her work, and therefore its value, for the purposes of section 65(6) of the EqA 2010. The same was true of the precise means by which the JH got the stock to the shop floor:

whether via a standard cage, a slimline cage, a dolly, or a flat-top trolley, and how many times she had to use a kick stool in the course of doing so. For the avoidance of doubt, the latter question was dependent on the height of the JH, and we could not see how the demands of a job for equal value purposes, i.e. for the purposes of section 65(6), could be affected by the height of the job-holder, especially, but not only, because there are (we understand) approximately 47,000 customer assistants here claiming equal pay on the basis that their work is equal in value to that of comparators in DCs. In addition, it is the value of the work required by the employer to be done by the employee that is in issue, and we could not see how that value would for the purposes of section 65(6) vary according to the physique of the person doing it.

155 We accepted what the JH said in **paragraph 98** as being true, i.e. we accepted the evidence of the JH as encapsulated in that paragraph. It was a description of how the JH in practice sought to adhere to the respondent's Cold Chain policy (which applied as stated in paragraph 24 of Appendix 1, at page 38 above) and, with some hesitation, we concluded that it might be relevant. We had no hesitation in concluding that (contrary to the respondent's submissions) it was irrelevant for present purposes whether or not the JH in fact put stock back into the chiller or as the case may be the freezer within 20 minutes of taking it out. What was relevant was the existence of the Cold Chain policy and the requirement imposed on the JH to comply with it, albeit that it was recognised that she might not always be able in practice to do so.

156 The content of **paragraph 100** and what was said by Mr Diment in response to it was capable of being relevant if only because it showed that the claimants' claim that there was a need to check the SEL was well-founded, so that the JH had to be alert to the risk of there being a mismatch all the time and to do one of the two things which it was agreed she might do when there was such a mismatch.

157 The respondent's dispute about the JH's knowledge of the legal requirements relating to country of origin, maintained in relation to **paragraph 101**, was mistaken given for example the right hand column on C7/189/2. We did not understand the respondent to be asserting that that part of that document (which was part of the "Know Your Stuff For Express: Replenishment" series and was entitled "Produce Replenishment") was inaccurate or that the JH did not need to know what was said in it about "Legal Compliance for Produce".

158 In relation to **paragraph 104** (concerning "gap cleaning"), neither party referred to the document which in our view (see paragraph 153 of Appendix 2, at page 121 above) resolved the dispute about the requirement for the JH to clean gaps as she went along: C7/860. That showed that she was required to "clean the gap before filling it" (as stated at the bottom of the left hand column on the second page of that document). We observe that that was an obviously sensible business practice of the respondent. In fact, the references on that page and the preceding page (i.e. C7/860/1) to the need to "[bring] products to the front of the shelf [to make] sure they are all visible and accessible to our customers" and to "display stock at the front of

the shelf ensuring it is both visible and accessible for customers" showed in our view also that the respondent was wrong to take issue with the claimants' proposed words for **paragraph 103**.

159 The requirement of vigilance in regard to freezer and chiller cabinets is stated in paragraph 83.7 of Appendix 1 (at pages 53-54 above). We mention it here merely to draw attention to the fact that it was the respondent's contention in response to **paragraph 113** 'that it was not JH's job to be "vigilant for signs that the freezer cabinets were not working properly".'

160 The respondent's position in regard to **paragraph 117** was unhelpful. It did not make it clear whether or not the JH was required to give prominence to the products of particular suppliers. The respondent's evidence was about the JH's involvement with for example Walls. That was not the point. In the absence of cogent evidence in response to the content of **paragraph 117** and the related **paragraph 133**, (which was simply that "[a]bout once a year, a Walls rep came to the store to check that products were displayed as they should be", which was about what someone other than the JH did and was therefore, if only for that reason, irrelevant here) we accepted the evidence of the JH as stated in **paragraph 117**. From that evidence, we inferred that it was a requirement of the respondent that the JH be aware of the need to give prominence to the products of suppliers of whose identities the respondent made the JH aware.

Horticulture

161 The issue of the extent to which the JH replenished or topped up the water levels of plants and flower displays, which was raised in **paragraph 119**, seemed to us to be incapable of affecting the demands and therefore the value of the JH's work except to the extent that the JH might have been required to keep an eye on the water levels. We therefore looked through the training materials before us and found that there were two documents which showed what was the work of the JH in regard to horticulture. They showed that what was said in **paragraph 119** was not sufficient to state that work, but that what was said in that paragraph was correct as far as it went.

162 Generally in regard to the replenishment of horticulture stock, we found C7/268 to be determinative of the requirements of the respondent. The whole of that document was relevant, but in regard to the particular matters which were disputed in relation to **paragraph 119**, we regarded what was said under the heading "Maintaining The Display" on C7/268/5 as determinative. While that document was issued in 2007, and there was before us a later document concerning horticulture, that later document (C7/469) was to the same effect. For example, on the first page of C7/469, this was said under the heading "Cut Flowers".

> "During replenishment, check that buckets already on the fixture that still have bouquets in them contain enough water to keep flower stems immersed. Top up with fresh water if necessary."

Alcohol

163 The possibility of a need to put out empty ("dummy") cardboard boxes for bottles of spirits was raised in **paragraph 120** and contested by the respondent on the basis that during the relevant period, such boxes were not used. We assumed that the JH raised the issue on the basis that she might need to do more than just put out the bottles behind the till. We failed to see the impact of that possibility on the demands of the JH's work and therefore its value.

164 **Paragraph 121** referred to the need to handle containers of alcoholic drinks with care because of their weight and because "wines were sometimes shipped in boxes that were insufficiently sturdy and might have broken if not handled with care". The respondent objected to that paragraph on the basis that the JH might have encountered boxes containing wine which were insufficiently sturdy only once every six months. That was a detail which could not conceivably be relevant here as the issue was the need to take care: if there was a real possibility of a box containing wine being insufficiently sturdy then there was a need to be aware of that possibility and therefore to handle such boxes with particular care. The respondent plainly accepted that there was such a possibility, since it accepted that it might happen twice a year that a box containing wine was insufficiently sturdy.

165 In fact, we thought that the claimants under-stated the responsibility of the JH in regard to alcoholic products. Her work in that regard was stated in C7/207. That was one of the "Know Your Stuff For Express: Replenishment" series and was entitled "Licensing Laws And Displaying Alcohol On The Shopfloor".

Date codes

166 We thought that what was said in **paragraph 125** was a statement of how the JH did her work of paying attention to date codes, and therefore was not irrelevant, as contended by the respondent. It appeared that the factual assertions in **paragraph 125** were not opposed by the respondent. They were in fact consistent with for example the content of C7/860, to which we refer in paragraph 158 above. That document was part of the "Know Your Stuff For Express: Replenishment" and was entitled "How To Fill – On The Shopfloor". It was an informative and detailed description of the role of a customer assistant when replenishing in an Express store.

The rumble

167 The extent to which the JH participated in the "Rumble" seemed to us to be irrelevant since (we concluded) she was required to do continuously, i.e. as she went along, what was done as a single task via the Rumble. Having said that, we accepted that C7/860 said that the Rumble was carried out at 2pm every day, and the JH would therefore not have been involved in the Rumble as such at various times. In any event, we could not see how resolving the dispute maintained in regard to **paragraph**

131 was going to affect the IEs' assessments of the demands of the JH's work for the purposes of section 65(6) of the EqA 2010. Accordingly, we declined to decide whether the claimants' or the respondent's contentions in **paragraph 131** on the extent to which the JH participated in the Rumble were correct.

Range changes

168 The disputes in regard to **paragraph 132** were to our mind wrongly maintained given that what the JH said at the end of that paragraph showed that the claimants accepted that the JH did not have authority to make decisions about the manner in which stock should be put out on the shopfloor.

The use of a PDA

169 The respondent objected to **paragraph 138** on the basis that the JH was not required to reduce the prices of items, and that that was confirmed by the fact that she could not recall having done it during the relevant period. The JH said via **paragraph 138** itself that she only rarely used a PDA to reduce the price of items, and that she could not recall doing it during the relevant period. That therefore was evidence which spoke for itself and did not need to be countered by opposition. In any event, the issue of the JH's role in regard to reductions was dealt with elsewhere in the EVJD, and we return to it in paragraphs 201-202 below.

170 As for the dispute maintained by the respondent in relation to **paragraph 140** (which concerned the use of a PDA to cause a portable printer to print labels), it had to be read as a dispute about frequency. Read literally, the wording of **paragraph 140** was unimpeachable, although it was irrelevant if the JH did not during the relevant period use the PDA to print out labels. We concluded that it was relevant only marginally, but that it was relevant in that it showed that the JH was aware of the possibility of using a PDA to cause a label to be printed out.

Working on the checkouts

171 We saw nothing in paragraph 424 of Mr Diment's first witness statement which justified us in rejecting what was said in **paragraph 146** about the manner in which the JH in fact interacted with customers. However, and in any event, what was said in **paragraph 146** was entirely consistent with the principles stated at C7/145/2-17, to which we have already referred in several places, most recently in paragraph 5.3 of Appendix 6 (at page 294 above).

172 Similarly, if and to the extent that the respondent opposed any part of **paragraph 147**, we concluded that the principles at C7/145/2-17 applied, and therefore prevailed, irrespective of the evidence of the parties about what the JH in fact did, or did not, do. Since the opening part of **paragraph 147** was that the JH was expected to do the things referred to in the subparagraphs of that paragraph, and C7/145/2-17

was consistent with that statement as to the respondent's expectation, we accepted that the JH was expected to do those things.

173 The JH's responsibilities in regard to the monitoring of the self-service (or assisted service) checkouts were definitively determined by C7/27 ("Know Your Stuff For Assisted Service Checkouts – Getting Started - Equipment") where, at page 1, what the claimants asserted in **paragraph 154** was shown to be correct in general terms, although the colours referred to at C7/27/1 were of more general application than was asserted by the JH in **paragraph 154**. So, for example, a flashing red light did not mean, as was said in **paragraph 154**, that "there was a mismatch between what had been scanned and what had been placed in the packing area". Rather, it meant that "Help [was] needed immediately." But those differences were immaterial. It was clear from C7/27/1 that the JH and anyone else who was responsible for overseeing the use by customers of ASCs had to keep an eye on the (as they were called on C7/27/1) "Tri-Lights" and that the JH plainly had to, as she asserted, "[look] out for cues from the lights and for customer activity that might require her to intervene".

174 **Paragraph 156** was also unimpeachable as a statement of the JH's responsibilities, when working on the main till, in regard to the ASCs, given what was said in C7/27, C7/61, C7/62, C7/63, C7/64, and C7/65 (to all of which we refer in Appendix 2 above). We thought that the JH had overstated the requirements of the job in that regard, though, in saying (in **paragraph 156.1**) that she was required to check that all items scanned had been bagged. That was because not all customers will have wanted a bag. We thought that if there was a need to come to a conclusion on that, then the correct description of that part of the JH's work was that she needed to check that a customer had not cancelled an item but still put it in his or her bag, as required by what was said at C7/64/3.

175 For the avoidance of doubt, we concluded that the respondent's objection to **paragraph 156.11** was misplaced, given C7/34, including what was said on the second and final page of that document, which included this.

> "It is important to always check why an intervention has happened – you must not just swipe your barcode to clear the problem straight away. If you do not check the intervention and just clear it, customers could take items they have not paid for. You should only clear an intervention when:
>
> - You know why it has happened.
> - You have talked to the customer and explained why the intervention has happened.
> - You are happy to authorise the products scanned."

176 The parties agreed the substance of **paragraph 157** by the time of closing submissions, we noted. So, it was clear that the JH was required to log onto a checkout using a 4-digit log-in number and a password, both which she was required to memorise.

177 The dispute about **paragraph 164** was in our view determined by what we said in paragraph 40 of Appendix 2 (at page 91 above).

178 **Paragraph 165** was about the obvious need to take care when passing behind a colleague at a checkout behind which there were bottles of spirits on shelving on the wall, especially when (as was, we concluded, usually the case at an Express store) the space between the checkout and the shelves was confined.

179 The dispute about **paragraph 166** was resolved by reference to what we said in paragraph 85 of Appendix 2 (at page 104-105 above). For the avoidance of doubt, we concluded (in line with the respondent's submissions) that if there was a till prompt then there was no scope for the JH to be alert to the possibility of an under-age sale "regardless of the prompt".

180 While this is in part a repeat of part of what we say in paragraph 74 of Appendix 2 (at page 102 above), we record here for the avoidance of doubt that the (1) the respondent's submission in relation to what was said in **paragraph 169** that the "JH was not required to check the sell by date of reduced products as she was scanning them at the checkouts" was wrong and (2) the claimants' proposed words for **paragraph 169** were correct, as was shown by the "Key Point!" at the bottom of C7/163/18, which was this:

> "Always check the sell by date on the reduced items to ensure the product is still in date."

181 "Not on file" items were the subject of disputes in relation to **paragraphs 170-172**. The training materials to which we refer in paragraph 81 of Appendix 2 (at page 104 above) showed what was required of the JH in regard to such items. For the avoidance of doubt, we concluded that if it was in fact the respondent's submission (made in response to **paragraph 172** by cross-reference to what the respondent said in response to **paragraph 147.4**) that the JH was not required to suggest an alternative product to one which was "not on file", then that submission was unrealistic and contrary to what was said on C7/145/11.

182 **Paragraph 176**, relating to swapping an old "bag for life" for a new one, was a correct statement of the JH's work for the purposes of section 65(6) of the EqA 2010. That was clear from what was said on C7/163/22. The frequency with which the JH actually swapped such a bag was irrelevant for those purposes given that the demand was to be aware of the requirement to swap such a bag on request.

183 The same principle applied to the content of **paragraph 179**: the JH was required to act as described in that paragraph. The number of times that she in fact did so was not material. The same was true of all like disputes and we say no more about them as maintained in relation to the rest of the JH's EVJD (for example in relation to **paragraph 185**).

184 As for the respondent's opposition to the word "discretely" in **paragraph 181**, we concluded that the respondent would not have wanted the JH to act indiscretely when a customer's payment card was declined, and in fact we concluded that it was consistent with C7/145/2-17 only to act with discretion in that situation. Opposing the use of the word "discretely" on the basis that '[i]t is not possible to ring a loud bell "discretely"' missed the point of what was said in **paragraph 181**.

185 The JH's responsibilities in regard to potentially counterfeit notes are dealt with in detail in C7/96/1-11. What the JH said via **paragraph 182** was in our view a helpful statement of her work for present purposes, and we did not understand the respondent to contend that it was inaccurate in any material respect. For the avoidance of doubt, we accepted it, both because it was on the balance of probabilities true, and because it appeared to us to be apt given (1) what was said at C7/96-1-11 and (2) what we will call common sense.

186 What we say in paragraphs 29 and 30 of Appendix 2 (at page 88 above) concerning "till lifts" was determinative of the disputed parts of **paragraph 183**.

187 The dispute about the need to ask customers whether they had a Clubcard, maintained in relation to **paragraph 187**, was resolved by us in paragraphs 112-114 of Appendix 2 (at pages 111-112 above), which among other things showed the claimants' proposed words for **paragraph 187.1** to be correct and that what was said in **paragraph 187.2** was consistent with the training materials referred to in paragraphs 112-114 of Appendix 2.

188 We record here for convenience that the parties had agreed **paragraph 191** by the time of closing submissions. That was clear from the fact that the claimants' closing submissions stated that they had accepted the respondent's proposal in regard to that paragraph.

189 We have dealt with the responsibilities of a checkout operator for age-restricted sales in paragraphs 137-138 of Appendix 1 (at page 67 above) and 85 and 86 of Appendix 2 (at pages 104-105 above). Those paragraphs are determinative of the disputes maintained in relation to **paragraphs 192-197**.

190 The parties' dispute in relation to the "arming" of fuel pumps, which related to **paragraph 200.1**, seemed to us to be wrongly maintained, given that it was agreed that if the JH was operating a checkout from which a fuel pump (which would necessarily have been at Danbury) could be "armed", then it was her job to do what is described in that paragraph. The fact that it might have been possible to do it only from two of the four tills was relevant only if it affected the frequency with which the JH was required to arm a pump, and that was not the subject of any debate. Assuming that there was a need for the JH to arm a pump every day, the correct description of that frequency was "frequently", and the number of tills at which a pump could be armed was not relevant for present purposes.

191 If and to the extent that what the parties disputed about **paragraphs 201 and 202** was relevant (and we understood that all that the respondent disputed was what the JH knew, not what she was required to do in regard to the "Other services at Checkouts" which were the subject of those paragraphs), it was resolved by what we say in paragraphs 87-89 of Appendix 2 (at pages 105-106 above). For the avoidance of doubt, we concluded that it was consistent with what was said at C7/145/2-17 only for the JH to offer to help an elderly customer to top up a pay-as-you-go mobile telephone. However we also concluded that since there was no reference in C7/94 to the possibility of money laundering as a justification for refusing to give a refund on a third-party's gift card (only that the "monetary value assigned to the card" could not be identified "once [the card had] been purchased", so that "Refunding a gift card could cause shrinkage"), the words "for money laundering reasons" were incorrect and if relevant (which we doubted) should be replaced by the words "because only the card provider could identify the value on the card".

192 We accepted that if a customer said that a fuel pump handle for example was dirty then the JH would be required, consistently with C7/145/2-17, to go out to the pump and clean it, as contended by the claimants in regard to **paragraph 205**. (The parties agreed by the time of closing submissions that the JH only about once a month topped up gloves and paper towels for customers' use at the pumps.)

193 The disputed factual assertions relating to lottery tickets, to which **paragraphs 209-227** referred, were in our view for the most part resolved by reference to the training materials which were relevant to those assertions. Those training materials were (or at least included) C7/150, C7/170, C7/171, C7/172, C7/173, and C7/174. So, for example, the things which the JH was required to do in relation to paying out, to which reference was made in **paragraphs 219 and 220**, were shown by what was in C7/174, which had to be read with C7/171. In addition, the latter document showed that, contrary to the respondent's submissions in regard to **paragraph 224**, the respondent did indeed have a concept of 'lottery "security"', or at least the respondent was much concerned, and obviously understandably, about the need to maintain security in regard to lottery tickets. By way of illustration, at C7/171/1, under the heading "What You Need To Do/Know", the first heading was "Security", under which this was said.

> "As with any department in Tesco, security is very important on the Lottery. Security precautions are easy to follow, but if you don't the impact can be huge."

194 One of the instructions given immediately below those words was this, with an arrow pointed towards the "play area".

> "Latex surface covering the play area. Check for tampering by running your finger over it. An irregularity may be an indication that the ticket has been tampered with."

195 On the next page, C7/171/2, this was said.

> "Beware - Fraudulent Tickets:
> • There have been numerous fraudulent attempts to claim prizes, both on the on-line game and Scratchcards. Usually, two separate tickets are torn in half and stuck back together to form a 'winning ticket'. It can be as simple as cutting out part of one ticket and sticking it on to another to form a winning ticket! It does not work."

Hygiene and safety – paragraphs 228-236

196 We record here that the respondent's 75-page document entitled "Know Your Stuff for Express – Silver Food Safety And Hygiene – Silver 3" at C7/179 was determinative of any disputes maintained by the parties in regard to the issues covered by that document.

Cleaning – paragraphs 237-242 and 247

197 The only aspect of the work of the JH which was raised by the claimants in relation to cleaning which required our analysis (given what we say in paragraphs 153 and 268 of Appendix 2, at pages 121 and 149 above) here was referred to in **paragraph 247**. That paragraph referred to the JH's (and that of the other staff of the respondent employed at the store) "responsibility to keep the Yard and front of the shop clean and clear". The respondent's response was that it was not the JH's responsibility as "that was not required of the JH, it was not her work and nor did she do this", and "it is not accepted that the Contract Cleaners did not keep the Yard clear".

198 While we accepted that the respondent did not require the JH specifically to keep the yard clear, it was in our view plainly part of the JH's responsibilities to clean as she went. That was not just because it was obvious (since we could not see the respondent agreeing to the proposition that its staff could leave parts of the shop floor or workplace dirty or unsafe because of blockages or trip hazards), but also because it was made plain by for example what was said on the right hand side of page 2 of C7/467 ("Know Your Stuff For Produce – Cleaning And Standards"), which was this: "Cleaning schedules and maintenance is in addition to 'Clean As You Go'." The yard was part of the JH's and her colleagues' workplace. At the top of page 4 of C7/467, the first reason stated in response to the question "Why is cleaning so important?" was this.

> "To maintain a safe place to shop and work."

199 In those circumstances, we concluded that if the JH encountered rubbish for example in the yard, then it was part of her job to put that rubbish in an appropriate place, such as a waste bin.

Waste and reductions and related matters

Paragraph 248

200 We have already (in paragraph 157 of Appendix 2, at page 122 above) identified one relevant document in the training materials describing the responsibilities of a customer assistant in the position of the JH in relation to waste and reductions: C7/197 ("Know Your Stuff for Express: Waste – Silver 1 (Card 6) – Recording Waste, Storage and Disposal"). In paragraph 225 of Appendix 2 (at pages 138-139 above), we have referred to another: C7/188 ("Know Your Stuff for Express: Replenishment – Bronze 2 (Card 5) – Would I Buy It?"). While we accepted that the JH would have been expected by the respondent to consult her line manager whenever she had any doubt about what to do with a damaged product, those documents showed that she had her own responsibility as a customer assistant "to remove products that fall below the required quality standards". That is because it was said at the end of the second paragraph in the box headed "What You Need To Know/Do" on C7/188/1 that

> "Everyone has the responsibility to remove products that fall below the required quality standards."

201 It was Mr Diment's evidence that it was only the shift runner who would decide whether a "damaged or out of code [product] could be repaired and sold or not". We concluded that that proposition was not borne out by the training on the left hand side of C7/188/2, which, read as a whole, required the JH to (1) repair minimally damaged packaging and leave the item at full price, or (2) remove from the shelf and sell at a reduced price a damaged product which was still "in an acceptable condition". Only if neither of those things was possible and one of the conditions stated on the right hand side of C7/188/2 was satisfied, was the JH required to follow the step numbered 3 at the top of the page and "Take the poor quality product to the waste and damages area."

Paragraphs 250 and 290-292

202 The subject-matter of **paragraphs 290-294** was covered by what was said at C7/188/3 and C7/656, but was also in our view self-evident and therefore for current purposes obvious. In fact, while there was a dispute about parts of **paragraphs 292 and 293**, we thought that the respondent accepted at least the thrust of what was said there. For the avoidance of doubt, we accepted what was said in **paragraphs 292-294**, in part because it was obvious and in part because it was fully supported by C7/188/3 and C7/656.

203 The respondent's reasons for seeking to avoid waste were in one sense immaterial. What was material was what the respondent required of the JH in regard to waste. For that reason, we were inclined to accept the respondent's submission that the content of **paragraph 250** was irrelevant here. However, the respondent's training materials referred to the things which were stated in **paragraph 250**, albeit in slightly

different terms. For example, at C7/197/1, this was said under the heading "What You Need To Know/Do":

> "Our aim is to minimise waste as this costs us money as a business, and the benefit we get from great sales is offset by an increase in costs."

204 As a result, we concluded, the JH was required to be aware of that factor.

205 In addition, at C7/134 ("Tesco and the community we serve – Know your stuff for everyone), at the top of page 9, this was said.

> "In Tesco we work hard to use our scale for good. We have routines in place to recycle everything that can be re-used rather than put them into landfill. As a colleague you will be helping us to achieve our carbon challenge and improve our financial performance."

206 There was on the same page a section entitled "The Waste Hierarchy", of which the JH was plainly expected to be aware.

207 So, in those circumstances, was the respondent's opposition to the claimants' factual submission (reading it purposively and in the light of our analysis of our task, which was not to decide primarily what the JH actually did or knew, but what she was required to do and know) that the JH was required to be aware of the things which were indicated in **paragraph 250** well-founded? No, in substance it was not. That was because the JH was plainly required by the respondent to be aware of the things stated by us in the preceding five paragraphs above (i.e. paragraphs 202-206). But was that relevant here, in other words, was it one of the demands within the meaning of section 65(6) of the EqA 2010 of the JH's work to be aware of those things? We could not see how it was so relevant, in that it did not appear to us to be a demand made on the JH "by reference to factors such as effort, skill and decision-making". If the JH was aware of the reasons for the respondent's requirement to minimise waste, then that was likely to encourage her to seek to avoid waste, but that was relevant only to how well she did her job, not its demands.

<u>Paragraphs 251-253 and 255</u>

208 We have already (in paragraphs 109-111 and 113-115 of Appendix 1, at pages 62-63 above) referred to the main relevant document concerning product waste: C7/119. The JH's responsibilities in regard to waste created as she replenished were, we thought, effectively stated in C7/262, for the most part at pages 4-5. We thought that the JH's responsibilities in regard to the management of wasted products were stated comprehensively in C7/119. As far as we could see, the main factual issue which might need to be determined in regard to the content of **paragraphs 251-253 and 255** was the frequency with which the JH was required to deal with waste. Neither party addressed that issue, but as a matter of common sense we thought that the

issue must have arisen nearly every day, if not daily. That was (applying H31) "frequently".

Preventing trespass and theft

209 The respondent's "six principles for security" stated at C7/147/3 were preceded by these words (on the same page).

> "We have processes across the store to help reduce our shrinkage and we all have a role to play in being vigilant."

210 Those words and those six principles seemed to us to require the JH and her colleagues at the store to be "vigilant for unauthorised people and suspicious activity". The respondent opposed the inclusion of those words in **paragraph 257**. It was shown by C7/147/3 to be wrong to have done so.

211 Generally, the respondent's submissions in relation to the content of **paragraphs 257-262** failed to take into account the content of C7/147 and C7/135 (which was the companion to C7/147 and in some respects fleshed out the contents of C7/147). We could not see any better way of stating the JH's responsibilities in regard to the risk of theft than what was said in those documents (ignoring duplication).

212 **Paragraph 263.6** was a helpful statement about one part of the JH's responsibilities when she was operating a checkout, which was being aware of common scams and how to avoid them. It was also a helpful statement about how she did in fact try to avoid them.

213 **Paragraph 263.2** was a statement of the obvious, namely that the JH could not simply go and deal with a delivery if there was no one else available to cover the tills. We agreed with the respondent, though, that the person with the main responsibility for ensuring that both tasks were covered (by different people, of course) was the shift runner. But that did not mean that the JH was not obliged to do something when a delivery arrived, and in our judgment she was required to alert the shift runner to the situation if the shift runner was not already aware of it.

214 We failed to see how the disputed parts of **paragraph 265** (concerning the "Electronic Article Surveillance" gates) could affect the determinations of the IEs about the demands of the JH's work for the purposes of section 65(6) of the EqA 2010, and therefore declined to determine those disputes.

Reporting of health and safety issues

215 Was it part of the JH's work within the meaning of section 65(6) of the EqA 2010 to report to a manager outside the store any health and safety issue which the JH believed was not being taken seriously by the store's managers, as claimed by the claimants in **paragraph 268**? We found it hard to see how that could not be part of

such work if the concern was genuine and reasonably justified. But that was a nebulous formulation, and we were as a result dubious about it. Certainly, the JH had her own responsibilities under the Health and Safety at Work etc Act 1974 ("the HASAWA 1974"), but we doubted that that fact added anything material here. The comparators had the same responsibility, after all. Given the latter factor, we concluded that it was not a material factor for the purposes of section 65(6) of the EqA 2010 that the JH had responsibilities under the HASAWA 1974.

Customer service – paragraphs 269-273 and 275

216 We have already (for example in paragraphs 171-172 above) referred to C7/145 and the principles relating to customer service which applied to the JH's work. We concluded that the matters which were disputed in **paragraphs 269-273 and 275** were resolvable by reference to what was said at C7/145/2-17. If and to the extent that any dispute about a factual assertion of the claimants in regard to the work of the JH described in those paragraphs was not so resolved, then it was, we concluded, unnecessary for us to determine that dispute. That was because we could not see how what the JH in fact did in pursuance of the principles stated at C7/145/2-17 could affect the demands of her work for the purposes of section 65(6) of the EqA 2010.

217 We record here that we rejected the respondent's submission in relation to **paragraph 272.3** 'that there was no requirement for Customer Assistants to know "key current promotions".' That is because it was inconceivable (and therefore we rejected on the balance of probabilities the proposition) that the respondent would not have wanted its customer assistants to know about current promotions.

218 We also record here that we doubted that it was the JH's responsibility, i.e. a requirement of her work, to suggest improvements to the store's shift runner, as implicitly asserted in **paragraph 275**. Certainly, there was nothing in the training materials as far as we could see which supported that assertion. In addition, it would be in our view inappropriate for the respondent to require the making of such suggestions.

Customer feedback

219 Similarly, we could find nothing in the training materials which justified the conclusion that the JH was required as part of her work to help customers to identify the colleague(s) in regard to whose work the customers sought to provide feedback, as submitted by the claimants in **paragraph 276**. Having said that, we concluded that the JH did in fact do that. We came to that conclusion because (1) it was claimed by her that she did it, and (2) it was consistent with her character as we perceived it to do it. Nevertheless, we regarded that fact as being irrelevant for present purposes.

220 Also, we concluded that while the JH was aware of the possibility of reviews being left by customers on Google maps, as stated in **paragraph 277**, it was not part of the

JH's work, within the meaning of section 65(6) of the EqA 2010, to be aware of that possibility.

Heat and cold – paragraphs 326-328

221 The amount of time that the JH spent in the warehouse freezer and the warehouse chiller was relevant. The respondent contended that the content of **paragraphs 326-327** was a repeat of what was said elsewhere. That was said because of what Mr Diment said in paragraph 698 of his first witness statement. However, we did not see in the paragraphs of the EVJD to which he referred there (**paragraphs 45 and 51**), or in the paragraphs of his first witness statement where he referred to them (paragraphs 218 and 335-337) a statement of the amount of time that the JH spent in the warehouse freezer and the warehouse chiller. We did see, however, from one of the paragraphs of his first witness statement to which Mr Diment referred in paragraph 698 of that statement (paragraph 310) that he agreed that the JH "probably spent 10-15 minutes in the chiller [when replenishing fresh stock] during the Broomfield Six Months". In any event, the times spent in the warehouse chiller and the warehouse freezer appeared to be substantially agreed. As a result, the dispute about **paragraphs 326-327** was difficult to understand. It appeared from the respondent's closing submissions that those paragraphs were objected to only because they were repetitious. For the avoidance of doubt, if and to the extent that there was a dispute between the parties about the amount of time that the JH spent in the freezer and the chiller, we concluded that its outcome would not affect the assessment by the IEs of the demands of the work of the JH so far as relevant.

222 Obviously, ovens are hot. As a result, it was unsurprising that (as stated in **paragraph 328**) **"**[w]hen JH was working on Bakery tasks and the ovens were on, JH felt hot and uncomfortable." However, given what we say in paragraph 72 of our second reserved judgment, at page 26 above, the impact on the JH of working next to an oven was in our judgment not relevant here.

Handling spillages

223 We concluded that (1) it was obvious that the work of a customer assistant in an Express store (or, indeed, any store operated by the respondent which sold fresh produce) might, in cleaning as she went, have to deal with spilt milk, yoghurt, or meat juices, and (2) the IEs would be able to assess the impact of that factor. The claimants' proposed words for **paragraph 329** were apt if read as a statement that the things spilt might be "sticky, dirty and/or unpleasant", but that was in our view also obvious.

Working outdoors

224 However, we concluded that what the respondent said about the extent to which the JH was required to work outdoors, as claimed in **paragraph 330**, was correct and should be preferred to what the claimants said there.

Confined spaces

225 The disputes concerning **paragraph 331** related to what were claimed by the claimants to be confined spaces. The spaces were what they were, and we could not see that they were so confined that they were relevant as part of the conditions of the JH's work (except as stated in paragraph 173 above). In any event, the dispute maintained in regard to **paragraph 331** was about the term "confined", and that was an evaluative term. On that basis, the dispute was about something which was irrelevant at this stage.

Sitting and standing

226 **Paragraph 333** was disputed in a slightly curious way. That was because (1) the JH herself did not seek the provision of a seat at the checkout, but (2) a colleague of hers had done, and (3) after what the claimants referred to in **paragraph 333** as an "occupational review", one was provided. As far as we were able to see, there was not much room behind the furniture on which the tills were placed, with the result that it was inconvenient for everyone if a checkout operator had to sit there.

227 The question for us was in what way, if any, that set of facts was relevant for the purposes of the JH's work within the meaning of section 65(6) of the EqA 2010, especially since at a mainbank checkout in a non-Express store, the operator usually had a chair. The respondent said that it was irrelevant, but gave no legal reason for that assertion: the respondent relied on the fact that seats were provided only if a colleague had a health problem which called for it and the JH herself said in cross-examination that she had not wanted a seat. At C7/168/3 ("Know Your Stuff For Checkouts – Checkout Familiarisation"), this was said.

> "Whilst they are not supplied as standard equipment in Express, checkout chairs are available to support those with health problems from standing up for any length of time, which may include pregnant women."

228 We concluded that the requirement of the JH was to stand behind the till unless she had "a health condition and required a chair" as a result of that condition. Whether she wanted a seat was irrelevant. That was the requirement.

Obligation to wear a uniform

229 The claimants said in **paragraph 334** that the JH was required to wear a uniform. No other sample claimant referred to the need to wear a uniform as such (as opposed to a clean one: that was discussed by us in relation to the work of Ms Cannon in paragraph 238 of Appendix 4, at pages 244-245 above), but it was clear from C7/863/74 that it was a requirement of the respondent that the JH (and other customer assistants) wore a uniform. We also were unable to see why the respondent asserted that that was not a condition of the work of the JH since it was

not "part of the JH's physical or operational working environment". In our judgment, (1) the requirement to wear a uniform plainly was a condition of the JH's employment, and (2) that requirement was relevant for the purposes of section 65(6) of the EqA 2010. We therefore concluded that what was said in **paragraph 334** was relevant. However, it was also relevant that this was said at C7/863/74.

> "The uniform collection consists of garments that are fit for purpose, easy care, durable and stylish and come in a wide range of sizes. There is both a formal and a casual range and you can choose whichever you want to wear, from a wide range of garments that suit you and the job you do."

Protective equipment

230 The claimants asserted in **paragraph 335** that the JH was obliged to wear protective equipment, and the respondent responded in such a way that we inferred that it was the respondent's case that the JH was not so obliged.

231 If protective equipment was provided for, for example, using an oven, as was the case here, then we would have thought that there was an implicit requirement to use that equipment or something else which did the same job effectively. There was no dispute on the facts about the protective equipment with which the claimant was provided by the respondent. In fact, under the heading "Dress Standards" on page 2 of C7/199 ("Safe and Legal In The Bakery"), this was said.

> "The Bakery is a production area, and food safety is essential. Colleagues are required to wear approved protective clothing:
>
> • all bakery colleagues must wear approved hats and a protective apron".

232 In the circumstances, we concluded (and the opposite was not contended) that it was relevant for the purposes of section 65(6) of the EqA 2010 that the JH was provided with protective equipment. That showed some of the conditions in which the JH worked, and the hazards arising from those conditions against which protection was given. We concluded in addition that the JH was in practice required to use the protective equipment, so that the use of that equipment was itself a condition in which she did the relevant part of her work within the meaning of section 65(6).

Test purchasers

233 The effect on the JH of the possibility of a test purchaser appearing before her, as claimed in **paragraph 336**, was in our judgment irrelevant. The key was that there was the possibility of such a purchaser. The respondent did not contend that there was no possibility of a test purchaser appearing before the JH. We understood that such a purchaser might appear only in relation to an age-restricted sale. We have dealt with that aspect of the conditions in which the JH and her colleagues worked elsewhere, for example paragraphs 137-138 of Appendix 1 (at page 67 above).

Paragraphs 337-339

234 We failed to see any kind of basis for advancing **paragraph 337**, which started with these words "JH had to put up with poor management". That was not an obligation which could in our view properly be regarded as a condition in which the JH was required to work. So far as relevant, we could see it as an incident of the contract of employment that the respondent was obliged not to breach the implied term of trust and confidence, but that was not a condition in which the JH had to work as far as section 65(6) of the EqA 2010 was concerned.

235 Similarly, the things which were contended for by the claimants, on the implicit basis that they were relevant, in **paragraphs 338 and 339** (which were that (1) "Shift Runners often contacted JH while she was away on annual leave, for example to ask her where things were kept", and (2) "Annual performance reviews were infrequent during the Evaluation Period") were in our judgment incapable of being part of the conditions in which the JH was required to work as far as section 65(6) was concerned. We concluded that those factors (the accuracy of which we did not decide) were advanced on the basis of the mistaken approach of both parties to the question of how the work of a claimant or comparator was assessed. That mistaken approach involved asserting that what the claimant or comparator did in practice or had to deal with in practice was the primary consideration, when the primary consideration was what the employer required of the holder of the job in question for the purposes of section 65(6) of the EqA 2010, which had to be judged on the basis that the primary considerations were the work that was required to be done and the conditions in which it was required to be done, and not the manner and conditions in which that work was in fact done.

Suspicion of theft

236 We thought that the content of **paragraphs 340-341** added nothing to what was said in C7/147 at page 3, concerning the possibility of employee, or "colleague" theft, and page 10, concerning "Colleague Search".

Hazards

237 We have already stated our conclusions on the hazards of working in a store. We have done that in for example paragraphs 6 and 7 of Appendix 5 (at page 249 above). We saw that the JH asserted in paragraph (k) of the table appended to her EVJD that one such hazard was "workplace bullying". That was of course a possibility in every workplace, and if it applied here would apply also to the comparators. It was in our view incapable of being a relevant factor to be taken into account by the IEs or us in deciding what were the conditions in which a customer assistant, or a DC worker, had to work. The same was true of the "Psychosocial hazards" asserted in paragraph (n) of that table.

238 Equally, it cannot have been part of the JH's work to engage in "overexertion", as alleged in paragraph (q) of what we will call here the "hazards" appendix.

Appendix 8

The work of all of the comparators

THE TRIBUNAL'S DETERMINATIONS OF THE PARTIES' DISPUTES IN RELATION TO THE WORK OF THE COMPARATORS

Contents

1 Because of the length of this document, we now list its contents in an index (in the form of a table). For reasons of convenience and with a view to maintaining a narrative flow, we have in some places in the text of this appendix referred to things which are not directly related to the topic which is the main focus of the passage in question. As a result, some of the topics which we have mentioned in the following index might not at first sight appear to have been referred to in the right place. We have included in the table some overall section headings as single rows, and in the middle column, with the heading "Topic", we have put major topics in bold font, and given, on the left hand side of the first column of the table, the paragraph numbers of the appendix where we deal with that topic. We have in many cases then stated the matters which we have described in those paragraphs, with the relevant paragraph numbers stated on the right hand side of that first column. Where we have not referred to the details of a particular passage in the index (because there were many sub-headings, which would have made the index rather less easy to apply), we have underlined the text in the middle column describing that passage.

The respondent's training materials and other documents which showed what was the work of a comparator

2 There were in the bundle before us a number of very helpful documents stating at least the fundamental components of the work (for equal value purposes) of a comparator doing a particular task. We refer here to the three main kinds of document, but there were others.

The main documents which showed what was the work of the comparators for the purposes of section 65(6) of the EqA 2010

Safe systems of work documents

3 Some of the documents which we found to be very helpful in determining what was the work of a comparator were relied on by the respondent to show only the hazards involved in doing the work of the comparator (i.e. and not the work of the comparator). Those documents stated safe systems of work, and were described by the respondent as "SSOWs". We use the same abbreviation below.

Training materials

4 Other documents were in the same format as those which were used in training the sample claimants and their colleagues. Those documents included ones with "Know Your Stuff For" as the introductory words in the title.

Policy and procedure documents

5 Finally, there were some documents stating the respondent's "policy" and "procedure" in relation to various things which were relevant to, or constituted part of, the work of one or more comparators. In a number of cases, what was said in those documents was at least for the most part reflected in the relevant training materials. However, we refer below to all of those policy and procedure documents which were relevant to our determinations of fact, not least because they were succinct statements of (1) the reasons for the procedure to which the document in question related, and (2) that procedure on a step-by-step basis.

The tasks which the comparators were required to carry out as their work within the meaning of section 65(6) of the EqA 2010

Assembly

Introduction

6 The work of the comparators (all of whom were, of course, male, so for the sake of simplicity in this Appendix 8, we refer for example to anyone doing their work only as "he") was done in two types of DC: (1) those which distributed what the respondent called "fresh" produce and (2) those which distributed what the respondent called "ambient" produce. The latter was produce which did not need to be kept refrigerated or frozen.

7 The manner in which the respondent required the comparators about whose work we heard evidence to do the work of assembly differed according to the type of DC at which the comparator in question worked. Four comparators worked at ambient DCs, and four of the comparators worked at fresh DCs. Before giving a brief overview of the work of assembly in each of those two types of DC, we found it helpful to refer to a piece of equipment which was used by all comparators, either in all of their work or at least some of their work.

Arm-mounted terminals, or computers, and connected scanners

8 All of the work of a comparator who was doing assembly was stated to the employee via a terminal which the respondent called either an "arm mounted terminal" (shortened to "AMT"), an "arm mounted computer" (shortened to "AMC"), or simply (as in D9/640, which was included in the bundle before us in addition as an appendix to the so-called EVJD of every comparator) an "arm computer". The piece of equipment in question was best described via, or seen in, an illustration or photograph. One helpful photograph was at D9/231/3. That photograph was in the document entitled "Know Your Stuff For Fresh Assembly – Arm Computer Familiarisation" (of which there was a copy also at D9/236). There was another helpful photograph at D9/144/5. That was part of the document entitled "Know Your Stuff for... Grocery/Non-Food Assembly – Introduction to Paperless Assembly". On that page, reference was made to "Information Card 2 – 'Wearing an Arm-mounted terminal", but we could not find that "Information Card" in the bundle before us. The picture at D9/144/5 was of what looked like a slightly different piece of equipment in the form of the scanner from that which was shown at D9/231/3. The latter document was dated "01/12" and D9/144 was dated "06/09", so the difference was probably the result of updating of the equipment. We saw that there was an updated version of D9/231 at pages 5-19 of D9/255, the updated version being dated "09/13", and that the same photograph was on page 3 of both of those versions. We assumed that no distinction should be made between the two types of equipment, and that we should refer to the arm-mounted piece of equipment with a screen by the acronym most used by the respondent, which was "AMC". The AMC was central to the work of the comparators as most of their tasks were given to them via their AMC. It did not have a touch-screen, and was operated by the user pressing buttons around the screen.

9 We record here that the AMC began to have "new voice functions and menus" in 2013, as shown by the documents at D9/265 entitled "Know Your Stuff for Assembly in Stocked – Voice Guided Assembly" and D9/257 entitled "Know Your Stuff for Fresh Assembly – Voice Guided Assembly". (We could see no material differences between those two documents.)

10 We also record that there was in the first four pages of D9/255 a document entitled "Know Your Stuff For Fresh Assembly – Arm Computer Familiarisation – Mobile Printers". That was followed by the updated version of D9/231 to which we refer in paragraph 8 above. That updating resulted from the addition of material relating to mobile printers.

Ambient DCs – an overview of the work of assembly

11 At ambient DCs (or at least the ones about which we heard evidence), assembly was carried out by doing what the respondent called "picking by store" ("PBS"). In practice, that meant the employee in question driving a battery-powered truck with low-level forks on which up to four cages were carried, and obtaining from various locations around the DC the stock to be put into those cages, all of which were going

to a particular store. Putting that stock into those cages was described by the respondent as “stacking” the cages.

12 Once the employee had filled those cages, he drove the cages to the loading bay from which they were intended to be put onto a lorry, to be driven to the destination store.

Fresh DCs – an overview of the work of assembly

13 At fresh DCs (or at least the ones about which we heard evidence), assembly was carried out by doing what the respondent called “picking by line” (“PBL”). That involved assemblers first going with a battery-powered truck with low level forks to a specific place in the DC at which there was a pallet of produce waiting to be picked up. The assembler would then manoeuvre the truck so that it could pick up the pallet safely, and the assembler would then drive the truck to the destinations to which the assembler was directed by his AMC. At each of those destinations there would be a cage into which one or more of the containers of produce on the pallet were to be put by the assembler. In putting that container, or those containers, in a cage, the fresh DC assembler was also doing what the respondent called “stacking”.

14 Once the employee had emptied the pallet, he was required to take that pallet to an appropriate place in the DC, and leave it there.

15 We found it helpful to record here that at pages 20-32 of D9/255 there was a document with the title “Know Your Stuff for Fresh Assembly – Opening and Closing Units of Delivery”, which had, on its second page, under the heading “What You Need to Know/Do”:

> “***Opening and Closing a Unit of Delivery***
>
> When a unit of delivery (UOD) is full and you cannot pick any more items into it, you will need to close it, both physically and on the Paperless Picking system. The unit of delivery then needs to be pushed to the back of the current store lane and replaced with an empty unit of delivery so that assembly can continue.
>
> If a unit of delivery is not closed properly on the system it may lead to the unit of delivery not being loaded or becoming lost on the system. This could result in our customers not being able to purchase the products they want.”

16 For the sake of completeness, we record that that document (D9/255/20-32) was dated “09/13”. Its predecessor, dated “01/12”, was at D9/250 (and, unhelpfully, D9/253). We could not see any material difference between them, although we saw that the order of events as stated on page 9 of each document differed. There was a further updated version of the document at D9/263 (dated “05/18”). Apart from the application of some red rings to highlight the proper positions of labels on UODs, and

the fact that page 9 of D9/263 had reverted to the content of page 9 of D9/250, we saw no differences between D9/263 and D9/255/21-32.

The training materials showing what was involved in the task of assembly

17 The process to be followed when assembling in a DC was stated in some detail in the following documents.

Ambient DCs

17.1 D9/144, entitled "Know Your Stuff for Grocery/Non-food Assembly – Introduction to Paperless Assembly".

17.2 D9/170, entitled "Know Your Stuff for Grocery/Non-food Assembly – Assembling Paperless Assignments".

17.3 D9/560, stating the policy and procedure for "Paperless Assembly in Stocked Depots". That document was dated January 2012. It was updated in September 2013 in the document at D9/151 and in 2017 in the document at D9/620.

17.4 D9/223, entitled "Know Your Stuff for Grocery/Non-Food Assembly – Multi-Store And Late Pick Assembly". Those tasks were helpfully summarised in the second half of the second page of that document.

17.5 D9/152, entitled "PBS Optimal Stop Location – Refresher".

17.6 D9/193; that was an SSOW headed "Area: Warehouse" "Activity: PBS Assembly". It was dated 13/08/15. There was an updated version (dated 10/04/18) at (for example) D5/3/11. (D9/193 was also at D5/3/5, but we preferred to refer only to a D9 reference where there was one.)

17.7 D9/190, which was an SSOW, headed "Area: Warehouse"; "Activity: PBS Assembly (Slim Line Cage DCs)". That was dated 12/09/14. There was a previous version (dated 25/11/13) at (for example) D5/3/5.

Fresh DCs

17.8 D9/234, entitled "Know Your Stuff for Fresh Assembly – Introduction to Assembly in Stockless Depots".

17.9 D9/240, entitled "Know Your Stuff for Fresh Assembly – Pocket Guide".

17.10 D1/3/15 (and in other appendices to comparator EVJDs), which was the SSOW dated "10/04/18" with the title "Area: Warehouse; Activity: PBL Assembly". We record here that there were some differences in the SSOW

dated “11/04/14” and entitled “Area: Warehouse”; “Activity: PBL Assembly (Slim Line Cage DCs)” at D1/3/6. However, we could not see those differences being material.

17.11 D9/251, dated “01/12” and entitled “Know Your Stuff For Fresh Assembly – Paperless Assembly in Stockless Depots”.

17.12 D9/154, dated November 2015, stating the policy and procedure for “Paperless Assembly in [a] Stockless Distribution Centre”. The first box on page 1 of that document was a highly informative statement of how the respondent intended “Pick By Line Paperless Assembly in Stockless Sites” to be done. The procedure part of the document (at pages 2-11) was also a highly informative step-by-step statement of the procedure of assembly in a fresh DC. The predecessor of that document was D9/575. That predecessor was slightly shorter. It was dated “June 2013”.

17.13 D9/553, dated September 2011, and D9/609, dated “2017-12”, stating the policy and procedure for “Picking Merchandising Units”.

17.14 D9/244, entitled “Know Your Stuff For Fresh Assembly – Dealing With Exceptions During Assembly”. That was about (as stated in the document’s first paragraph) “how to deal with exceptions at the end of an assignment – whether from damages, or as a result of a short or an over during assembly.”

17.15 D9/256, entitled “Know Your Stuff for Fresh Assembly – Product Handling and Cage Stacking”.That document was dated “11/13”. It was an updated version of D9/239, which was dated “01/12”.

17.16 D9/534, which was “Skim And Drop Colleague Training” on “how to skim pallets for Express store assembly”. (It was clear from for example the content of page 6 of that document that it related to fresh DCs only.)

17.17 D9/264, entitled “Pick by Line – Singles Picking Operation”. (It appeared that that document also related only to fresh DCs.)

17.18 D9/567 (dated November 2012), stating the policy and procedure for “Assembling on Merchandising Units in Stockless Depots”. That document was updated in 2017 (the date being given as “2017/12”) in the document at D9/605.

17.19 D9/232 (also at D9/237 and D9/254), entitled “Know Your Stuff For Fresh Assembly – Assembling in Sets of 6”, which was stated at the top of the second page to be about the “times when [an assembler’s] assignment [required] 6 or more cases to be assembled for a single store, from a single, multi-product or a skimmed pallet”.

17.20 D9/530, entitled "Know Your Stuff for Fresh Zone Leaders – Condensing Units of Delivery". It was dated "05/13 (selected trial)", and was aimed at the manager of an assembler, as could be seen from its opening words, which were these.

> "By the end of this session you will have the skills and confidence to condense a unit of delivery whilst monitoring the Fresh Assembly within your Distribution Centre."

Uncontroversially, it stated on page 4 that it was only possible to "condense units of delivery for the same store". It was a clear and apparently comprehensive statement of how to condense UODs in fresh DCs.

17.21 D9/596, which was a statement of the policy and procedure for merging pallets in stockless DCs. While the decision to merge pallets was (it was to be inferred from the whole of the document) to be taken by a "Warehouse Service Co-ordinator", it was the "Team Member[s]" who were required to do the job of merging when they were instructed by their line manager to do it.

<u>All DCs</u>

17.22 D9/539, which was entitled "Safe Strapping of Roll Cages". It applied not only to assemblers, as it applied to "all colleagues, warehouse and transport".

17.23 D8/9, which was an SSOW headed "Area: Warehouse"; "Activity: Stacking Trays Above Shoulder Height Onto Dollies".

17.24 D9/580, which stated the policy and procedure for "Condensing Units of Delivery" for all kinds of DC. That document showed that all condensing had to be done "using the Arm Computer" and that the process of condensing did not differ according to the type of DC in which it was done. That policy and procedure were updated in the document at D9/630, the policy in the latter document being dated "2018-16", and the procedure being dated "2017-12". D9/630 contained precisely the same statements as the ones in D9/580 to which we refer in paragraphs 578-580 below, but D9/630 had in addition a section stating the steps to take when "Condensing Units of Delivery (spreading products across multiple UODs)."

18 While there was in those documents a certain amount of repetition, they all said something highly material about the work of assembly. However, there were in those documents cross-references to other documents, only some of which were before us. That was problematic from the point of view of the comprehensiveness of our fact-finding. We thought that we should nevertheless do what we could now, on the basis of the documents before us, because it would be open to the parties, acting sensibly and in accordance with the overriding objective, to agree that to the extent that the missing documents added anything material to our findings here, the content of those

missing documents had to be taken into account by the IEs and us. If such agreement occurs, then we and the IEs will have to be informed accordingly.

19 Ignoring for the moment the absence of those other apparently relevant documents, while we thought that (1) the documents before us spoke for themselves, (2) those which were not before us would fill any gaps, and (3) we could properly have simply referred the IEs and the parties to those documents, we concluded that we should record here what we saw as the work of an assembler as stated or described in the documents before us, in part by quoting from them and in part simply by referring to the parts of the documents from which we drew our understanding. We arrived at that conclusion because we thought that it would help the IEs and the parties (and ourselves at the final hearing in relation to the current sample claimants' work) to do so and because any additional facts found by us in particular below in this appendix could be identified as having been derived from other (in the main, if not solely, oral) evidence. The fact that there were material differences between the work of an assembler in an ambient DC and the work of an assembler in a fresh DC meant that in some respects we had to distinguish between the work of assembly in an ambient DC from that of assembly in a fresh DC. However, because of some gaps in the documentary evidence before us and because some of the aspects of assembly in one kind of DC were described only in documents relating to the other kind of DC, it was difficult for us to distinguish definitively between the two types of DC. We therefore simply did what we could with what we had before us.

The work of assembly in both kinds of DC

20 The work of an assembler in both kinds of DC in which the current comparators worked was helpfully summarised at D9/144/2, which helped to make it clear how the work done in an ambient DC differed from the work done in a fresh DC.

> "Grocery and Non-Food depots take units of delivery around the warehouse on mechanical handling equipment to collect products from pallets. This is referred to as 'Pick By Store'.
>
> They also operate a Continuous Working process whereby at the end of their shifts assemblers are advised they can log off their arm-mounted terminal's. Any remaining cases still to be assembled for that assignment then create new part-picked assignments to be downloaded and picked by someone else.
>
> Fresh Food depots assemble units of delivery by taking the products on a pallet around the warehouse. Assemblers use a hand-powered pump [truck] to assemble into various units of delivery which are held in the store lanes. This is called 'Pick By Line'."

21 We pause to say that in our judgment that passage showed that an assembler was not under any specific pressure to complete an "assignment" by the end of his shift. We do not mean by saying that to imply that assemblers were under no time

pressures, as to which we had already come to the conclusion stated in paragraph 55 of our judgment of 12 July 2023.

The process which was referred to by the respondent as "paperless assembly" in an ambient DC

22 It was helpful to record here also that at the top of D9/144/2, the process of "paperless assembly" generally was described in the following illuminating terms.

> "Paperless Assembly is a computer system that allows cages, dollies, pallets and merchandising units to be tracked from the depot all the way to stores, using unit of delivery labels.
>
> Battery operated arm-mounted terminals worn by each Team Member are used to direct the assembly of products via radio link with the Paperless Assembly System.
>
> Assembly assignments are displayed on this terminal and direct Team Members to collect products from locations in the warehouse.
>
> As the system's name suggests, Paperless Assembly removes the need to complete any paperwork during assembly, saving time and improving accuracy.
>
> Arm-mounted terminals are worn by all Team Members and Assembly Team Managers. Team Managers have access to functions that allow them to manage and control the Assembly process.
>
> Scanners are used to read the product barcodes before they are placed into cages.
>
> Unit of delivery labels are placed on each cage and once the assignment is complete the terminal directs the assembler to a Loading Bay."

23 The term "unit of delivery labels" was then the subject of the explanation at the top of D9/144/3, all of which bears repeating.

> "Cages, dollies, pallets and merchandising units are referred to as units of delivery. Each type of unit of delivery has a unique label, which allows its content to be tracked throughout the distribution system via the scanning of its barcode. Each cage has one unit of delivery label.
>
> The label provides all the information needed to track the content of a unit of delivery from the time it is picked to delivery at a store. As an Assembler you will only have to scan cage unit of delivery labels.
>
> The information on the label includes:

- Unit of delivery type (cage, dolly, pallet or merchandising unit).
- Date and time unit of delivery label was printed.
- Name and user identification number of the person who printed the label.
- Depot name.
- Delivery date and day.
- Unit of delivery number.
- Cage designation (A, B, C).
- Door number.
- Store name.
- Store number."

24 Thus, an assembler in an ambient DC needed to scan the labels only on cages, not dollies, pallets or merchandising units.

25 The manner in which an assembler needed to work his way around the aisles and the places where he was required to park his truck was stated in D9/152 ("PBS Optimal Stop Location – Refresher"). That document showed that the AMC would tell the assembler where to stop.

26 The SSOW at D9/193 ("PBS Assembly" in the "Warehouse") was a very helpful and succinct but also apparently comprehensive statement of the work of assembly in an ambient DC, i.e. each step to be taken, and how it had to be taken safely. We did not see any material differences in D9/190 (" PBS Assembly (Slim Line Cage DCs)").

The process of paperless assembly in a "stockless" depot

27 D9/251 ("Know Your Stuff for Fresh Assembly – Paperless Assembly in Stockless Depots") was a reasonably comprehensive description of the task of assembly in a fresh DC and could be taken in itself as a statement of that task. That which we say in the rest of this section was, however, not apparent from D9/251 and was an essential part of the background to the series of tasks stated in D9/251.

28 The "Pocket Guide" at D9/240 contained on page 2 a summary of the role of an assembler in a fresh DC and the "top four key points" for "Assembly Accuracy."

29 D9/234 ("Know Your Stuff for Fresh Assembly – Introduction to Assembly in Stockless Depots") had a helpful flowchart at page 3 and this succinct summary of what a fresh DC did.

> "The depot is designed to process stock delivered by our suppliers (Goods In) through the warehouse by picking into store cages (Assembly) and then loading for delivery to store (Goods Out)."

30 That was expanded on at the top of the next page (page 4) in this way.

> "• **Goods In** – This is where we receive and process stock from our suppliers ready for you to assemble for our stores.
>
> • **Assembly** – In our depot we use Pick By Line (PBL). This is where we take the product pallets from Goods In around an Assembly layout, putting the products into units of delivery (cages, dollies, merchandising units) for different stores that have placed an order for that product. This is what your main role will be.
>
> • **Goods Out** – This is where we load the units of delivery that have been assembled onto trailers, ready for delivery to our stores."

31 Page 5 of D9/234 had a highly informative series of definitions, the first five of which were these.

> "• **Goods In grids** – The individual location where pallets are located to be checked before being collected for assembly.
>
> • **Pallet** – The wooden base that all products or trays are stacked on when delivered.
>
> • **Layouts** – The location where certain types of product are picked together – for example, produce trays, produce boxes.
>
> • **Lanes** – The area where store cages, dollies and merchandisable units are located and are picked into by Assemblers.
>
> • **Assignment** – A unit of work which lists the location of the pallet to collect from Goods In and the list of stores to pick for."

32 It was also helpful to know that the "Dolly and cage holding areas" were

> "The location where all empty dollies or cage equipment will be held for Assemblers."

33 In addition, it was informative to know that a "holding area" was

> "An area designated for placing any pallets which have an exception (overs, damaged or an incorrect product)."

34 We found it helpful too to know that a "Pallet stacker" was

> "The piece of equipment that stacks empty blue CHEP pallets only."

35 A "blue CHEP pallet" was a pallet which was supplied by a company which went by the name of "CHEP": that was clear from page 2 of the document at D9/235, entitled

"Know Your Stuff For Fresh Assembly – Using a Pallet Stacker", which described in detail how to use such a stacker. On the same page, this was said.

> "You will be using the Pallet Stacker machine during the Assembly process:
> • At the end of the assignment you will need to take your empty blue CHEP pallet to the Pallet Stacker, for stacking.
>
> • At the start of a new assignment you may need to de-stack a pallet for an activity called skimming."

36 We refer further to "skimming" in paragraph 38 below. In regard to pallet stacking, we record here that at D9/240/7, this was said.

> "To reduce the risk of manual handling accidents we use pallet stackers, for empty blue CHEP pallets only.
>
> No broken pallets should be placed into the pallet stacker.
>
> Brown, red and white pallets must be stacked by hand.
>
> No attempt should be made to remove debris or rubbish from the equipment.
>
> Pallets can be manually stacked or de-stacked up to 6 high by one person and to 10 high by two persons."

37 Returning to D9/234/5, while it was in one sense self-explanatory, it was helpful to know (as stated on that page) that the "Outer case code or barcode" was

> "The barcode on the outside of the box/tray that can be scanned to identify the product."

38 Another helpful definition was at the top of the next page, D9/234/6:

> "• **Skimming** – The process of removing stock off a series of pallets to make a full pallet assignment."

39 The trucks used by an assembler in a fresh DC were in one sense helpfully described on the same page in this way.

> "• **Pedestrian pump pallet trucks** – This is a piece of equipment that lifts product pallets that need to be moved around the assembly layout.
>
> • **Pedestrian powered pallet trucks** – This is an electrical piece of equipment that will carry around product pallets with minimal effort."

We say “in one sense”, because both of those pieces of equipment could be known as a “PPPT” or a “Pedestrian PPT”. In fact, the first of those two pieces of equipment was better referred to (and was otherwise in the training materials generally referred to) as a “Hand Pump Truck” (that was at D9/402/2) or (as at D9/379/1) simply a “Pump Truck”. We refer below in some places to a pedestrian powered pallet truck as a “Pedestrian PPT” because that was the abbreviation used by the parties, and we refer to a pedestrian pump pallet truck as simply a pump truck or, where it was referred to by the respondent as a “Manual Pump Truck”, a manual pump truck.

40 The “Paperless Picking System” was described on page D9/234/7 in this helpful way (which, although it involves some repetition, we set out in full to put it beyond doubt how the work of picking in a fresh DC was different from, but similar to, that of picking in an ambient DC).

> “Paperless Picking is a computer system that allows cages, dollies, pallets and merchandisable units to be tracked from the assembly lanes in our depot all the way to our stores.
>
> Battery operated arm computers are worn by each Team Member. These are used to direct you to the products that need to be assembled in the warehouse via a radio link to the Paperless Picking system.
>
> Assembly assignments are displayed on your arm computer and inform you of where to collect pallets of products from the Goods In grids, and to which store lanes you should take the products to assemble into units of delivery.
>
> As the system’s name suggests, Paperless Picking means that you do not need to carry or complete any paperwork during assembly which saves you time and improves our accuracy.
>
> The benefits of a Paperless Picking system are:
>
> - You can scan products which gives us greater accuracy when assembling of units of delivery, because the system will check that the product scanned is the correct one.
>
> - You are directed by your arm computer to locate products and units of delivery,
>
> - The Assembly process can be continually monitored and work prioritised when needed by your manager.
>
> - Units of delivery can be tracked through assembly and loading using the unit of delivery label.
>
> All of these help us to improve the availability for our customers.”

41 We found it informative too that at pages 9-10 of D9/234, this was said.

> "***Product Layouts***
>
> The Paperless Picking system arranges products into chambers, groups, waves and layouts:
>
> - **Chambers** – Chambers are the different temperature areas within the Warehouse. In a Fresh Food Warehouse there is a chamber set at +1°C, and another chamber set at +12°C.
>
> - **Groups** – Groups contain different product types arranged in the order they will be picked (examples of a product group are: Butters and Fats, Fresh Meat Box, Fresh Meat Tray, Fresh Juices).
>
> - **Waves** – There are 2 waves, Wave 1 and Wave 2, which indicate when products are planned to arrive at the depot. Wave 1 are shorter code life products and arrive into the depot throughout the day. Wave 2 are generally longer code life products and arrive overnight into the depot.
>
> - **Layouts** – Each depot has specific designated assembly layouts where certain product groups and tray[s] or boxes are assembled. Each product group has its own layout. Product layouts can be split if the products to be assembled are supplied in both boxes and trays. Each layout contains the lanes for each store that your depot is delivering to. The arm computer will automatically direct you to the correct layout for the products you are assembling."

42 Also on page 10 of D9/234, there were these helpful statements under the heading "Checking You Know Your Stuff".

> "**4.What are the three types of pallet that you are likely to come across during the assembly process?**
>
> - Pallets with only one product on, pallets with more than one product on or building your own pallet, from a number of other pallets.
>
> **5. In order to pick accurately, it is important to:**
>
> - Pick the right product, in the right quantity, into the right cage."

43 On the next page, it was made clear that if there were "multiple or missing unit of delivery labels on a cage, dolly or merchandisable unit" then the assembler had to "Contact a Warehouse Manager".

The roller shutter doors in a fresh DC

44 One unique aspect of assembling (or, in fact, working in) a fresh DC was the fact that (as indicated in paragraph 41 above) there were temperature-controlled areas. Those areas were separated by "Roller Shutter Doors", which were alternatively called "Rapid Roll Doors", the operation of which was shown by the SSOW at D1/3/12 (dated 09/01/17). Such operation was also described at the bottom of D9/234/5 in these terms.

> "These doors are installed in Fresh depots primarily for access by mechanical handling equipment to temperature controlled chambers (including pedestrian operated mechanical handling equipment and movement of loose equipment). The doors are made from reinforced PVC and roll up (retract) or roll down (close) at speed. These doors are usually operated by a pull cord allowing the door to retract however, some have motion sensors that detect the operator or truck and open the door automatically. Pedestrians are prohibited from using rapid roll doors and must stay on the designated pedestrian route at all times when moving between chambers.
>
> **Key Point!**
>
> When moving through a Roller Shutter Door, be aware of other operators at all times, exercise caution, sound your horn to warn others who may be ahead or on the other side and face the direction of travel.
>
> Expect to meet someone on the other side and always keep to the left.
>
> Never tailgate (following directly behind someone else who has activated the door to retract) as there is a possibility the door will close while you are travelling under it and this could result in injury to yourself and/or damage the door."

The use of an AMC and its attached scanner

45 The process of assembly in an ambient DC (and it had to be the same in a Fresh DC) started with the assembler collecting the necessary equipment, which was stated at D9/144/3 to be:

45.1 "Arm-mounted terminal"

45.2 "Gauntlet"

45.3 "Scanner".

46 The assembler was (as stated at the top of D9/144/4) issued with his own "personal arm and finger band" for use when using the AMC and the scanner which we describe in paragraph 8 above. At the start of the shift, the assembler was required

(see D9/144/4) to "report to the equipment issue point to collect your equipment." The document continued.

> "Check the condition of all equipment issued and return and report any damaged or faulty items to the Paperless Assembly Clerk.
>
> Checks should include:
>
> - Body of unit isn't cracked or broken.
> - Screen isn't cracked.
> - Scanner operates.
> - Connecting leads/plugs are not damaged.
> - All straps and mounts adjust to achieve a comfortable fit.
>
> The process for issuing this equipment may vary from depot to depot, but generally equipment is collected from storage lockers. You will need to leave your swipe card when collecting equipment. This allows the depot to know who has what equipment. When you take back the equipment, your swipe card will be returned to you."

47 The manner in which the AMC and the attached scanner were to be attached to the body of the assembler was stated comprehensively on D9/144/5-7, where (at D9/144/6) what was required by way of skin care was also stated. The impact of using the small screen on the assembler's eyes was clear from what was said under the heading "Eyesight" on D9/144/7. Cross-reference was made on that page to "the 'Using An Arm-Mounted Terminal' Safe Systems Of Work Poster". We assumed that that was a reference to D9/640 (entitled "Using an Arm Computer"), to which we refer in paragraph 8 above. The only additional information which we could see there was the pictorial guidance given about how the AMC needed to be attached to the wrist and how it could be adjusted.

48 The AMC itself was helpfully explained on page D9/240/3.

49 The document at D9/170 entitled "Know Your Stuff for Grocery/Non-food Assembly – Assembling Paperless Assignments" stated that there were three documents which should first have been read before the assembler was given the training recorded in the document at D9/170. They were

49.1 "Know Your Stuff For Grocery/Non-Food Assembly – Bronze 1 – 'Introduction To Paperless Assembly'."

49.2 "Know Your Stuff For Grocery/Non-Food Assembly – Bronze 2 – 'Basic Arm-mounted Terminal Functions'."

49.3 "Know Your Stuff For Grocery/Non-Food Assembly – Bronze 3 – 'Product Recognition And Handling'."

50 We turn now to the first of those documents. It was at D9/144. The other two documents were not before us. We saw that there was one document relating to fresh DCs which was similar to the second of those three documents. It was the document "Know Your Stuff For Fresh Assembly – Arm Computer Familiarisation" at D9/231 to which we refer in paragraph 8 above. The manner in which an AMC worked in practice was shown by the content of pages 8-12 of D9/240. It was highly likely that the procedure required to be followed was at least similar in ambient DCs.

51 The content of D9/231 was in some respects a repeat of what was said in D9/144 and D9/640. That which was new in the introductory section included the reference at D9/231/2 to the assembler's "Personal IFOB". That "IFOB" and its use was described comprehensively in the 4-page document at D9/474, entitled "Know Your Stuff for Mechanical Handling Equipment – Using a Personal iFob".

52 The first page in particular of that document, i.e. D9/474, but also what was said at the top of the second page, showed that the iFob was required for the use of a "truck" of the sort which was required by the respondent to be used by a person in order to do the work of assembly. That document also showed that a "pre-operational truck check" needed to be carried out on the truck before it could be used by the assembler. It also informed us that an iFob had to be charged once a day when used by the person to whom it was assigned.

53 The "pre-operational truck check" was stated succinctly at D9/240/5 and explained more fully at D9/251/2.

54 There was at D9/142/29 (the document was entitled "Supporting Your Performance – Participant's Workbook") a clue to what was in the document entitled "Know Your Stuff For Grocery/Non-Food Assembly – Bronze 3 – 'Product Recognition And Handling'" to which we refer in paragraph 49.3 above. On that page (D9/142/29), there was an extract from the document recording what was involved in being trained to assemble in a fresh DC. At the top of the page, above that extract, this was said.

> "Page 1 of the contents matrix for Know Your Stuff for Fresh Assembly is shown below. Use the objective column to find out what is covered in a specific Training Card."

55 The "Product Recognition and Handling Training Card" was recorded in the extract to have this objective.

> "By the end of this section your trainee will be able to:
>
> - describe what you would use to recognise a product;
> - list the information on an outer case code;
> - explain how products are arranged on the system;
> - describe how to stack products correctly and safely into a cage or dolly."

Rejection of faulty cages

56 We record here (and this was relevant to the work of the sample claimants) that the respondent's DC staff who carried out assembly were required to reject faulty cages, including where there was (as stated at page 5 of D9/256, entitled "Know Your Stuff for Fresh Assembly – Product Handling and Cage Stacking")

> "broken metal work on the sides as this can be a hazard because of sharp edges".

Stacking of cages

57 The most important part of the work of assembly was the stacking of cages and dollies.

58 We saw that towards the top of page D9/168/2 ("Accuracy and Stacking Session May 2018"; it appeared to be a developed version of the document with the same title at D9/541)), this was said.

> "We pick products to suit the store layout. It means that when a colleague takes a cage/dolly out onto the shop floor to stock the shelves, everything in the cage/dolly is for the same aisle. If we have not followed the AMT exactly, it results in our colleagues having to restack cages and move from aisle to aisle stacking shelves. Or worse, we haven't picked all the stock requested and our colleagues don't have anything to put on the shelves for the customers to buy."

59 That was relevant background, which helped us to understand the demands of a replenisher's work in this case: the work of replenishing was theoretically more straightforward if a cage or dolly was stacked in the manner which the respondent's computer systems required. That factor was in turn helpful in showing the extent to which the use of digital technology by the respondent affected the work of both comparators and sample claimants.

60 That was further illustrated and reinforced by what was said at the top of D9/168/3, which was this.

> "The system knows what stock will fit in the cage at the start of the pick. That is why it is important that we follow what the AMT says and ensure the right stock and the right amount of stock, goes into the right cage. Otherwise we end up with the cage we saw at the beginning.
>
> Grocery – If there are any issues with the cage, e.g. telling you to put too much in, ensure you tell a Manager, as it may be a system issue."

61 Towards the bottom of page D9/168/2, there was this helpful summary of the principles applicable to stacking a cage.

> "The main coaching points to deliver to the individuals as they go are;
>
> - Stack to protect the stock from damage, e.g. light items on top and heavy on the bottom.
> - Products should be laid flat or folded appropriately.
> - Products should not be stacked, upside down or at an angle.
> - Use all available space and rearrange if necessary. Better to do it now than when the cage is full of stock."

62 At the bottom of the page, this was said.

> "Message to deliver is, that it is easy to stack properly and the benefits can be seen in the cage."

63 There were at D9/145 some highly informative "Cage Stacking Guidelines" accompanied by pictures showing what a well-stacked cage looked like and what a poorly-stacked cage looked like. There were similar but also helpful pictures in the "Information Card[s]" numbered 1, 2, 4, 5, 6 and 7 (Information Card 3 was apparently not before us) at (respectively) D9/230, D9/227, D9/228, D9/225, D9/229, and D9/226.

64 There was at D9/224/5-7 (the document was entitled "Know Your Stuff For... Grocery/Non-Food Assembly – Cage Stacking Guidelines") a detailed statement of how cages should be stacked, including "Three Basic Steps to Cage Stacking". The representation of the "traditional game of Jenga" on D9/224/7 was particularly helpful by way of exposition, but all of pages 2-8 of D9/224 were invaluable in describing to us and the IEs what cage stacking involved.

65 By way of illustration, we saw also that at D9/224/8, this was said.

> "**Key point!**
>
> Never force products into gaps.
>
> - Allowances are built into picking time to spend for time re-arranging the cage stack where required. This can often be needed as the types of products we pick are so diverse in size and shape."

66 There were similar guidelines, but without the helpful depiction of the traditional game of Jenga, in D9/239 (which was updated in D9/256), relating to fresh DCs (the documents were entitled "Know Your Stuff for Fresh Assembly – Product Handling and Cage Stacking").

Stacking of dollies

67 We thought that the task of the stacking of dollies, as described in the SSOW at D8/9 with the title "Stacking Trays Above Shoulder Height Onto Dollies" in the "Warehouse", was probably done more in fresh DCs than in ambient DCs. In any event, that document needed to be taken into account in assessing the demands of the work of assemblers putting trays onto dollies.

Loading

68 Loading was the subject of much cross-examination of the respondent's witnesses. In principle, the work of a loader was the same whether the products being loaded were fresh or ambient. However, even before the respondent inserted references to the training materials into the part of Mr Pratt's EVJD which related to loading, as its recast case concerning the task of loading (to which we refer from now on was "the respondent's recast case), there was before us what appeared at first sight to be a reasonably comprehensive set of documents describing how the work of a loader in each context had to be done. In fact, the respondent put before us some additional documents relating to loading in its bundle of documents accompanying its recast case. Those new documents were at pages 71-111 of that bundle. There were at those pages extracts from documents, or documents themselves. The number of such documents or extracts was six. The first one contained information that was in other documents before us. The next two (pages 72 and 73) were scanned 2012 versions of SSOWs of which we had updated versions from May 2018. The second of those two SSOWs, at page 73 (headed "Area; Goods Out; Activity: Loading") was illegible but a clear copy was sent to us by the respondent on 22 March 2024 at the request of EJ Hyams. The next document was a 36-page training document for "pick[ing] by line", i.e. relating to assembly. It was at pages 74-109 of the bundle accompanying the respondent's recast case relating to loading. That document was referred to by the respondent as an addition to paragraph 6.54 of the EVJD for Mr Pratt. We could not see why it was, as it appeared to have nothing to do with the subject-matter of that sub-paragraph. We say that because the recast paragraph was in these terms.

> 'The "loading card" was a single use card that the job holder swiped through a card reader having first done the same with his personal ID card. The job holder then activated his AMC as set out in D9/387/2-3 – Distribution Training – KYS for Fresh Goods Out – Getting Started On Paperless Loading (bundle page 43) and operated it as set out in pages 17 to 28 of D1/2/17-28 – the AMC Guide extract (bundle page 6) and TSC24394 – Distribution Training – Case Picking – Pick by Line – Trainers Notes – Version 3 (bundle page 74)) to identify his first Assignment."

69 The final two documents were (scanned and legible) SSOWs. The first one, at page 110 of the bundle accompanying the respondent's recast case relating to loading, was headed "Area: Goods Out"; "Activity: Inside Dekit (Fresh Depots)". That was not

in the hearing bundle, but a comparable one, relating to ambient depots, was. It was at D5/3/8 and was headed "Area: Goods Out"; "Activity: Inside Dekit – Grocery/GMEC DCs". There was also the document at D2/3/14 to which we return several times below (most pertinently here, in paragraph 841 below), headed "Area: Goods Out"; "Activity: Inside Dekit". The document at page 111 was headed "Area: Goods In/Out"; "Activity: Unloading/Loading Double Deckers Using a Transdek Dock Lift". That document was not in the hearing bundle before us, but there was one which contained comparable information. It was the document at D9/340 entitled "Know Your Stuff For Fresh Goods Out - Using a Transdek Lift". D9/340 was (unhelpfully; this occurred quite frequently) a duplicate: it was also at D9/422. That document (as D9/340) was in fact referred to by the respondent in its recast case concerning the work of loading as done by Mr Pratt (the reference was at paragraph 6.62 of the EVJD for Mr Pratt). However, only two pages of D9/340 were in the bundle appended to that recast case (they were at pages 39-40 of that bundle). There was a separate training document relating to the use of a Transdek lift in an ambient DC (D9/381), but it was in almost precisely the same terms as D9/340.

70 Some of the documents in the hearing bundle before us were applicable to both ambient and fresh DCs. The document at page 73 of the bundle accompanying the respondent's recast case, was, as we say in paragraph 68 above, the 2012 version of the document dated 18 May 2018 at D1/3/17. The latter document was also at D5/3/12, D6/3/11, and D8/3/11. It was not in the section called "Generic documents" relating to the comparators, i.e. section D9. We refer only to the first of those documents (D1/3/17) throughout the rest of this document. We saw that there was (at D1/3/7 and elsewhere; we refer here and below only to D1/3/7) a separate document entitled "Area: Goods Out; Activity: Loading (Slim Line Cage DCs)", but that it added nothing to D1/3/17. That was because it contained less information because it did not need to cater for standard sized cages.

71 The document at D1/3/17 was highly informative and we took it as the starting-point of our fact-finding in relation to the work of loading. It applied to loading at all types of DC. One of the things that it referred to was "consolidating". That was in the first sentence of column 3, which was this.

> "Before loading cages, the Loader ensures that red straps (two-sided cages) are secured in place and that product is safely stacked within the confines of the cage (consolidating when required, but never onto slim line cages with UOD labels that state 'Heavy') and that the cage is undamaged."

72 We saw that there was a document (D9/440, repeated at D9/533) headed "Know Your Stuff for Walkers Consolidation" and sub-headed "Condensing Walkers PBL cases onto MU's, Semi Pallets, S-Docks & into Part Filled Cages". We assumed therefore that consolidation was the same as what the respondent called elsewhere "condensing". (In fact, further on down the third column of D1/3/17, reference was made to condensing a "half full dolly of bread trays ... onto a half full dolly of green trays".) We did not hear any evidence about the extent to which Walkers products

were distributed by the DCs at which the comparators worked, but we assumed that Walkers products were crisps and related products. The document at D9/440 was at least potentially relevant, but how much it added to the factual matrix on which the IEs were going to have to make their determinations was not clear to us. We assumed that Walkers crisps and similar products were put into cages where there were gaps, not least because the boxes of the for example crisps will have been relatively light, so that the insertion of the box in question would have been unlikely to affect detrimentally the content of the cage or the loading of the lorry. That assumption was based on both what we thought was common sense and what was said in D9/578, which stated the respondent's policy and procedure as at "December 2013" concerning "Walkers Stockless Consolidation on to Merchandising Units, Semi Pallets, S-Docks & Part Filled Cages", especially in the box numbered 2 on the first page of that document.

73 At D9/378 there was a document entitled "Know Your Stuff For Grocery/Non-Food Goods Out – Condensing Units Of Delivery". At D9/386 there was a document entitled "Know Your Stuff For Fresh Goods Out – Condensing Units Of Delivery". Those documents showed the factors which needed to be borne in mind by the loader when considering whether to condense units of delivery ("UODs"): they were the first three paragraphs under the heading on the first page: "What You Need To Know/Do". While there were differences in some of the wording of the documents, and some differences in regard to the content (so that for example there were different words concerning the products which could not be mixed), the procedure to follow when condensing was in substance the same in both documents (it was described on pages 2-3 of both documents). The document at D9/426 entitled "Know Your Stuff For Fresh Goods Out (Podium) – Condensing Units Of Delivery" was less detailed but added something in that it showed (on page 4) what the AMC would show when the condensing process was "complete".

74 The document entitled "Know Your Stuff For Fresh Goods Out (Podium) – Dealing with Paperless Alarms" at D9/356 showed what was required of the loader when an alarm was generated on the AMC (as stated at the top of the second column on the first page) "to highlight any issue that the Loading Team may be encountering during the loading process". We did not see an equivalent document for ambient DCs, but we assumed that the process was the same for those DCs.

75 The first three pages of the document at D9/373 (which was dated "06/09") entitled "Know Your Stuff For Grocery/Non-Foods Out – Getting Started on Paperless Loading" showed that the first steps in the day of a loader were the same as those which were required to be taken by an assembler (in that they both had to log onto an AMC). The next steps were described on page 2 of D9/374 (which was entitled "Know Your Stuff For Grocery/Non-Food Good[s] Out – Loading Units of Delivery"). In order easily to understand the steps required to be taken at the start of loading, it was best to read the latter's following words at D9/374/2, and then go to the steps shown in the boxes with arrows below them at D9/373/2-3.

> "To begin loading you need to be clocked onto a loading assignment on the Distribution Centre Assignment Monitoring System. This will give you access to the loading 'Special Functions' menu, from which you need to select 'Request Load' to begin loading. The Team Manager will assign loads on the system before you begin loading, so when you request a load the system will direct you to a loading door that has a trailer waiting to be loaded."

76 The first part of D9/373 also contained the following informative passage (on the first page of the document) giving an overview of the impact of the use of digital technology on the process of loading.

> "Paperless Loading is a system that allows units of delivery to be tracked from the assembly lanes all the way to the stores. The system updates the stores stock records at point of delivery with the exact contents of each delivery, which helps improve availability for customers. The system also controls the loading priority which will make sure the stores get the stock they need when they need it, again improving availability for customers. Loading is system driven, which means Loaders do not have to drive around the Warehouse searching for units of delivery as they can get this information from the arm-mounted terminal. As the system's name suggests, Paperless Loading removes the need for Loaders to complete any paperwork whilst loading, which will save time and improve accuracy."

77 The equivalent document for fresh goods out was at D9/387 (which was dated "03/09"). We doubted that there was any good reason for the difference, but D9/373 contained a passage about iFobs (with the iFob being referred to as an "I-Fob"), while D9/387 omitted the passage. The passage was helpful in that it told us a bit more about the iFob to which we refer in paragraphs 51 and 52 above. It was in the box at the top of D9/373/2 and was this.

> "Each Team Member has their own I-Fob key issued to them which will operate the equipment they are authorised to use. The I-Fob must be inserted into a download point at least every 48 hours in order to maintain continual use. It is best practice to insert the I-Fob into a download point at the start of each shift."

78 Reference was made during oral evidence about the respondent's stores to "lost sales" cages or other UODs. They were defined at page 4 of both D9/373 and D9/387. The more informative definition was in the first of those documents, and was this.

> "Stock that has failed to reach a store on its planned delivery date and needs to be delivered at the earliest opportunity."

79 One of the things which a loader had to do was to use what the respondent called bay door equipment. D9/383 (entitled "Know Your Stuff for Grocery/Non-Food Goods Out – Bay Door Equipment") contained an expansion of the description at D1/3/17 of

how to operate that equipment at an ambient DC. The equivalent document for a fresh DC (entitled "Know Your Stuff for Fresh Goods Out – Bay Door Equipment") was at D9/385. We could not see any difference between those two documents apart from their headings. Page 3 of both documents contained significantly more information about what was required of a loader when arriving at the bay door than was at D1/3/17. (We found it helpful to record here that we saw that the respondent referred in its recast case in five separate places, in four separate paragraphs of what was originally the extensive (160-page) EVJD for Mr Pratt, to D9/385. No reference was made to D9/385 originally in that EVJD. In the recast case, reference was made to D9/385 with one exception to supplement rather than replace the relevant original parts of the EVJD.)

80 The document at D9/374 entitled "Know Your Stuff For Grocery/Non-Food Good[s] Out – Loading Units of Delivery" also contained additional information about the work of a loader. That was at pages 3-4, which concerned (1) "Unit of Delivery Checks", (2) "Trailer Weight Distribution", (3) "Loading Cages", (4) "Loading Dollies And Merchandising Units", and (5) "Loading Pallets". Probably the most important passage, given the way that the case was conducted before us, was under the second of those headings, where this was said.

> "There is a legal requirement to ensure all goods vehicles are loaded correctly. It is therefore important to distribute the weight evenly to comply with the vehicles legal permitted axle weights. If excessive weight is placed at the front or rear of the trailer, it can have an adverse effect on the handling characteristics of the vehicle, making it difficult and dangerous to drive.
>
> At least six to nine light cages therefore are needed both on the front and rear of the trailer. All other heavy cages should be distributed evenly throughout the trailer. Pallets ideally should be at the mid point of the trailer secured by cages to prevent movement and possible damage to stock."

81 There was then, immediately under those words, a table showing the maximum number of cages which could be loaded onto the various kinds of delivery vehicle used by the respondent. On pages 5 and 6 there was a fairly detailed description of how to secure a load using "Conventional Horizontal Strapping". There was an equivalent document for fresh DCs, entitled "Know Your Stuff For Fresh Goods Out – Loading Units Of Delivery". That was D9/393. While there was different information in those documents (since there might be a need to move "Split Bulkhead Doors", as shown by D9/393/3, or load "S-Dock pallets", as described on D9/374/5), we could not see any other material difference in their approaches to the task of loading.

82 The documents to which we refer in the preceding paragraphs above under the heading "Loading" (i.e. paragraphs 68-81) appeared to us to state at least the main aspects of the work of a loader. They were not comprehensive, but they stated what we understood to be the core work of a loader, which would be done on a daily basis. There were documents which stated aspects of that work in more detail. One was

D9/375, which was headed “Know Your Stuff For Grocery/Non-Food Goods Out – Loading Units Of Delivery” and described in its side-bar as “Information Card 1 – Loading Units Of Delivery”. We saw that on the second page of that document, some typical error messages were referred to, and that one of them was “Out of Sequence – unit of delivery is not being loaded in sequence order.” We could see that that error message might be applicable in the case of a non-fresh delivery to different stores, but we had no evidence before us about that.

83 There were in addition at D9/376 and D9/392 documents stating in detail how to use the “Strap 2000” system in ambient and fresh DCs respectively, but that their content was (apart from the their headings and what was in their side-bars) identical. There was a video put before us in evidence about the use of the Strap 2000 (D9/186), but neither party referred us to either D9/376 or D9/392 in their closing submissions. D9/392 was, however, referred to in the respondent’s recast case by way of an addition to what was originally paragraph 6.82 of the EVJD for Mr Pratt. The video was referred to also in that recast case in the same place, but we doubted that the video added anything to the description on page 3 of both D9/376 and D9/392. If the IEs believe that it is necessary to take into account the content of the video at D9/186, then they can of course do so.

84 We record here the additional documents which showed in our judgment what was involved in the work of a loader. We do so in part for the avoidance of doubt but also in case in particular (but not only) the IEs believe it to be necessary to look at more of the details of the elements of the work of loading in the documents to which we refer in paragraphs 68-81 above.

85 In regard to loading generally, the following additional documents were relevant.

85.1 D9/146, D9/149/2-14 and D9/141 concerning the policy and procedure for paperless loading, dated, respectively, June 2012, April 2013 and “2018-14”.

85.2 D9/615 concerning “Control of Trailer Straps”.

85.3 D9/583 concerning ensuring that only full pallets were sent to stores (“Full Pallets to Store”). That document was dated April 2014. It appeared to have been superseded by the document at D9/592, which was entitled “Full Pallets to Store Policy including multi pallet movement” and was dated “2016-15”.

85.4 D9/582 (dated April 2014) and D9/598 (Dated “2017-12”) concerning “Handball Pallet” building. The term “handball” was referred to only by Mr Todd in paragraphs 3.14-3.15, 6.170, 6.227-6.231, 6.243, 7.4(e) and 10.9 of the EVJD for his work, at D3/1.1. D9/582 and D9/598 stated the policy and procedure for building pallets by hand.

85.5 D9/584 and D9/629 (dated, respectively, August 2014 and “2018-16”) stating the “Late Cages” policy and procedure.

85.6 D4/3/13, headed “Loading Containers and Trailers with Chep pallets”. At the bottom right hand corner of D4/3/13 there was, we saw, a “Pallet Loading Plan”.

Dekitting

86 While it was not strictly to do with loading, unloading a trailer was capable of being part of the work of the “goods out” team and it was asserted to have been done by some of the comparators. As we say in paragraph 386 below, we saw that dekitting was a specific part of the work of Mr Pustula, so that if only for that reason, it was necessary to take into account the training materials relating to dekitting. Such materials showing what the work of dekitting was and how it had to be done included D9/357, entitled “Know Your Stuff For Fresh Goods Out (Podium) – Dekitting Equipment Inside”. At the top of page 2 of that document, there was this “Key Point” for a member of the loading team (probably, but we could not see without evidence about the document whether this was correct, a loader’s line manager rather than a loader):

> “If at the start of your shift no trailers have been dekitted or there are no trailers on bay to be dekitted, this will be your first priority.”

87 At D9/357/3, there was this “Trainers Note”:

> “Inform your trainee(s) that on occasions they may be required to ask a team member to dekit their own trailer. In doing this they must ensure that the correct job card has been swiped, allowing the team member to move between tasks.”

88 The work of dekitting inside a DC was the subject of the SSOWs referred to in paragraph 69 above. They included D2/3/14, which was an SSOW entitled “Area: Goods Out”; “Activity: Inside Dekit”. It showed (1) what was a “nest” of cages and (2) that it was “a mandatory legal requirement for hearing protection to be worn whilst carrying out internal dekit activities”. The work of dekitting inside a DC was also the subject of the following documents (none of which, we saw, were referred to in the respondent’s recast case):

88.1 D9/402 (repeated at D9/403 and D9/415) entitled “Know Your Stuff for Fresh Goods Out – Unloading Empty Cages and Pallets”;

88.2 D9/379 entitled “Know Your Stuff for Grocery/Non-Food Goods Out – Unloading Empty Cages and Pallets”; and

88.3 D9/577, which concerned the respondent’s policy and procedure for “Dekitting Equipment Inside” as at November 2013 and D9/618, which was the updated version of that document.(D9/618 was dated “2017-29”.)

89 The noise levels arising in the course of dekitting (and loading generally) were recorded in the document at D9/650. Those levels could be high and, as recorded in the opening part of paragraph 88 above, the respondent required the wearing of hearing protection when dekitting inside. It was not clear whether or not the noise levels were as high when dekitting was carried out outside, as provided for in the policy and procedure document at D9/588 (dated February 2015) and updated in 2017 (dated "2017-29") at D9/617. Those documents suggested to us that the work of the comparators did not normally include dekitting outside.

The loading of empty pallets

90 One other task which was done by the loading team was loading empty pallets onto vehicles which had just delivered stock to a DC. That was described in the policy and procedure document for "Empty Pallet Container/Trailer Loading", at D9/562, dated August 2012. Those pallets did not include the CHEP pallets to which we refer in paragraphs 34 and 35 above. Those CHEP pallets were loaded by a "counter balance team member". That could be seen from what was said on the first page of the document at D9/514, entitled "Know Your Stuff for Fresh Warehouse (Gold) – Empty Pallet Management (CHEP)". The "Putaway" policy and procedure document at D9/621 (dated "2017-12") similarly stated (under the heading "Procedure" on page 2) that the tasks described in that document were to be done only by a forklift truck driver.

91 The SSOW for "Pallet Clearance, Storage and Loading" at (for example) D4/3/16 dated 10/09/18 was applicable. So was the policy and procedure document for "Pallet Management in Distribution Centres" dated "2016-10" at D9/591, and its successor dated "2017-12" at D9/604. In addition, the policy and procedure for "Stacking and Clearing Empty Pallets in Stockless Distribution Centres" document dated December 2012 at D9/570, which was updated in "2017-12" at D9/603, was relevant here. We need for the sake of completeness here to record that the SSOW for "Using a Pallet Stacker Machine" at D3/3/13 was also relevant here.

Loading in a fresh DC

92 In regard to fresh DCs, the following additional documents were relevant.

92.1 The work of a comparator doing fresh DC loading included dealing with bulkheads. That work was best discerned from the SSOW entitled "Area: Goods Out/Driver Operations; Activity: Lowering, Moving & Lifting Bulkhead Doors", at D1/3/5 and from the SSOW entitled "Area: Goods Out; Activity: Lifting Bulkhead Doors", at D9/656. The latter described what was involved in "[l]ifting the three types of Composite bulkhead doors as part of the loading process: full width gas assisted, full width mattress and split bulkheads."

92.2 D9/394 was entitled "Know Your Stuff For Fresh Goods Out – Marshalling Units of Delivery". Its purpose was to describe (as it said at the top of the first

page) "how to move units of delivery from one Warehouse point to another, known as 'marshalling'." That was further explained lower down that page in these terms.

> "To assist Loaders and help your depot reach its 'Delivery On Time' targets, there is a marshalling function built into the Paperless Loading System. Marshalling is the transfer of units of delivery from one Warehouse point to another that can be tracked on the Paperless Loading System. In this case it is used to move units of delivery from the assembly lanes or holding areas to the loading doors."

92.3 We noted that pages 2-4 in particular of that document (D9/394) showed how much attention to detail was required to be paid when doing the work described on those pages. D9/394 was dated "03/09". So was D9/397, which was helpful in showing the "Screen Sequence" which was required to be followed when "Marshalling Units of Delivery". D9/433 was in substance the same document as D9/397 but was dated "07/14".

92.4 D9/429, entitled "Know Your Stuff For Fresh Goods Out – Loading And Marshalling Units of Delivery", related to a change in the software used on AMCs which helped with loading UODs intended to be delivered to different stores.

92.5 D9/395 was entitled "Know Your Stuff For Fresh Goods Out – Moving Products Between And Removing Products From A Unit Of Delivery". The purpose of that training was stated on its first page as enabling the trainee to:

> "• know how to remove damaged products from a unit of delivery, so that you do not load anything the store will not be able to sell;
>
> • know how to move products from cages that are poorly stacked or have been overfilled. This will help you make sure they are safe to move."

92.6 The importance of doing those things was explained at the bottom of that page in the following terms (which we thought, without having heard from the IEs on this, were relevant; if the IEs disagree then they can ignore the following words):

> "It is important that we do not send damaged products to store as these cannot be sold to customers, and the stores have no way of claiming back the cost from distribution or suppliers. If damaged products are identified and removed in your depot then there is a chance Tesco can claim from the supplier. Loading damaged goods can lead to cross contamination during transit, which will mean the stores cannot sell those products. This

could also lead to dirty, unhygienic trailers that require cleaning before they can be used again."

92.7 In addition, the need to avoid mixing "[p]roducts assembled at different temperatures", "[c]ooked meats with uncooked meat", and "[c]ut flowers, or wet fish with anything", stated on page 2 of the document, also showed the need to pay attention to detail. So did the series of tasks stated on pages 3-4 of the document.

92.8 D9/421 was entitled "Know Your Stuff For Fresh Goods Out – Loading Double Decker Trailers Using A Bay Mounted Scissor Lift", which was self-explanatory. There was a comparable document concerning ambient DCs, at D9/382. It was entitled "Know Your Stuff For Grocery/General Merchandise Goods Out – Loading Double Decker Trailers Using A Bay Mounted Scissor Lift". Both of them contained something relevant about the distribution of UODs when loading. That was on page 4 of both documents, but the terms of those pages differed slightly. We could not see anything material in the differences, however. We saw that on pages 4-5 of D9/382, this was said.

"**Weight Distribution**

There is a legal requirement to ensure all goods vehicles are loaded correctly. It is essential that the weight is distributed evenly to comply with the vehicles legally permitted axle weights.

If excessive weight is placed at the front or rear of the trailer, it can have an adverse effect on the handling characteristics of the vehicle, making it difficult and dangerous to drive.

Key Point!
All units of delivery have a weight guide, which you will see on the unit of delivery's label. This will support you in identifying the difference between a heavy and light unit of delivery. [End of key point]

Remember when loading a double deck trailer you should always load the bottom deck first.
You should start with the heavy units of delivery, then medium units and finally light units of delivery, before loading the top deck; this will ensure that the trailer has not got all of the weight on the top deck.

If the bottom deck is filled with heavy units of delivery, you should place any remaining heavy units of delivery on the top deck, but make sure they are evenly distributed across the deck.

If product pallets are to be loaded, they must always be placed on the bottom deck of the trailer.

Key Point!
Retail deliveries using double deck trailers should be loaded to a maximum of 75 cages.

Trunking double deck trailers should be loaded as per the loading plan.

You should always stick to the loading schedule provided and not load any additional units of delivery on the vehicle, if you have any doubts you should see the Goods Out Warehouse Manager. [End of key point]

When loading the trailer with empty cages and / Recycling Service Unit returns, you should always load the bottom deck first."

92.9 D9/389 was entitled "Know Your Stuff For Fresh Goods Out – Loading Shrouded Cages For Express Stores". The purpose of the training in that document was evident from the following opening words of the section entitled "What You Need To Know/Do", on page 1.

"To make loading Express deliveries easier, shrouds are fitted to all plus 12 units of delivery so they can be loaded at I+°C.

When loading shrouded cages you should remember the following:

- All plus 12 units of delivery for Express stores should be shrouded, except Beers, Wines and Spirits.
- Shrouded cages should be left in the 12+°C chamber until they are ready for loading.
- Poorly sealed units of delivery are highlighted to the Loading Team Manager and re-sealed.
- You should only condense shrouded cages in the 12+°C chamber."

92.10 In addition, there was at D9/389/2 a helpful diagram of the way in which UODs which were required to be held in a "+12" environment (i.e. at 12+ degrees Celsius) and those which were required to be held in a "+1" environment, were to be placed in a trailer containing deliveries for three Express stores.

92.11 D9/391 (dated "03/09") was self-explanatorily entitled "Know Your Stuff For Fresh Goods Out – Loading Units Of Delivery – Screen Sequence". (D9/432 was dated 07/14, but it was in the same terms.)

92.12 D9/427 was similar in that it was entitled "Know Your Stuff For Fresh Goods Out – Loading Units Of Delivery – Other Activities Menu". There were five of those "other activities", stated in the second box on the left hand side of D9/427/2, namely (1) shrink-wrapping cages, (2) operating a bulkhead, (3) using the lift to get to the upper deck of a two-decked trailer, (4) using the lift to get down from that upper deck, and (5) handling empty cages, which meant (it was clear from page 3 of the document) loading either one or two empty cages when it was necessary to do so in order to "make up a full row at the back of a load with empty cage(s)".

92.13 D9/390 was a 2-page document entitled (self-explanatorily) "Know Your Stuff For Fresh Goods Out – Loading Units Of Delivery – Closing A Load – Screen Sequence".

Battery care and changing

93 We saw that in the left hand column on the first page of D9/475 ("Know Your Stuff For Mechanical Handling Equipment – Battery Changing (Grocery/General Merchandise Assembly Drop and Drive"), this was said.

> "There are four main types of processes used to change batteries at Tesco distribution centres:
>
> - Automated Roll On/Roll Off Battery Changing;
> - Manual Roll On/Roll Off Battery Changing;
> - Crane Operated Battery Changing.
> - Drop and Drive Battery Changing.
>
> When working on assembly in [a] Grocery or General Merchandising distribution centre we use Drop and Drive battery changing."

94 What was involved in "Drop and Drive battery changing" as far as an assembler was concerned was stated in the rest of that document. Essentially, the assembler was not involved in the changing of the battery and (as stated in the right hand column of the first page of the document) was required simply to "park the LLOP in the designated 'Drop-Off' battery changing parking space and pick up one of the fully charged LLOPs from the twinned 'Pick Up' battery changing parking space."

95 One of the ways in which the job of changing a battery in any piece of MHE, i.e. mechanical handling equipment, which was completely battery-powered was done where there was a "battery car" was stated neatly and succinctly in the SSOW at D4/3/10, with the title "Area: Battery Change"; "Activity: Battery Change (Battery Car)". All but one of the comparators were not involved in that process, except that they waited while the battery was changed. The comparator who was involved in that process was Mr Young (as shown by what we say in paragraph 724 below).

96 The use of a crane to change such a battery rather than the use of a "battery car" to do it was described clearly in the SSOW at D1/3/9 with the title: "Area: Battery Change; Activity: Battery Change (Crane)". In that SSOW, there was a clear distinction between the "Battery person" and the "MHE Operator", including in the statement that "MHE Operator stands clear of the battery change operation in the designated area at all times" and that "Whilst operating the crane, the Battery person remains constantly vigilant to avoid collision between moving machinery / batteries and themselves / others." That was an indication that the comparators would not have been expected to do the job of changing MHE batteries using a crane. There was a passage on the first page of D9/468 ("Know Your Stuff For Mechanical Handling Equipment – Crane Operated Battery Changing") from which we could also have drawn the conclusion that it was not part of the work within the meaning of section 65(6) of the EqA 2010 of any of the comparators to be involved in that process. That passage was in these terms.

> "This process of battery changing involves a team member whose sole duty is the changing of MHE batteries. You will not be physically involved in the process."

97 Changing the battery on a pedestrian-powered pallet truck was described in 18 steps with pictures for each step at D1/3/13. This was a process in which at least some of the fresh DC comparators might be involved. That was clear from what was said in D9/470, which was entitled "Know Your Stuff For Mechanical Handling Equipment – Battery Changing (Manual Roll On/Roll Off)". At some DCs, it was said on page 2 of that document, a "Team Member" would be "assigned to change all batteries" in a "battery changing room". At other DCs, it was said on that page also, there would be "Battery Changing Pods", where "Team Members [would] change their own batteries". The process to be followed was stated at pages 4-6 of that document, in the same way as it was described at D1/3/13, but with additional information in the series of questions and answers on D9/470/5-6.

98 The risk of battery acid spillage and what to do if it occurred was the subject of the overview document at D9/208, entitled "Battery Acid Spillage", where this helpful summary of the situation was stated on the first page.

> "The most likely cause of a battery spillage is due to a battery being tipped over in the distribution centre, training material has been created that provides instruction on the correct method of lifting and uprighting a tipped battery."

99 The risk-assessment for "Warehouse: Battery Change" at D9/212 was informative about the risks which were associated with the changing of a battery for a piece of MHE.

100 The SSOW at D9/641 (with the title "Area: Warehouse/Yard"; "Activity: Battery Spillage") stated what steps needed to be taken, and how they were to be taken, in the event of a fallen battery.

101 The (single-page) document at D9/504 entitled "Know Your Stuff for Mechanical Handling Equipment – Battery Acid Spillage" stated the steps to be taken in the event of any member of staff at the DC finding a battery acid spillage. We note here that D9/501 (which was six pages long and was entitled "Know Your Stuff for Mechanical Handling Equipment – Battery Acid Spillage and Containment") was stated on its first page to be "targeted at maintenance operatives and battery change operatives", so it was not ostensibly applicable to the comparators here. The primary responsibility of the comparators for the purposes of section 65(6) of the EqA 2010 was best seen in the following passage from D9/504 (at the top of the second column of that single-page document).

> "**When a spillage occurs**
>
> On discovering a spill in the warehouse DO NOT assume that someone else has reported it.
> - The first priority is to make the area safe by not allowing any other colleagues near the spillage.
> - Stay close to the spillage and attract the attention of another colleague, this colleague should go and inform a line manager."

The use of what the respondent called "Mechanical Handling Equipment" (abbreviated to "MHE")

The use of a personal "iFob"

102 We understood that all of the comparators were obliged to use a "personal iFob" which were the subject of the training document at D9/474 (to which we refer in paragraphs 51 and 52 above) with the title "Know Your Stuff For Mechanical Handling Equipment – Using A Personal iFob".

Pre-operational checks

103 All MHE had to be checked before it was used by a comparator. That was clear from many documents before us, most obviously the policy and procedure document (dated "May 2012") relating to "Mechanical Handling and Cleaning Equipment Pre-Operational Checks" at D9/561. There was an updated version of that document at D9/594, dated "2016-26". There was a helpful summary of those checks at pages 15-16 of D9/463 (internal pages numbers 13-14), which was a set of "Trainer's Notes" for a course called "Mechanical Handling Equipment For Managers".

The cost of the MHE used by the comparators and the hazards in the environment in which it was used by them

104 The document at D9/463 was (as its title suggested) aimed at managers rather than persons in the position of the comparators, but it was relevant in showing a number

of possibly material factors. (We were not at all sure at this stage that the value of the equipment used by the comparators was a relevant factor, but we could not conclude without having heard from the IEs that it was irrelevant.) Those included the cost (at the time of the publication of that document, which was stated to be "11/12") of for example a "Low Level Order Picking Truck". That was stated on page 10 of D9/463 (the internal page number was 8) to be £23,000. A "Pedestrian Powered Pallet Truck" was stated there to cost £13,000. A "Reach Forklift Truck" was said on that page to cost £92,500. There was also on that page the following succinct overview of the way in which working in a DC doing the work of assembly might be hazardous:

> "The environment we work in also presents a range of hazards. Often, space is tight in aisles and working areas and there are often a number of people and equipment moving around the warehouse as others do their jobs."

Monitoring of operators' use of MHE

105 There were at D9/147 and D9/628 documents stating the respondent's policy and procedure for what it called its "Mechanical Handling Equipment Behaviour Log", whose purpose was implied (by what was said in the third bullet point on the first page of both documents) to be "to assist Warehouse Managers in observing and correcting poor mechanical handling equipment behaviours at their depots". The two documents were dated "October 2012" and "2017/12" respectively.

The respondent's warehouse highway code and other means of ensuring so far as reasonable that its DCs were safe to work in

106 The respondent's "warehouse highway code" was set out in a number of places, including on page 14 of D9/463. At D9/488 there was a set of "Trainer's Notes" for a training course with the title "Mechanical Handling Equipment Safety And You". There was a "Participant's Workbook" for the same course at D9/489. At D9/488/9, under the heading "The Warehouse Highway Code", this was said.

> "To ensure that all types of MHE are used safely we also have some specific health and safety guidelines for their use.
>
> MHE can be lethal if used inappropriately, just like a car driven out on the road.
>
> Just like you follow a Highway Code when out on public roads, we similarly have a wide range of MHE safety rules and guidelines which have been designed to ensure your safety and the safety of your colleagues and any visitors to our distribution centres. It's called the 'Warehouse Highway Code'."

107 The trainer's notes at D9/488 were otherwise highly informative about the risks to which the comparators were subjected and the things which they were required to do to minimise those risks. Not exceeding the maximum truck speeds stated in D9/174 was one of those things. The document at D9/507 referred (in its title) to the

respondent's "MHE behaviours process" and stated (on page 4) a number of "MHE Do's & Don'ts", stating (on page 5) what were minor infringements of the respondent's "MHE Driving Code" and the more serious infringements which would (as stated on page 7) trigger the respondent's "company multi behaviour procedure".

108 There was a "Manual Handling Risk Assessment" at D9/189. That document was dated "May 2014" and related to the task of assembly in "Grocery Distribution Centres", i.e. ambient DCs. The summary of the work on the first page of that document was not a comprehensive statement of the circumstances in which the risks in question arose, but the manner in which the risks were to be avoided (stated on all four pages of the document) appeared to us to be applicable to the things done in the course of assembly in all kinds of DCs. The "operation title", i.e. the task to which the risk assessment related, was stated on the first page of the document to be "Assembling units from pallet to pallet (Grocery)". The description of that operation was then stated in these words.

> "Assembly is the process of collecting items of stock, usually from pallets, carrying them a short distance and then stacking them onto a unit of delivery, for example a pallet. An assembler travels between pallet locations on ride-on mechanical handling equipment (MHE) – a low level order picking truck (LLOP) which carries 2 pallets and each 'assignment' involves assembling onto the pallets.
>
> Assembling units to pallets, is usually only carried out when sites have no roll cages available for use."

109 The "postural hazards" which arose in doing that work were stated on the first page of the document in the following highly informative manner.

> "There is a risk of postural hazards if the Assembler:
>
> - Stoops and bends to low levels when picking and placing units
> - Attempts to remove a unit from the far side of a pallet, without getting close to the unit (i.e. with it held or manipulated at a distance from the trunk)
> - Does not utilise pivot and slide techniques when picking a unit up from a pallet and when placing onto the pallet, particularly when lifting heavy units to the average maximum height of 168cm
> - Does not utilise leg muscles to create momentum to raise a heavy unit to the maximum height of 168cm
> - Holds the unit away from the body to place it on the pallet, rather than keeping it 'within base' for the whole manoeuvre (leading to excessive arm extension and lower back pressure)
> - Does not park the pallet (on the LLOP) in the optimum position for product to be transferred from pallet to pallet
> - Assemblers below average adult height, may need to reach upwards to place the unit into the top of the pallet".

Average weight of products moved by assemblers

110 The whole of the rest of that document appeared to us to be relevant (but if the IEs disagree with us in that regard then they need not take into account anything which they regard as irrelevant). Given the dispute before us about the typical or average weight of items moved by ambient DC assemblers, we found it particularly helpful (bearing it in mind that the document was created well before these proceedings were instigated) that on page 2 of the document, under the heading "Characteristics of the Load", this was said.

> "• Units vary in size, weight (between $\leq$ 1kg up to 25kg), shape (predominately box shaped), stability, contents (varying from solids to liquids).
> • Packaging of the units can be either solely cardboard, a mix of cardboard and plastic wrap, plastic wrap only.
> • The average weight of a unit of stock in a grocery warehouse is 6.5kg".

The impact of PI targets

111 Similarly (i.e. given the way in which the respondent had pressed its case here, as discussed in paragraphs 70-72 of our judgment of 12 July 2023), concerning the impact of what the respondent called its "PI" targets, we saw that this was said on page 1 under the heading "Requirements of the Activity (Task)".

> "• The rate of work is not imposed by the process, however, Assemblers do have performance targets to meet and have to work to a 'motivated' pace in order to achieve these.
> • Assemblers are tasked to achieve 100% productivity index (PI)."

112 In that connection, we saw too that on page 3 of the document, this was said under the heading "Current Controls".

> "Assemblers have an 8 week familiarisation period after their induction and initial training is completed at the end of which they are required to meet the PI target. During this period the individual receives ongoing supervision and reviews of their performance and their ability to carry out the task."

113 In addition, on page 2, this was said, under another "Current Controls" heading (the text was in the first set of bullet points at the top of page 2).

> "• PI targets for assembly are calculated using detailed data from work study observations carried out in line with an internationally recognised standard. The Assembler receives additional allowance to handle heavier product groups both in terms of the time it takes to lift them and the amount of relaxation time between lifts.

- Assemblers are trained and reviewed on how to pick, handle and stack the units correctly and are given 8 weeks to build up to the PI standard. Trainers are required to monitor and measure the capability of colleagues for 3 weeks after training".

The use of a pedestrian powered pallet truck

114 The way in which a pedestrian powered pallet truck was to be used was stated in the document at D9/465 ("Know Your Stuff For Mechanical Handling Equipment – Pedestrian Powered Pallet Truck – Training Pack") and D9/479 ("Know Your Stuff For Mechanical Handling Equipment – Pedestrian Powered Pallet Truck"). The first of those documents showed how the truck had to be operated. The second showed how it should be manoeuvred. All of the "training pack" documents to which we refer in this section (concerning MHE generally) (1) were dated "02/13", and (2) contained pictures of the MHE to which they related. Those pictures and the content of the documents in which they were contained were by far the best indicator of what the equipment was and how, in principle, it had to be used. Without in any way detracting from the generality of that statement, each training pack contained a brief description of the equipment which we thought it would be helpful to set out here. The description on page 3 of D9/465 of a pedestrian powered pallet truck was this.

> "The Pedestrian Powered Pallet Truck is a type of MHE that is used to move palletised loads.
>
> All travel, lift and lowering functions on this equipment are motorised and easily operated from a tiller control shaft, with 'butterfly' controllers to move the equipment backwards and forwards and buttons to raise and lower the forks.
>
> This enables any Team Member to move even the heaviest of loads, for example a pallet of potatoes, with ease.
> The benefits for you are that it will be easier to lift pallets and to move them around the warehouse. It will remove the effort that was needed when using a manual pump up truck [i.e. we inferred, MHE of the sort to which we refer in the next paragraph below] to raise and move pallets, allowing you to concentrate fully on your task. This will help to reduce the risks of injury to yourself and others."

The use of a pedestrian pump pallet truck

115 D9/477 ("Know Your Stuff For Mechanical Handling Equipment – Pedestrian Pump Pallet Truck – Training Pack") was the training pack to be used for training operatives to use a pedestrian pump pallet truck. It was the simplest of pieces of MHE and was described in this way on page 3 of that document.

> "The Pedestrian Pump Pallet Truck is a type of MHE that is used to move palletised loads.

> Lift and lowering functions on this equipment are operated from a tiller control shaft."

The use of a ride-on powered pallet (or loading) truck

116 D9/481 was entitled "Know Your Stuff For Mechanical Handling Equipment – Ride-On Powered Pallet Truck/Loading Truck – Training Pack". On page 3 of that document, it was described in this way.

> "The Ride-on Powered Pallet Truck/Loading is a type of MHE that is used to move palletised loads. The Loading Truck is the same truck, but has had its forks lengthened and adapted to load cages/dollies.
>
> All travel, lift and lowering functions on this equipment are motorised and easily operated from a tiller control shaft, with 'butterfly' controllers to move the equipment backwards and forwards and buttons to raise and lower the forks.
>
> The benefit for you is that it is easier to lift and move pallets/cages/dollies compared to doing so manually, allowing you to concentrate fully on your task. This helps reduce the risks of injury to yourself and others."

The use of a "Low Level Order Picking Truck"

117 D9/476 was entitled "Know Your Stuff For Mechanical Handling Equipment – Low Level Order Picking Truck– Training Pack". That kind of truck was referred to in practice as a "LLOP", and we refer to it below as such. It was summarised on page 3 of D9/476 in this way.

> "The Low Level Order Picking Truck is a type of mechanical handling equipment (MHE) that is used to move cages and dollies.
>
> All travel, lift and lowering functions on this equipment are motorised and easily operated from a jet pilot control handle or from a tiller arm control handle. Both types of control handle have 'butterfly' controllers to move the equipment backwards and forwards and buttons to raise and lower the forks.
>
> The benefit for you is that it is easier to lift and move cages and dollies compared to doing so manually, allowing you to concentrate fully on your task. This helps reduce the risks of injury to yourself and others."

The use of a "Layermaster Truck"

118 D9/492 was entitled "Know Your Stuff For Mechanical Handling Equipment – Layermaster Truck– Training Pack". Such a truck was summarised on page 3 of that document in this way.

> "The Layermaster truck is a type of mechanical handling equipment (MHE) that is used to top overheight pallets that are above 1.68 metres in height.
>
> All travel, lift and lowering functions on this equipment are motorised and operate from the Tiller Arm at the rear of the machine, with 'butterfly' controllers to move the equipment backwards and forwards, and buttons to raise and lower the mast and open and close the grab attachment.
>
> It is easier to remove stock from overheight pallets using the grab attachment, rather than attempting to do so from the ground level, or using the Topping Truck."

119 A "Layermaster" truck would (it was clear from what was said at the start of the SSOW at D3/3/12 entitled "Area: Goods In"; "Activity: Topping Over-Height Pallets Using a Layermaster Truck") typically be used after "Over-height pallets suitable for topping by the Layermaster truck ... have been identified during the unloading process and taken to the Goods-In Grids".

120 The policy and procedure relating to "Topping and Multi Stacked Pallets" dated "November 2012" at D9/568 stated on its first page when a Vertical Order Picking Truck had to be used and when a Layermaster Truck could be used instead. That document was updated in the document at D9/632 dated "2018-18". At D9/308/2, in the document entitled "Know Your Stuff For Fresh Goods In – Topping Taller And Double Stacked Pallets", dated "07/06", it was said that a "a 'pallet topper' [was] sometimes called a Vertical Order Picker". (We return to that document in paragraph 181 below.) We presumed that a "pallet topper" was the piece of MHE to which we now turn.

The use of a "Topping Truck"

121 D9/466 was entitled "Know Your Stuff For Mechanical Handling Equipment – Topping Truck– Training Pack". Such a truck was summarised on page 3 of that document in this way.

> "The Topping Truck is a type of mechanical handling equipment that is used to de-stack double pallets and to 'top' palletised loads that are above 1.68 metres in height. All travel, lift and lowering functions on this equipment are motorised and operated from an operator's platform, with 'butterfly' controllers to move the equipment backwards and forwards and buttons to raise and lower the forks/platform.
>
> The benefit for you is that it is easier to remove stock from over-height pallets from a raised position rather than attempting to do so from ground level. This helps reduce the risks of injury to yourself and others."

Forklift trucks

122 There were two kinds of trucks which were regarded by the respondent as forklift trucks: reach trucks and counterbalance trucks. We say "regarded by the respondent as forklift trucks" because on one view, a LLOP for example was a forklift truck.

Counterbalance trucks and their usage

123 A counterbalance forklift truck was illustrated (by way of an annotated diagram) at D9/288/5, which was part of a "Participant's Workbook" for a training session entitled "Know Your Stuff For Forklift Trucks (Counterbalance)". That document (which was also dated "02/13") was a very helpful guide to how to operate (and how not to operate) a counterbalance forklift truck. The corresponding trainer's notes (at D9/273) were, however, rather more comprehensive and therefore an even better such guide. For example, the section at pages D9/273/13-14 (internal numbering 11-12) describing when a counterbalance forklift truck will be stable and when it might be used in such a manner that it is unstable, was highly informative about the skill required in operating such a truck.

124 There was at D9/337 a document with the title "Know Your Stuff For Fresh Goods In – Empty Pallet Movement And Loading Using A Counterbalance Truck With Extended Forks", which was about

124.1 the precautions to be taken when "transporting empty pallets from inside the depot to the outside pallet area";

124.2 the safe transport of "empty pallets from inside the depot to outside pallet area";

124.3 the precautions to be taken "when loading empty pallets onto a trailer"; and

124.4 how to "load empty pallets onto Flatbed and Curtain Side trailers" safely.

125 The SSOW for the activity of "Changing LPG Cylinders on a Counterbalance Truck" in the "Yard", dated 05/02/16, at D4/3/9, showed what was involved in that operation. The document entitled "Know Your Stuff For Mechanical Handling Equipment – Forklift Trucks – Changing LPG Cylinders On A Counterbalance Truck" at D9/462 was to the same effect, including, as it did, the same photographs (incidentally thereby confirming our view that the SSOW documents were equivalent for present purposes to the respondent's training materials).

126 The only other document that we could see that related to the use of counterbalance forklift trucks specifically was D9/638, which was stated to be a "Risk Assessment [of] External Empty cage Movements using CB with long forks". It was dated 06/04/14. It looked as if it had printed out oddly and was incomplete. We mention it here because it indicated one of the uses of a gas-powered counterbalance truck in a DC's yard.

Reach forklift trucks and their usage

127 A reach forklift truck was illustrated in a drawing at page 5 of D9/290 (which was duplicated, in a scanned and less clear copy, at D9/274). That document was a "Participant's Workbook" for a "Know Your Stuff For Forklift Trucks (Reach)" training session. The trainer's notes for that session were at D9/291, and that document's description of when such a truck would be stable and when it might be unstable (at pages 13-15, internal page numbers 11-13) was in almost precisely the same terms as the description at pages 13-14 of D9/273 (internal numbering 11-12) to which we refer in paragraph 123 above, of the situations in which a counterbalance forklift truck will be stable and when it might be unstable.

128 The document at D9/283, entitled "Know Your Stuff For Forklift Trucks – Working Safely With High Level Racking" was not stated to apply only to ambient DCs, but it appeared that it did so apply. On page 3 there was this helpful passage indicating the extent to which, and how, the operator of such a truck would be guided by the respondent's digital information system.

> "When a product is first stocked by Tesco, its single packaging size and weight is measured and entered onto our distribution centre systems. This allows us to determine the weight of products stacked onto a pallet and so calculate the total weight and size of a pallet of products.
>
> The weight and height of every pallet in a distribution centre is recorded on the distribution centre systems. The maximum load rating of each racking level and the maximum weight of load that can be safely lifted to each level of racking is also known. The system will only allocate pallets of a safe height and weight to match the maximum tolerances of each level of racking and the Reach Trucks' rated capacity.
>
> When you start to use your Reach Truck, the Reach Truck-mounted Terminal tells you which pallet to collect from where and which racking location it is to be moved to.
>
> Load rating is a truck's capability to support a load at full height and reach."

129 That document was highly informative about other aspects of the use of a reach forklift truck.

Training forklift truck drivers generally

130 There was a "Trainer's Guide" for giving training on both counterbalance and reach forklift trucks. That was at D9/285. It was informative about the time required to give initial training to an intended driver of either of those trucks. On page 3, this was said.

> "This training will take five days for Reach truck training and four days for Counterbalance training.
>
> Operators, will after successful completion of this basic truck training, require further job training on key activities such as high level tracking (Reach), extended forks (Counterbalance) and the use of attachments.
>
> The exact time of training however, will depend on the number of trainees and their experience and learning capacity."

131 The respondent's "Forklift Truck Training Standards Policy" was at D9/566 (dated "October 2012") (it was also at D9/272, in the same terms as far as its substance was concerned) and D9/626 (dated "2017-12"). That policy stated what was required of and for an instructor and a trainee. We saw for example that on the second page of both documents it was said that the pass mark for the theory test of a trainee was 80% or above and that the trainee's training had to be for five days, at least three of which were to be spent practically. It was also said there that "Refresher training will be every 3 years and the duration of this course will be 1 day."

132 Such refresher training was the subject of the document at D9/282, which showed that such training was "based on the Health and Safety Executive approved code of practice (L117) and guidance issued by the Institute of Logistics and Transport".

Initial checks to be made on a forklift truck before using it

133 The initial checks which were required to be made before either kind of truck was used were stated in both sets of trainer's notes for reach and counterbalance trucks: they were at D9/291/16-19 for reach trucks and at D9/273/15-18 for counterbalance trucks. There was in the bundle before us in addition a document stating (only) those checks for reach trucks, but not one for counterbalance trucks. That was at D9/289, which was entitled "Know Your Stuff for Forklift Trucks (Reach) – Pre-Operational Checks Using a Truck-Mounted Terminal". That document (dated "10/13") showed (helpfully) the contents of the "Truck-Mounted Terminal" which would be displayed during such checks. There was a "pre-use check sheet" for both kinds of truck at D9/467. One box plainly only applied to a gas-powered counterbalance truck.

The use (or otherwise) of seat belts

134 The respondent's "The Use of Seat Belts in Fork Lift Trucks Policy" document at D9/624 dated "2017-12" showed that seat belts did not need to be worn when operating a reach truck but that they did need to be worn when using a counterbalance truck.

The self-levelling fork device and camera system

135 There was a document entitled “Know Your Stuff for Forklift Trucks – Self Levelling Fork Device And Camera System” at D9/275, which started with this sentence.

> “This training will give you the skills to safely operate a Forklift Reach Truck with the Self Levelling Fork Device and camera system fitted.”

136 The “Overview” section of the document (on the first page) informatively included this text.

> “The Self Levelling Fork Device is fitted to Forklift Reach Trucks in our distribution centre that operate at ten, eleven and twelve metre racking levels. It is designed to make the process of putaway and retrieval of pallets into the racking safer as it provides you with assurance that the forks are level and positioned correctly.
>
> If the forks are not level at the time of putaway and retrieval, you could cause a tip pallet incident.”

Putting pallets away

137 The five SSOWs at D2/3.1 concerning the use of a forklift truck to put pallets away were informative about the operations described in those SSOWs. Those documents were applicable in all cases to the area of the “Warehouse” and were about the following activities.

137.1 “Reach Truck Multi-Pallet Putaway”, with an overview that it was about “Reach truck putaway of multi-pallet stacks from Goods In to reserve locations”. There were three such documents dated respectively 20/02/13 (repeated at D9/179), 24/02/14 and 25/02/19.

137.2 “FLT Putaway & Replenishment”, with an overview that it was about “FLT putaway of pallets from Goods In to reserve locations and replenishment from reserve to select or direct to Goods Out bay.” There were two versions of that document, dated respectively 20/02/13 and 28/06/16.

138 At D9/205, there was a third version of the second of those two sets of documents, i.e. another SSOW concerning “FLT Putaway & Replenishment”. It was dated 14/03/16.

139 The document at D9/536 with the title “Know Your Stuff for Reach Forklift Truck Drivers – Bronze 4: Full Pallets to Store”, dated “06/16”, was intended to enable the trainee to (as it was said in the first passage of the document):

> “have the confidence to locate and safely stack pallets on top of each other. Place them in the correct locations in a safe manner. Shrink wrap pallets to

maximise safety of the pallets. Enabling our drivers to deliver full pallets to our stores."

140 We saw that the second column on the first page of that document showed that the operator had to judge whether it would be safe to "stack another pallet on top" of the one at "the reserve location" to which the operator had been "directed by [the] truck mounted terminal".

Full pallets to store procedure

141 One activity which was to be completed only by a forklift truck driver was the subject of the document recording the respondent's "Full Pallets to Store Policy including multi pallet movement" at D9/592, dated "2016-15" and its predecessor at D9/583, to both of which we refer in paragraph 85.3 above.

Goods in

The use of bay door equipment

142 One of the training documents relating to the use by "goods in" staff of bay door equipment (D9/296, entitled "Know Your Stuff for Fresh Goods In – Bay Door Equipment", dated, we saw, "07/06") added nothing to the factual picture shown by the documents to which we refer in paragraph 79 above. However, there was in addition the document at D9/349 entitled "Know Your Stuff for Fresh Goods In – Bay Door Equipment with Traka and Castell drive off prevention system", and that document did add something material to that picture. That may well have been the result of the use of more developed technological aids: D9/349 was dated "05/13 (selected trial)". However, it should be said that the main, and possibly the only, additional relevant piece of information was that an iFob was now required to be used.

The possibility of rejecting some or all of a delivery

143 A forklift truck was required to be used when receiving goods as part of the "goods in" process. There were differences in the goods in process required by the respondent to be followed in fresh and ambient DCs. However, the initial procedures for both were the same. There was a "Load Rejection" policy and procedure document dated "September 2011" at D9/555 which, on the first page, had boxes containing the policies to be followed where (1) there were damaged pallets, (2) there was damaged stock, or (3) a delivery arrived on a damaged trailer. In the latter situation it was said that "Damaged trailers are side tipped where necessary". Generally, D9/555 showed what the respondent required of employees who were responsible (because they were required by the respondent to do it as part of their work) for receiving (or, as the case may be, rejecting) goods into the respondent's DCs.

144 There was an updated version of that policy and procedure document at D9/602. It was dated "2017-12" and catered in addition for an "Inbound Standards Non conformance database".

145 At D9/368, there was an undated document entitled "Recording damages on Goods In. (GSCOP)". It started with this passage.

> "**Overview**
>
> We're introducing a change to the current damages process that will support our accuracy of stock sent and ensure suppliers receive correct payment for their stock.
>
> **Why this matters**
>
> Currently we do not record all damages accurately whilst receiving units on Goods In, resulting in suppliers not having visibility on their EPOD's of the complete reasons as to why their orders are short received. We have a manual process of moving damaged stock to cages but cannot record them via the Arm Computers.
>
> **What's new**
>
> The new functionality will allow the Goods In operatives to indicate via their Arm Computers that there are damages on the pallet they are receiving. The Arm Computer will request the damaged cases be removed from the pallet, the quantity of units damaged entered, and request the Goods In colleague scan to a designated damages cage via a barcode. The remainder of undamaged products will then be counted and received as normal. This information will then be reflected on the suppliers EPOD giving them visibility of any damages recorded."

146 We heard no evidence about the date of that document, but the date given for it in the index to the bundle was "01/02/2017".

Unloading a supplier delivery

147 There were sets of documents relating to (1) unloading a supplier delivery and (2) unloading a supplier trailer. We thought that they had to be about the same things, but in case we were wrong, we recorded them separately. We refer in this section to the first of those sets of documents.

148 There was at D9/314 a document entitled "Know Your Stuff For Fresh Goods In – Unloading a Supplier Deliver [sic]". That was dated "??/09". On page 2, there was this informative passage.

> "The majority of Tesco's suppliers send their Goods In on pallets on a single deck trailer. These need to be unloaded and the correct information needs to be entered on your arm-mounted terminal before the pallets can be topped or broken down and checked.
>
> The total amount of pallets expected and whether or not we will be exchanging them will be shown to you on your arm-mounted terminal during the course of unloading.
>
> If a supplier has sent in too much stock on a previous delivery, or the Quality Assurance team have rejected some stock from a previous delivery these, with the supplier's agreement, will be sent back on the next delivery they make.
>
> It is important that all information is entered onto the arm-mounted terminal accurately so that other Goods In Team Members can find the pallets so that topping, breakdown or checking can be done."

149 An updated version of that document with the same title but the missing "y" included at the end, was at D9/354. It was dated "05/13 (selected trial)". The second document was a more accurate statement of the precise way in which the respondent required the unloading of a supplier delivery to be done, given that it was written during the relevant period and the technology referred to in it was more up-to-date than that to which reference was made in D9/314.

Unloading a supplier trailer

150 At D9/571 and D9/610 there were two versions of the respondent's policy and procedure for "Unloading a Supplier Trailer in Stocked". Those were dated February 2013 and "2017-12" respectively. At D9/573 and D9/622, there were equivalent documents for "Stockless" DCs. The approach taken in the two sets of documents differed, but apart from the fact that receiving goods into a fresh DC required steps to be taken to maintain the temperature of those goods, we could not see a substantial difference between the process of unloading a supplier trailer in a fresh DC as compared with an ambient DC.

151 The SSOW with the heading "Unloading Pallets from Back of Trailer", which was at D3/3/16, was dated 06/04/17 and was described to be about the following activity:

> "Unloading pallets of stock from the back of a supplier trailer onto a Goods In bay or from a backhaul/drop & drive trailer onto a dual-purpose bay at depots with the Traka and Castell systems fitted."

Unloading merchandising units

152 In July 2006, in the document at D9/309 (and D9/334), entitled "Know Your Stuff For Fresh Goods In – Unloading Merchandising Units", the respondent described (on

page 2) what merchandising units were, why they were introduced, and how they had to be unloaded. The whole of that page was highly informative. There was an amended and updated version at D9/355, dated "05/13 (selected trial)".

153 The policy and procedure document dated September 2011 relating to "Unloading Merchandising Units" at D9/551 was followed by the document with the same name dated "2017-12" at D9/608. They both seemed straightforward. By the time of the second version, the policy requirement to have two team members unloading each merchandising unit delivery (the first bullet point at the top of page 1 of D9/551) had gone. That appeared to be the only substantial change.

Multi pallet unloading

154 At D3/3/15 there was an SSOW dated 06/04/17 and entitled "Multi Pallet Unloading". The "Activity" to which it related was summarised (informatively) in the following manner.

> "Unloading multiple pallets of stock at a time from a supplier trailer onto a Goods In Bay using a ride-on pallet truck with extended forks at depots with the Traka and Castell systems fitted."

155 The equipment required was helpfully listed alongside that summary, and it was this:

> "• Ride-on Pallet truck with extended forks
> • Counterbalance truck
> • Personal Ifob".

156 The procedure to be followed as described on that single-page document was far from straightforward. It was supplemented by the SSOW entitled "Unloading last row of Pallets using Counterbalance" at D3/3/18, dated 09/10/17.

Unloading a container

157 We assumed that the policy and procedure relating to "Unloading a Container" (at D9/576) dated "November 2013" applied only to fresh DCs. An updated version, entitled now "Unloading a Container and checking using Multi Pallet Checking", was at D9/616. That document was dated "2017-34". A mobile printer and flexi and fixed roller beds were now required to do that work.

Unloading a "Supercube" trailer

158 We saw that D9/361, dated "09/13", there was a document entitled "Know Your Stuff For Fresh Goods In – Unloading A Supercube Trailer". Such a trailer was described on the first page in this way.

> "The trailer incorporates cross beams spaced along its length so that it can support a second row of pallets, in effect a double deck within a single deck vehicle."

159 The process of unloading such a trailer by a non-forklift truck driver was similar to the usual one for unloading. That was clear from page 2 of the document. A counterbalance forklift truck driver was required to unload the upper row of pallets. The two members of staff were required to work (as it was said on page 2) "in tandem".

Unloading double-decker trailers

160 As indicated in paragraph 69 above, the respondent used what it called a Transdek lift to load and unload stock from double-decker trailers. The manner in which that lift was to be used in a fresh DC was stated in the document at D9/316, entitled "Know Your Stuff For Fresh Goods In – Using A Transdek Lift". That document was dated "11/09", and an updated version, dated "09/12", was at D9/340.

Unloading an "Incoming Trunk"

161 At D9/565 there was the respondent's "Unloading Incoming Trunk" policy and procedure document dated "October 2012". The "Purpose" box at the top of page 3 showed that the purpose of the procedure was to "unload units of delivery from an incoming trunk delivery and place them in the correct store lane or storage area". The next box, headed "What Good Looks Like" showed that the activity was driven by the AMC of the person following the procedure, but that it required that the person paid full attention to what he was doing, for example by (1) scanning "[a]ll differently numbered units of delivery" and (2) identifying "[a]ll misdirected units of delivery" and informing "a Warehouse Manager immediately" of those units.

162 Apart from the fact that the next version of that document (at D9/589; it was dated "February 2015") referred (on the first page) in words to the "Related Safe Systems of Work" documents rather than by hyperlinks to those documents (those links were on page 2 of D9/565), we could not see a material difference in that later version.

163 There was an SSOW which applied to unloading trunked deliveries; it was dated 10/04/18 and was at D1/3/16.

Checking deliveries in

<u>Policy and procedure documents for checking deliveries in "Grocery Stockless"</u>

164 At D9/557 and D9/613 there were policy and procedure documents relating to "Checking Deliveries in Grocery Stockless". The first of those was dated "October 2011" and the second was dated "2017-12".

Denver

165 The respondent called its computer network on which it recorded stock and stock movement its "Denver Mainframe Computer system" (which was called simply "Denver" by the respondent's witnesses; we refer to it in the same way below). That system was evidently in place before the start of the relevant period because it was the subject of the document dated "??/09" at D9/317 entitled "Know Your Stuff For Fresh Goods In – Introduction To Denver Goods In Workflow". On the first page of that document, this was said.

> "Goods In workflow is the name given to the part of the Denver Mainframe Computer system that controls Goods In. It starts from the unloading of a supplier trailer up until the products are checked and are made available for assembly."

166 The rest of the document described in detail how AMCs were used in conjunction with Denver, to which the AMCs were connected by what was referred to on the same page as "a radio link". There was an updated version of that document (in a different format) at D9/352, which was dated "05/13 (selected trial)".

167 There was a document entitled "Know Your Stuff For... Fresh Goods In – Denver Scanning", dated "07/06", at D9/298. Its purpose was to train staff "how to use a Denver hand-held terminal, sometimes called a scan gun, to enter incoming stock onto the Denver system". The reason for scanning in the goods just received was explained at the top of page 2, in the following terms.

> "When a supplier delivery has been unloaded and broken down, the goods need to be entered onto the Tesco Warehouse Management System, called Denver. To do this the product barcodes, or outer case codes, sometimes referred to as OCC's, need to be scanned using a hand-held terminal, sometimes called a Denver scan gun. As well as the barcode information Denver also needs to know the quantity, location and if the goods are in a green tray or box. When Denver has this information it can then create a picking assignment, which is sent to the Paperless Picking System allowing the goods to be assembled into cages ready for delivery for stores."

168 On page 4, the requirement to count the number of undamaged cases for the product which was being scanned was stated, as was the (in fact self-evident) importance of doing the count accurately. Damaged cases were stated to be required to be moved "to the holding area" and recorded "on the Tip Sheet".

Pallets of goods received

169 The SSOW at D3/3/3 for "Goods In Checking & Breakdown" dated 04/05/12 showed that the work of a goods in checker started after the goods had been taken off the delivery vehicle. The document described succinctly what was the work of (1)

breaking down pallets where that was required and (2) topping pallets where that was required. We were not sure whether or not the flow chart (recorded in the form of a spreadsheet) at D9/542 applied at this point, but we record here that that chart helped to illustrate the (in fact obvious) need for accuracy when moving the contents of a pallet where there were several different products on the pallet.

The checking in process

170 The "Goods In Checking Training" document at D9/370, dated 07/08/2018, helpfully showed (including by means of a series of photographs of AMC screens) what was involved in the process of checking in goods at the end of the relevant period. The "Goods In Checking Validation Questions" at D9/369 were not answerable by reference to what was said in D9/370, if only because the term "Ti x Hi" was not defined in D9/370. However, it appeared (from an internet search, which we carried out as we were baffled and on the basis that if what we found was wrong then the parties could, assuming that it was necessary to do so, tell us that and we would accept what they said) that that was a shipping term, and that (1) "the Ti" was "the number of boxes/cartons stored on a layer, or tier" on a pallet, and (2) "the Hi" was "the number of layers high that these [were] stacked on the pallet".

171 The "Trainee's Workbook" for the "Goods In Receiving: Warehouse Checking" training, dated 15.01.11, at D9/365, showed what was involved in the process of checking in goods at the start of the relevant period. The whole of the document was relevant, but we record here that on page 6 of that document, there was a very helpful summary of the process of receiving goods and the role of the checker. We also record here that it was said there that (1) stock was received "in a similar way" in "Pick by Store and Pick by Line" DCs, and (2) there were "3 main tasks that make up the responsibilities of a Warehouse Checker", namely:

171.1 "Labelling Stock"

171.2 "Receiving an Appointment", and

171.3 "Releasing an Appointment".

172 There was a set of "Trainer's Notes" for that training, at D9/366, which included additional information about the role of checking goods in.

173 The "Checking in Fresh Stockless Depots" policy and procedure at D9/572 (dated April 2013) stated what looked like a slightly different procedure. The updated version (dated "2017-12") at D9/607 did not appear very different from D9/572.

174 There was at D9/312 a document entitled "Know Your Stuff For Fresh Goods In – Checking a Supplier Delivery". Some of its content was elsewhere, such as in D9/298 (to which we refer in paragraph 167 above). However, D9/312 was more informative about precisely what was involved in the process of checking a supplier delivery in a

fresh DC, in 2009 (the date shown being "??/09"). The document at D9/351, which was also entitled "Know Your Stuff For Fresh Goods In – Checking a Supplier Delivery" but whose content was different, was an updated version of D9/312. D9/351 was dated "05/13 (selected trial)".

175 The "Goods-in Random Accuracy Checking in Stockless DC's" policy and procedure at D9/593, dated "2016-11" was relevant only tangentially, since it described the use of an "External Accuracy Check (EAC) Team" for "All accuracy checks". It appeared to have superseded (1) the document entitled "Know Your Stuff For Fresh Warehouse (Gold) – Random Accuracy Checking", at D9/515, which was dated "05/13 (selected trial)", and (2) the document at D9/359 (which was also dated "05/13 (selected trial)") entitled "Know Your Stuff for Fresh Goods In (Podium) – Random Accuracy Checking".

Goods in checking report - OR50

176 At D9/293 (repeated at D9/324), there was a document entitled "Know Your Stuff For Fresh Goods In – Goods In Scanning Checking Report", which was stated to be "more commonly called" an OR50 report. The document was dated "06/05", but it referred on the first page to "scanning a delivery" onto "the Denver system", using a "hand-held terminal". On the second page, it was said that if there were "discrepancies on the order the hand-held terminal will show that an OR50 is being printed" and that if one had been printed then it meant that "the goods sent in by the supplier do not match the order". This was then said.

> "There are five common discrepancies that could lead to an OR50 being printed, these are;
> - code date out of tolerance;
> - excess quantity;
> - shorts, missing products;
> - unknown products;
> - products not on order.
>
> How to resolve each of these discrepancies will be covered in Know Your Stuff For Goods In Silver I, 'Goods In Scanning Problem Solving'."

177 The latter appeared to be the document at D9/307. On any view, that document was relevant here, as it was entitled "Know Your Stuff For Fresh Goods In – Scanning Problem Solving". It was dated "07/06".

Receiving merchandising units

178 The purpose of the policy and procedure for "Merchandising Units Checking and Putaway" at D9/554 (dated September 2011) and D9/611 (dated "2017-12") was stated at the top of page 2 of both of those documents. It was to "manage the accuracy and movement of merchandising units to store lanes and rollover lanes".

Some of the tasks in that procedure were to be carried out by a "Team Member". No indication was given in the documents whether they applied not only to fresh DCs but also ambient DCs, but it appeared that they applied at least mainly to fresh DCs.

Breaking down mixed pallets

179 One activity which appeared to us clearly to be applicable to both fresh and ambient DCs was breaking down mixed pallets. However, the two documents before us about that were stated to apply only to fresh DCs. They were

179.1 D9/297, which was dated "07/06" and was entitled "Know Your Stuff for Fresh Goods In – Breaking Down Mixed Pallets"; it was repeated at D9/310 and D9/348; and

179.2 D9/350, which had the same title but was updated. It was dated "05/13 (selected trial)".

Topping pallets

180 The document at D9/313 (dated "??/09"; it was in fact repeated at D9/321) was entitled "Know Your Stuff for Fresh Goods In – Topping Single Product or Multi-Stacked Pallets". Its aim was to enable the trainee to

"• explain the differences between a single product and multi-stacked pallet;
• describe when to top a single product or multi-stacked pallet;
• demonstrate how to top over height and multi-stacked pallets using mechanical handling equipment;
• demonstrate how [to] use an arm-mounted terminal to scan pallet and grid barcodes;
• explain how [to] make sure the area [the trainee was] working in [was] safe, for both [the trainee] and others; [and]
• describe how to top pallets if the mechanical handling equipment [was] not available."

181 D9/313 referred (on page 2) to a "Topping Truck". That truck was the subject of the training pack at D9/466, to which we refer in paragraph 121 above. The "Topping Truck" was relevant also to the tasks described in the document entitled Know Your Stuff For Fresh Goods In – Topping Taller And Double Stacked Pallets", at D9/308. That document was dated "07/06". It was updated in the document at D9/353 with the same title, but in a different format and dated "05/13 (selected trial)". The first of those two documents stated on page 2 under the heading "What You Need To Know/Do" this.

"To help reduce the number of deliveries from suppliers into Fresh Food Depots, reduce transportation costs and so that we can get the stock we need at the right times, Tesco has agreed to allow some suppliers to deliver pallets that are

> double stacked or are taller. Before these pallets can be scanned they need to be broken down or topped to 1.68 metres in height, which is the safe limit for assembly. To top a taller pallet or double stacked pallet you should use a 'pallet topper', sometimes called a Vertical Order Picker, which is mechanical handling equipment specifically designed for this purpose."

182 There was an SSOW for the latter operation. It was at D9/639. It was dated 27/07/15 and the activity overview and the purpose of the SSOW were stated to be "Topping over-height pallets using the Vertical Order Picking truck (VOP)."

Moving accumulated empty pallets

183 The document headed "Know Your Stuff for Fresh Goods In – Moving Pallets Using a Four Cage Low Level Order Picking Truck (Fresh distribution centres with pallet stackers only)" at D9/343 (dated "12/12") stated what needed to be done once there were "three stacks of empty pallets in the empty pallet storage locations". That was to "move them to either the dedicated main bulk storage area or to the exterior door ready to be moved to the exterior storage area using the four cage Low Level Order Picking Truck (LLOP)."

Warehouse organisation, including grid-walking and lane set-up

Personal scanning, searches and surveillance

184 The document at D9/646, stating the respondent's "Archway Scanner" policy and procedure, applied to everyone going onto the respondent's DC premises, and the document made it clear that anyone (including a visitor) was subject to the possibility of a random search.

185 Similarly, the respondent had a closed circuit television ("CCTV") policy at D9/645, making it clear that the respondent used CCTV in its DCs, and in what way.

Lane set-up in stockless depots

186 At D9/559, there was a document stating the respondent's policy and procedure on "Lane Set Up In Stockless Depots". More than half of the tasks stated there were for a "Warehouse Manager" to do, and the rest were stated to be done by a "Team Member", probably (we inferred) under the direction of that manager. That document was dated "January 2012". It was updated in 2017. There were two versions of the updated document, at D9/597 and D9/599, both dated "2017-29". The second of those two documents was later and more comprehensive than the first of them.

187 At D9/606 there was a document stating the respondent's Express Lane Set Up policy and procedure. Those were lanes for use in connection with supplying Express stores. All of the tasks referred to in that document were to be carried out by a "Warehouse Service Team Manager".

Grid walking

188 There was a policy and procedure document for "Grid Walking" at D9/569, dated "December 2012", and an updated version (dated "2018-07") at D9/634. The purpose of the procedure was stated on the second page of the documents to be that "[p]roblem pallets are highlighted and resolved to fulfil demand". The procedure was stated at rather more length.

Investigating missing stock

189 There was a document dated "2018-18" at D9/648 stating the respondent's policy and procedure for investigating missing stock. We saw that it was said in the first part of the document that "[a] policy of No Claims between Tesco Distribution and Tesco Stores exists to ensure we focus resources on improving distribution delivery accuracy as a network". That bore out one of the things said by Ms Jemmett in oral evidence.

Health and safety documents

190 We noted that there was an SSOW relating to the moving of roll cages at (for example) D1/3/8 and that it applied not only to DCs but also to "store delivery". We saw too that there was a policy and procedure document relating to ammonia leaks (D9/627, dated "2017-12") and that such leaks were identified in that document to be likely to arise from refrigeration equipment.

Our findings of fact on the work of the ambient DC comparators

Introduction: the approach we took in considering the parties' allegations relating to the work of the comparators

191 The EVJDs for the four comparators from each kind of DC had many common elements, with precisely the same words used in many parts of them. For example, when we considered the task of assembly we looked first at that task as described in the EVJD for Mr Jones, if only because the only substantive task done by him for present purposes (i.e. the only task which was done by him in the course of his employment by the respondent which had a specific overall label) was assembly.

192 The EVJDs for the other three ambient DC comparators (Mr Hornak, Mr Macko and Mr Davis) were for the most part in the same terms where they described the same tasks as those of Mr Jones, but, unfortunately, not all of the time. The first of those factors supported rather strongly the proposition that there was unnecessary repetition in the evidence of the respondent relating to the work of the comparators. The second factor, namely that there were some variations, was not helpful, because it meant that we could not focus on just one of the relevant sections of the EVJDs, as there was a possibility that something relevant was in the others.

193 After making all of the factual determinations which we considered to be necessary at this stage, we came to the clear conclusion that the case of the respondent in relation to the work of the comparators for the purposes of section 65(6) of the EqA 2010 should have been focused on the tasks done by them and that there was no need for, say, four descriptions of how assembly was done in an ambient DC and four descriptions of how assembly was done in a fresh DC. In addition, if the only justification for there being four such descriptions, i.e. one for each (say) ambient DC comparator, was that each comparator had his own way of doing one or more of the tasks, then that was a bad justification given that (1) for equal value purposes the question is what is the work, not how well or badly was it done, and (2) where there were many people doing the work in question, any minor differences in the way in which the work was done (in our view, for the reasons which we state in paragraph 18 of our second reserved judgment, which is at page 8 above) had to be ignored.

194 We therefore focused as much as we could on the disputes of the parties in relation to the tasks done by the comparators in turn, rather than on the evidence of, and in relation to the work of, each comparator in turn. However, the fact that the parties had focused on the work said to have been done by the comparators individually meant that we had to be pragmatic in stating our determinations of those disputes.

195 In any event, we turn now to the task of assembly, and we examine it primarily by reference to the EVJD for Mr Jones and the parties' contentions in regard to that EVJD.

196 For the sake of convenience, we also consider in the following section the other parts of the EVJD for Mr Jones, which were about matters of general application.

Assembly as stated in the EVJD of Mr Jones

Introduction

197 Mr Jones did not give evidence, because he refused to do so. He was chosen as a comparator by the claimants.

198 Despite those factors, the EVJD for Mr Jones as it stood on 14 April 2023 (it was at D7/1.1) had in it 112 pages of (double-line-spaced) text. The document itself, including its front page and its indexes (one for the document's contents and one, at the end, for a number of appendices), was 119 pages long.

199 For obvious reasons, we do not refer below to the matters which were agreed by the parties unless it was necessary (or we judged it to be helpful) to do so. Surprisingly, it was so necessary in several important respects.

200 For the sake of brevity, as stated in paragraph 52.2 of our second reserved judgment (at page 21 above), in some cases we do not deal expressly here with disputes which

were maintained about things which were dealt with in full in the training materials. Thus, in some cases we concluded that the evidence of the respondent in the form of the EVJD for Mr Jones was so clearly contradicted by the training materials that once the parties and the IEs had read the training materials to which we refer below, they would be able to see that the corresponding part of the EVJD had to be rejected by us. If the parties or the IEs do not believe that any dispute has been resolved by those materials, either in full or at all, then they can ask us to state our resolution of the factual dispute which they think has not been resolved by us.

The format of the submissions made to us and the difficulties caused by them

201 We add that the use by the parties of spreadsheets and tables for the making of their written closing submissions made it difficult in some cases to see what their cases were. We appreciated the attempt on the part of the Leigh Day claimants to avoid duplication by putting all of their closing submissions in relation to all of the four comparators about whose work they made submissions in a single spreadsheet, but we found it hard in some cases to see precisely what was their case on a disputed matter. By way of example, the part of that spreadsheet which dealt with paragraph 6.7 of the EVJD for Mr Jones did not correspond to the content of that paragraph. Instead, it appeared to relate to what was said in paragraph 6.12 of that EVJD.

202 In any event, both for the sake of legibility and in order to encourage brevity, we came to the firm view that any future submissions to us should be made purely in narrative form, that is to say not in a spreadsheet and not even in a table. We have stated that conclusion in paragraph 83 of our second reserved judgment (at page 29 above).

Mr Jones' employment details

203 The number of hours worked per year by Mr Jones did not seem to us to be material. Nor did his shift pattern. We saw that on page 1 of the EVJD for him (that was page D7/1.1/7; we refer below only to the paragraph numbers of the EVJD at D7/1.1) this was said.

> "The job holder was allowed one unpaid break for 30 minutes and was allowed to take two separate breaks of up to 10 minutes, of which both impacted directly on his individual measured productivity rate, as the clock did not stop during these breaks in relation to the PI rate the job holder was required to achieve each shift."

204 We could not see how the fact that the respondent imposed a particular performance target on a comparator could be relevant in determining, at a stage 2 hearing, the value of that employee's work for the purposes of section 65(6) of the EqA 2010, even as part of the conditions in which the employee worked. That was for the reasons stated in paragraphs 684-685 below. We mention that conclusion here also because it was arrived at after considering the words set out in the preceding paragraph above.

205 Similarly, as we say in paragraph 74 of our judgment of 12 July 2023, the location of the DC at which Mr Jones worked (it was in fact Magor) was irrelevant at this stage.

206 The employee's responsibility for stock was also in our view irrelevant at this stage. Indeed, we concluded that almost all of the background factors to which reference was made in paragraph 2 of the EVJD for Mr Jones were irrelevant when determining the value of the work of a comparator. In any event, those factors were sometimes the subject of detailed factual assertions elsewhere in the EVJD. If and to the extent that they were relevant, we considered them when considering those other parts of the EVJD.

207 We found the following facts to be material, over and above those which were discernible from the training materials to which we refer in paragraphs 8-67 above so far as they applied to assembly in an ambient DC.

208 We should say, however, that in some cases, for the avoidance of doubt we refer back to the training materials to show why we regarded a particular factual dispute as determined by those materials, and in others we state for the avoidance of doubt why we regarded a dispute as being about something which was irrelevant.

Paragraph 3 of the EVJD for Mr Jones

209 We thought that it was material that Mr Jones was on his feet all day when he was working: whether or not he leant on "the cushion/back support on the assembly truck when using it" (which was contended for by the claimants in response to paragraph 3.4 of the EVJD for Mr Jones) was in our view irrelevant. (An "assembly truck" was stated in paragraph 3.3 of the EVJD for Mr Jones to be "a LLOP with rear-facing forks".) Thus, we concluded that paragraph 3.4 of Mr Jones' EVJD was material and wholly apt.

210 Otherwise, we concluded that disputes about the content of paragraph 3 of that EVJD concerned things which were either (1) determined by one or more of the training materials to which we refer above or (2) about a factor which was irrelevant at this stage.

211 By way of illustration, we could not see why it was thought necessary to dispute the content of paragraph 3.3 of the EVJD, which was about the number of cages which were carried by a LLOP. That was because (1) the LLOP bore that load, so that (2) it was only if there were any additional difficulty caused to the person driving it from the LLOP carrying (say) five slim cages as opposed to three standard-sized cages that the fact (if it were one) that the LLOP carried five slim rather than three standard-sized cages could be relevant. No evidence to the effect that it was more difficult to drive and control a LLOP with five slim cages on it rather than three standard sized cages on it was put before us. Bearing in mind that the fully-laden weights of both

kinds of cages must have been similar, we doubted that such evidence could have been put before us.

Paragraph 4 of the EVJD for Mr Jones

212 The fact that Mr Jones was trained in the operation of a counterbalance forklift truck (as asserted in paragraph 4.1 of the EVJD for him) seemed to us to be irrelevant to the value of the work that he did, or the conditions in which he did it. It might be relevant to a material factor defence, but we doubted that it would be so relevant in the circumstance that he did not drive a counterbalance forklift truck during the relevant period.

213 Paragraphs 4.2-4.17 of the EVJD seemed to us to be irrelevant in the circumstance that the training materials to which we refer in paragraphs 8-190 above which were applicable to the work of Mr Jones showed precisely what training he ought to have received in order to do his job.

Paragraph 5 of the EVJD for Mr Jones; the issue of "responsibility" generally

214 Similarly, those training materials showed precisely in what way Mr Jones was himself responsible for the things that he did, and the extent to which his managers were responsible for what he did. We therefore saw no need to come to any conclusions on the disputes maintained in relation to the content of paragraph 5 of Mr Jones' EVJD. We add that we found very few among the plethora of references to responsibility on the part of a comparator which added anything material for present purposes. That is because stating that a comparator was responsible for doing something is no more than another way of saying that the comparator was given that something to do as part of his work for the purposes of section 65(6) of the EqA 2010, i.e. it was a task which it was part of his work for those purposes to do. As a result, unless stated otherwise below, any reference in an EVJD for a comparator to him being "responsible" for something must be read by the IEs as adding nothing material for present purposes.

Paragraph 6 of the EVJD for Mr Jones

<u>Paragraph 6.2; what clothing and boots Mr Jones was provided with by the respondent</u>

215 Paragraph 6.2 was the subject of some dispute. We agreed with the claimants that there was a degree of comment or evaluative analysis in it. The fact that Mr Jones was provided with safety boots, for example, was relevant in that it showed that the respondent took steps to minimize the risk of injury to his feet when he was at work, but we doubted that it was otherwise relevant. In the circumstances, we accepted the claimants' proposed words to reflect the factual situation described in paragraph 6.2.

<u>Paragraph 6.12 of the EVJD for Mr Jones; personal responsibility for an iFob</u>

216 The dispute maintained about paragraph 6.12 of Mr Jones' EVJD (as expanded by paragraph 6.12A) was dealt with by the claimants as if that were paragraph 6.7. The dispute related to the extent to which it was relevant (if it were the case) that

216.1 Mr Jones was required to "bring his I-Fob to work every day" and, if he did not do so, to go home to collect it in his own time, i.e. without pay, and

216.2 if he had lost it, to pay for a replacement.

217 Given that Mr Evans (who gave evidence, it will be recalled, for the respondent) said, in paragraph 59 of his witness statement, that "in practice we did not enforce this", we thought that the factual dispute was wrongly maintained by the respondent. If and to the extent that the IEs regard it as relevant that the respondent stated the requirement but did not in practice enforce it, then they can of course take that factor into account.

218 Having said that, we saw that neither party referred us to D9/474, to which we refer in paragraphs 51 and 52 above. What was said on the first page of that document, in the red "Key Point!" box, showed the true position, which was that if Mr Jones had lost his iFob then he only might have been "liable for any costs incurred": not that he would have been so liable.

Paragraphs 6.25-6.33 of the EVJD for Mr Jones: "Using Vehicular MHE"

219 We could not see how for example the precise measurements of an aisle or the precise number of colleagues with whom Mr Jones shared usage of the space in them could be material to the demands of the work of an assembler or the conditions in which it had to be done. That was because (1) there was an obvious need for all comparators and their colleagues in the DCs in which they worked to work safely, and (2) the respondent was under legal obligations in that regard which will be well-known (at least in general terms) by the IEs and us. We also could not see that it was accurate to say (as it was said in paragraph 6.30A of the EVJD for Mr Jones; there was an equivalent statement in paragraph 6.27 of the EVJDs for Mr Hornak, Mr Macko and Mr Davis) that an assembler when operating and controlling his MHE "was constantly moving his hands, wrists and fingers". That which was required in that regard of the user of all of the kinds of MHE used by the comparators was in our judgment in any event sufficiently shown by the documents to which we refer in paragraphs 114-129 above.

Paragraph 6.37 of the EVJD for Mr Jones; the need (or otherwise) to turn 180 degrees when driving a LLOP

220 Paragraph 6.37 of the EVJD for Mr Jones gave rise to another illustration of the extent to which the EVJD for Mr Jones contained a description which was unnecessary, and in relation to which the respondent disputed a factual matter unnecessarily. The manner in which Mr Jones (or any other user of a LLOP) was

required to use a LLOP was definitively stated in D9/476. The factual assertions in or in relation to paragraph 6.37 were unnecessary given the text of the first bullet point on internal page 9 of that document, at D9/476/5, and the pictures below that text.

Paragraph 6.38 of the EVJD for Mr Jones; his for example "developed level of sensory awareness"

221 Also by way of illustration, this time of an issue of relevance, paragraph 6.38 concerned how Mr Jones did his job, not what it was. Given that what was in issue at stage 2 was the work and not how well it was done, paragraph 6.38 was about something which was irrelevant.

Paragraph 6.57 of the EVJD for Mr Jones; the noise caused by opening up a cage stored in a "nest"

222 There was a photograph of a nest of cages at D2/3/14, to which we refer in paragraph 88 above. (We were eventually able to find the photograph to which the EVJD referred as "T8" at D9/0.6/10, but it added nothing material as far as we could see.) We concluded that it was obvious and supported by D9/650 (to which we refer in paragraph 89 above) that extracting a cage from such a nest would be noisy.

Paragraph 6.61 of the EVJD for Mr Jones; ensuring that cage straps were securely attached to the sides of the cages when driving around the warehouse with the cage on the forks of the LLOP

223 The need to avoid straps being caught in other equipment was obvious, but bore being stated here. Vigilance in that regard was (as the respondent submitted) required. The number of accidents which had in fact happened at the DC because of trailing cage straps was irrelevant.

Paragraphs 6.64, 6.66 and 6.67 of the EVJD for Mr Jones; mounting cages on the LLOP's forks

224 While the content of paragraph 6.64 of the EVJD for Mr Jones ("*The job holder was responsible for ensuring that all Cages were securely mounted on the forks of his Assembly Truck to ensure against damage to the Cages and their contents as well as injury to colleagues and third parties when driving around the Aisles*.") was obvious, the explanation in paragraphs 6.65 and 6.66 of that EVJD ("*The job holder manually pushed and pulled the Cages into position next to the Assembly Truck. He then manually placed them on the Assembly Truck forks ensuring that the base of the Cages were flat and steady so that they remained as stable as possible as he assembled into them. To mount the Cages on the forks, the job holder tilted each Cage backwards with his foot before manoeuvring each Cage onto the forks by hand*.") was not. Therefore, if the content of paragraphs 6.65 and 6.66 of the EVJD for Mr Jones was accurate, then it added something material. However, it was, we

concluded, not an accurate statement of the way in which the respondent wanted its assemblers to work. We say that for the following reasons.

224.1 The box with the heading "Your Chance to Practise!" on internal page 10 on page D9/476/6 showed that the respondent required assemblers to "Position [the LLOP's forks] under and raise three empty cages". The first step was, however, as shown at the top of that page, to align the cages "in a row before reversing under the[m] and then raising the forks to the safe travel height." The SSOWs at D5/3/5, D9/193 and D5/3/11 all said that (or words to the effect that; the words which we are about to quote were in D5/3/5) the assembler merely "carefully positions each cage onto the forks of the LLOP and then raises them into the safe travel position."

224.2 In part in the light of what was said in all of the training materials to which we refer in the preceding sub-paragraph, and in part as a result of a common sense consideration of the practicalities of the situation, we could see no need for an assembler to tilt "each Cage backwards with his foot before manoeuvring each Cage onto the forks by hand", as alleged in paragraph 6.66 of the EVJD for Mr Jones. Rather, the cage was on wheels and simply needed to be pushed and pulled, not tilted, into place, i.e. in a straight line or (as it was said on internal page 10 of D9/476) "aligned in a row" with the other cages to be picked up by the LLOP. It was then necessary to ensure that the "loads are carried, positioned up to the heel of the fork arms", as stated on internal page 11 of D9/476. That would also involve only pushing, not tilting the cage backwards. We therefore concluded that the assertion that Mr Jones "tilted each Cage backwards with his foot before manoeuvring each Cage onto the forks by hand" was untrue.

225 While Mr Matthews' evidence in paragraphs 60-65 of his witness statement was to the effect that what Mr Jones did was accurately described in paragraph 6.66 of the EVJD for him, Mr Matthews did not expressly say that the manner in which Mr Jones actually worked was approved by the respondent. If we had concluded that Mr Jones did in fact do the thing that we state at the end of the preceding paragraph above, and we had had to infer from that evidence of Mr Matthews that what Mr Jones did as described in paragraph 6.66 of the EVJD for him (Mr Jones) was approved by Mr Matthews, however, then we would not have been able to accept that that manner was relevant here, given that the proper way to do the job in question was stated in D9/476/6, D5/3/5, D9/193 and D5/3/11.

226 Similarly, what was said in D9/476/6, D5/3/5, D9/193 and D5/3/11 was a more comprehensive statement of how to ensure that the load on the forks of a LLOP was secure, and therefore the content of paragraph 6.67 of the EVJD for Mr Jones was both superfluous and potentially misleading. The skills required of the assembler were evident from what was said on D9/476/6 (and in fact might well have been understated by comparison in paragraph 6.67 of the EVJD for Mr Jones).

Paragraph 6.69 of the EVJD for Mr Jones; tying the final two slim line cages together

227 Paragraph 6.69 of the EVJD for Mr Jones was in the following terms.

> 'The last and the penultimate Slim Line Cages placed on the Assembly Truck forks were tied together by the job holder using additional Cage straps (not those already present on the Cages) to ensure safe transit throughout the Assignment (given the increased risk of them toppling due to their particular dimensions making them "tall and thin").'

228 In fact, the claimants objected only to the final words at the end of paragraph 6.69 of Mr Jones' EVJD, namely these:

> '(given the increased risk of them toppling due to their particular dimensions making them "tall and thin").'

229 The respondent's response to the claimants' objection to those words was the same for three of the ambient DC comparators, and that was "As per MH 6.405 [i.e. as stated in the respondent's written closing submissions in relation to paragraph 6.405 of the EVJD for Mr Hornak]." Those three were the comparators other than Mr Hornak. Thus, the submissions were made only in relation to the work of Mr Hornak. The respondent's submissions in regard to the claimants' objection to those words in paragraph 6.405 of Mr Hornak's EVJD were stated in the right hand box on page 180 of the 289-page table containing the respondent's written closing submissions in relation to the work of Mr Hornak. That box contained this text.

> "The Claimants object to the reference to the toppling risk of 'tall and thin' cages.
>
> PM gives evidence (PM§63) that the 'tall and thin' dimensions creating an increased toppling risk.
> This is a fact of the equipment the JH had to use, not an evaluation of the value of the JH's role in using them."

230 The reference to "PM" was to Mr Paul Matthews. In paragraph 63 of his (54-page) witness statement, this was said.

> '[WJ 6.69] The last and the penultimate Slim Line Cages placed on the Assembly Truck forks were tied together by Wayne using additional Cage straps and not those already present on the Cages, to ensure their safe transit throughout the Assignment given the increased risk of them toppling due to their dimensions making them "tall and thin".'

231 So, the only evidence put before us about the practice of any of the four ambient DC comparators who did the work of assembly in regard to the strapping of the final two slim line cages together came from Mr Matthews, and was about his observation of what Mr Jones did. The other three comparators' EVJDs then contained an assertion

that they did what Mr Jones did in that regard, but those parts of their EVJDs were supported only by the evidence of Mr Matthews, which did not relate to their work: only that of Mr Jones.

232 In no place in closing submissions or the primary oral evidence before us (including in the EVJDs) was reference made to D9/476. Reference was made to that document on internal pages 117 and 118 of the transcript of day 26, when Mr Kevin Bates was cross-examined by Mr Bryant, but only about the posture of a user of a LLOP: not about the manner in which cages were got onto the forks of the LLOP.

233 However (and the fact that the parties did not themselves refer to this document was regrettable but was probably the result of the failure by them to focus on the primary evidence here) there was a statement in the SSOW at D9/193 (to which we refer in paragraphs 17.6 and 26 above) to the strapping of the fourth and fifth slim line cages together. That was in the box at the bottom of that one-page document, in these terms.

> "When 5 empty slim line roll cages are correctly positioned onto LLOP forks, there should be approximately 10mm of protruding fork tip left visible. If incorrectly positioned, the 5th cage will not be fully supported by the truck's forks and therefore will be less stable and there is the potential for it to fall from the truck in transit. The 5th cage is strapped to the 4th cage for added stability. The Assembler must individually position each empty slim line cage the same way round onto the LLOP forks, starting at the truck's back-rest and working backwards, with steerable green wheels facing them. Cages must be tightly compacted tightly together to reduce movement in transit. Steerable wheels must be left facing straight on and not be turned."

234 There was an earlier version of that document, and a later, updated, one. Those documents were at D5/3/5 and D5/3/11 respectively. Neither of them referred to strapping the final two cages together, which suggested that the respondent's practice changed during the relevant period.

235 However, what that practice was seemed to us to be of peripheral relevance only. What was relevant was that there was a need to exercise considerable skill in positioning cages on the forks of a LLOP, as shown by for example what was said at D9/193 and D5/3/11. In addition, D9/193 showed that if it was correct that Mr Jones (or any of the other three ambient DC comparators) strapped together the fourth and fifth empty slim line cages on a LLOP's forks, then that was objectively justified by the risk of the fifth one falling off. Why there was that risk was irrelevant. The claimants' objection to the final words of paragraph 6.69 of the EVJD for Mr Jones was therefore misplaced in that there was a justification for the practice of strapping the cages together.

<u>Paragraphs 6.77-6.79 of the EVJD for Mr Jones; positioning the LLOP</u>

236 In several places in paragraphs 6.77-6.79 of the EVJD for Mr Jones, it was asserted that Mr Jones used his experience to decide what was the best place to position his LLOP in an aisle. We saw that the document at D9/152, to which we refer in paragraphs 17.5 and 25 above, was referred to as a "refresher", but also stated that it was about the "Introduction of an optimal stop location displayed on the AMT when assemblers are required to pick from two or more locations in close proximity." The document was not dated but it was assigned a date of 23/06/2015 in the index to the bundle. Thus, it appeared from that document that at least for the second part of the relevant period, Mr Jones did not need to exercise any judgment about where was the best place to stop his LLOP.

237 We saw that it was asserted by the respondent's witnesses (without referring, we saw, to D9/152) that the use of the AMC to state the best place to stop was done on a short trial basis only and that it did not work. That was asserted by Mr Evans in paragraph 416 of his witness statement, seconding what Mr Matthews said in paragraph 71 of his witness statement. However, that evidence was not supported by the documents before us. We say that because at D9/193, to which we refer in paragraphs 17.6 and 26 above, in column 4, reference was made to stopping at the "optimal stop location indicated on [the] Arm Computer". That document was dated 13/08/15. It was updated (as we say in paragraph 17.6 above) in the document at D5/3/11, which was dated 10/4/18. There was in that SSOW (i.e. in both of those versions) an even more clear reference to the "Optimal Stop". Indeed, in column 4 of the latter document, it was said that "Optimal Stop, as opposed to left hand side of the aisle only picking, reduces the amount of aisle crossing by foot and thereby reduces the risk of the Assembler being hit by other trucks and increases the amount of times the Assembler is shielded by their stopped truck." That showed in our judgment that it was not part of the work of an assembler for present purposes to use his judgment in deciding where to place his LLOP unless there was some practical factor which showed that the software was stating what was not in fact the optimal stopping place in the circumstances.

238 However, in relation to the period before the AMC told the assembler what was the optimal stopping place for the LLOP, so before 23 June 2015, Mr Jones had to exercise some judgment in deciding where to park his LLOP but in doing that he had to (in our view this was an inescapable conclusion) take account of the risk of injury to himself as a result of poor placing of the LLOP.

<u>Paragraphs 6.80-6.82 of the EVJD for Mr Jones; the order in which products might be picked</u>

239 Paragraphs 6.80-6.82 of the EVJD for Mr Jones were subject to similar considerations. They were all about the extent to which Mr Jones used his initiative to do his work. However, he was not cross-examined on what was said in those paragraphs, and he gave no direct evidence about them. Most importantly, the sequence of events shown at D9/170/6-7 (we refer to that document in paragraph 17.2 above; it was entitled "Know Your Stuff for Grocery/Non-food Assembly –

Assembling Paperless Assignments") did not appear to allow for a deviation from the sequence for picking shown there. In those circumstances, we concluded that the IEs and we should regard the training materials, including D9/170, as being determinative of this aspect of the work of assembly.

Paragraph 6.84 of the EVJD for Mr Jones; what an assembler had to do when stepping down from the LLOP; the relevance or otherwise of the width of the aisles (2.84 metres)

240 We thought that what was said in paragraph 6.84 of the EVJD for Mr Jones was an unhelpful elaboration of what was said in the third bullet point on page D9/476/6, which was this.

> "**Dismounting**:
>
> • Bring the truck to a complete standstill and then look around you to check that it is safe for you to dismount."

Paragraphs 6.89 and 6.90 of the EVJD for Mr Jones; the range of physical positions required for picking product from a pallet

241 We thought that the IEs would be able to work out the manner in which an assembler would have to pick up a case from for example a pallet. The manner in which that was required to be done, required, that is, by the respondent, was the key here. That manner was shown by two SSOWs relating to manual handling which were in a number of places in the hearing bundle. The first place where they appeared in the bundle was at D1/3/3-4.

Paragraphs 6.91-6.92 of the EVJD for Mr Jones; lifting and removing units from pallets

242 The aspect of assembly to which paragraph 6.91 of the EVJD for Mr Jones related was the subject of the "Key Point!" at D9/224/3. We refer to D9/224 in paragraphs 64 and 65 above. We did not set out in those paragraphs the text of that key point (on page 3 of D9/224), which was this.

> "It is important to remove products from a pallet one layer at a time to avoid the pallet becoming unstable. Often referred to as pyramid picking, this is where products are picked mostly from the front of a pallet, which can lead to a steep face of products that are potentially unstable. This also mean[s] that assemblers have to stretch over products to reach products at the back of a pallet. This could lead to injury to yourself or others and damaged stock."

243 The respondent asserted (relying on what Mr Evans said in paragraph 428 of his witness statement) that Mr Jones went a step further and would, if he found that a pallet had been pyramid-picked, select "Units strategically so as to leave the Pallet more safe and stable than he found it". We therefore had to decide whether that was

a factually correct assertion and, if it was, whether in doing that thing, Mr Jones was doing work for the purposes of section 65(6) of the EqA 2010.

244 We had no demonstration before us of what that work might have involved. There was no suggestion in the evidence before us that Mr Jones positively rearranged the units on the pallet. The assertion of Mr Matthews in the final sentence of paragraph 76 of his witness statement that he himself (i.e. Mr Matthews) "might try and make the Pallet more stable to try and prevent damages in the future" told us nothing in that regard. In any event, we concluded that the fact that some assemblers were guilty of pyramid picking supported the proposition that, given what was said at D9/224/3 as set out in paragraph 242 above, the work of an assembler employed by the respondent at a DC in regard to picking from a pallet was (and was only) not to pyramid pick: the work was not to seek to diminish the impact of the pyramid picking of others. If and to the extent that an assembler did the latter thing, then he was being helpful (and therefore he was doing his job particularly well, so that he was in that regard excelling), but it was not a requirement of his job for the purposes of section 65(6) of the EqA 2010.

245 In fact, we could not see how an assembler could in practice select units "strategically" so as to leave the pallet "more safe and stable" than it was before the unit was selected. If a pallet were the subject of pyramid picking then the only way to keep it from collapsing in any way would, as far as we could see, be to pick from the top of the stack. We could see nothing that could be done to select units strategically so as to leave the stack "more safe and stable than [the assembler] found it". That was an additional reason for rejecting the assertion that it was part of the work of an assembler (such as Mr Jones) to do that.

Paragraph 6.93 of the EVJD for Mr Jones; getting products from the back of a pallet

246 In contrast, however, we accepted that the final sentence of paragraph 6.93 of the EVJD for Mr Jones was an accurate statement, even if it was to an extent obvious. Factually, we had no doubt that it was correct. Mr Jones and any other assembler will indeed have had to adopt an awkward body position when a pallet was nearly empty.

Paragraphs 6.95-6.127 of the EVJD for Mr Jones; the stacking of cages

247 We thought that the work of stacking in an ambient DC was definitively stated in the documents to which we refer in paragraphs 58-66 above. To the extent that what was in paragraphs 6.95-6.127 of the EVJD for Mr Jones differed from what was said in those documents, what was said in those documents had to prevail.

248 In addition we found the content of paragraphs 6.95-6.127 of that EVJD to be in some cases vague and in other cases an over-complication of what the work was.

249 By way of example, in paragraph 6.111 it was said that Mr Jones "worked out in his head, what products were likely to have to be stacked in the Cages later in the

Assignment, and at what point in the Assignment he would reach those products". That was directly contrary to the words that we have set out in paragraphs 58 and 60 above. Paragraph 6.111 therefore asserted that the work of assembly involved forward thinking when there was no room, let alone a requirement for, such thinking.

250 Nevertheless, while what was said in paragraph 6.122 of the EVJD for Mr Jones was directly contrary to what was said as set out in paragraphs 58 and 60 above, it was not contrary to the principles stated at D9/224/4-8. However, we thought that the latter pages were a better description of what was involved in stacking a cage.

251 For the avoidance of doubt, what was said in paragraph 6.123 of the EVJD for Mr Jones ("*The stacking of multiple different Unit types into individual Cages was more difficult when assembling into Slim Line Cages, given that these Cages were narrower. This meant that the practical difficulties of having to stack Units of different shapes, sizes and weights were exacerbated.*") was directly contrary to the passages that we have set out in paragraphs 58 and 60 above. The latter in our judgment were rather more reliable than the oral evidence of Mr Evans (in paragraph 442 of his witness statement) and Mr Matthews (in paragraph 103 of his witness statement), neither of whom referred to the documents referred to in paragraphs 58 and 60 above.

Paragraph 6.132 of the EVJD for Mr Jones; planning the stacking

252 Paragraph 6.132 of the EVJD for Mr Jones was in these terms.

> "Using his experience and in-depth knowledge of where individual Products were usually located in the warehouse, the job holder was able to visualise the shape and size of Units at that Aisle location and so consider and plan for the potential impact on the stacking of the Cage of the larger number of Units to be Assembled."

253 Not only was that imprecise, it was contrary to what was said in D9/224/4-8. The latter prevailed, therefore.

Paragraph 6.136 of the EVJD for Mr Jones; more on planning the stacking

254 The content of paragraph 6.136 of the EVJD for Mr Jones was under the heading 'Assembling multiple Units at a single location ("Multi-Select Locations")'. In fact, the term "multi-select locations" was not in the training materials before us. As far as we could see, the situation was covered by the document at D9/232 to which we refer in paragraph 17.19 above. Even though that document applied to "Fresh Assembly" rather than assembly in an ambient DC, we thought that what it said could not be ignored on the basis that it was stated to apply to a fresh DC and Mr Jones worked in an ambient DC. Indeed, we thought that the respondent probably had produced a document to the same effect in relation to assembling in an ambient DC. If it had not done that, then (see paragraphs 256-258 below) the respondent had accepted that

what Mr Jones did as described in paragraph 6.136 (and therefore also paragraph 6.137) of the EVJD for him was not what he had been taught to do when putting more than six units into a UOD. At page 4 of D9/232, this was said.

> "**Key Point!**
>
> Highlight that it is very important that each set of 6 cases is picked in their individual sets of 6.
>
> These sets of 6 help to prevent mistakes because if you count in sets of 6, you will be less likely to lose track of how many you have assembled.
>
> Do not attempt to press 'Enter' after each set of 6, before assembling them, because you may have to close and open another unit of delivery midway through the pick."

255 Unfortunately, while paragraph 6.136 of the EVJD for Mr Jones referred to "page 29 of the AMC Guide", we could see nothing which was relevant to the issue raised by that paragraph in the extract from the AMC guide at D7.2, which was the place where the respondent had put the extracts relied on in support of the assertions made by the respondent in the EVJD for Mr Jones. When, on 2 May 2024, we were sent the Pick by Store AMC User Guide, we found nothing in any part of that document which related to the text of paragraph 6.136 of the EVJD for Mr Jones.

256 The respondent's submissions on this part of the EVJD were in the following terms.

> "1. Mr Matthews and Mr Evans both confirm that the JH adopted the technique of repeatedly confirming the message 'more than 5' to identify the total number of Units to be collected before starting to collect them. This was a different technique than that taught, which involved collecting and assembling the first 5, then confirming, and repeating until the full number of units was collected and assembled. This technique yielded both gains in speed and also better efficiency in stacking. This was not the result of doing the same work better; it was the result of a materially different way of working. The fact that it was done in service of the same ultimate objective does not change the fact that the content of the work, and the demands arising from working in this way, were different.
> 2. See the submissions on the relevance of the AMC Guide at 5.5(b)."

257 The cross-reference to "5.5(b)" did not assist us. The submissions made there were to the effect that the respondent's guide to the use of an AMC was relevant. For the reasons stated in paragraphs 16 and 77 of our second reserved judgment (at pages 7-8 and 27-28 respectively above), we agreed with that proposition. The problem here was that we could not see anything that related to assembling in sets of six (or five, for that matter), either in the extracts from the "AMC Guide" included in an

appendix to an EVJD, or the Pick by Store AMC User Guide when we were sent it on 2 May 2024.

258 Thus, the respondent was saying that Mr Jones did something that was "a different technique than that taught", but did not say whether or not that different technique was approved by the respondent. In fact, that different technique was contrary to the way in which the respondent required at least its fresh DC assemblers to put more than six units into a UOD. In those circumstances, we concluded that what was described in paragraph 6.136 of Mr Jones' EVJD was not part of his work for the purposes of section 65(6) of the EqA 2010, although it might be at least a partial basis for a material factor defence for a difference in any bonus paid to him.

Paragraphs 6.140 and 6.165 of the EVJD for Mr Jones; the requirement to count stock accurately

259 As it must be apparent from what we say in paragraphs 167 and 168 above, we accepted that it was a requirement of the respondent that its assemblers counted stock accurately.

Paragraph 6.146 of the EVJD for Mr Jones; "breakpack" locations

260 The term "breakpack location" did not appear in the training materials before us. There was only one reference to breaking a pack, and that was in D9/633, which was about measuring and weighing fresh and packaged products, so it was not relevant. The respondent relied here on its submissions in relation to paragraph 6.469 of Mr Hornak's EVJD. Those relied on the evidence of Mr Pilley, Mr Evans and Mr Matthews, in paragraphs 184, 254 and 121-123 of their respective witness statements. Mr Pilley there referred simply to the evidence of Mr Matthews. Mr Evans did the same. Mr Matthews' evidence related to Mr Jones' work. We could not understand why the respondent's submissions here did not simply refer to Mr Matthews' evidence. However, all he did in paragraphs 121-123 of his witness statement was in substance say the same as was in paragraph 6.146 of the EVJD for Mr Jones.

261 The only material thing that was relevant here was that Mr Jones and any other assembler who was required by his AMC to pick stock from what the respondent in practice called a "breakpack location" had to (as Mr Matthews put it in paragraph 122 of his witness statement) "open and assemble from the Breakdown pack". The term "Breakdown pack" helped us to locate a document in the bundle in which reference was made to the situation. That was the policy and procedure document concerning "paperless assembly in stocked", of which there were three versions in the bundle (at D9/151, D9/560 and D9/620), to which we refer in paragraph 17.3 above. There, at row numbered 37 of the procedure part of the document, this was said.

> 'Check whether the case to be picked is a standard case or a breakdown pack **Note: Breakdown packs will have "BD" printed on the outer case**'.

262 In row 38, this was said.

> "Scan the barcode of the product you require in the select [sic] to identify it is the correct product
>
> **Standard Cases**
> • Scan the barcode
>
> **Breakdown Packs**
> • Open the outer carton with a company safety knife and select an individual unit
> • Scan the unit barcode after removing from the outer case
>
> **Note: If you scan the breakdown pack you will get an error message and be prompted to scan the individual unit**"

263 Thus, the only additional thing required to be done when the unit was to be taken from a breakdown pack was open the outer carton with a company safety knife. We doubted that the word "select" in the sequence "select an individual unit" meant more than just "take".

Paragraph 6.154 of the EVJD for Mr Jones; the possible impact of the size and weight of seasonal items

264 The assertion in paragraph 6.154 of the EVJD for Mr Jones to which the claimants objected was that seasonal stock items "were awkward to lift and carry and, subject to the content could weigh up to 25kg". Plainly, the word "were" was too universal. "Might be" was, on the factual assertions in paragraphs 6.150-6.153, which were agreed, more appropriate. We leave it to the IEs to decide whether or not the possibility of the need to carry something which it might be awkward to lift and might weigh 25kg added anything material to the demands of Mr Jones' work.

Paragraph 6.157 of the EVJD for Mr Jones; the number of assignments per shift that Mr Jones undertook

265 The number of assignments which Mr Jones undertook every shift was in our judgment irrelevant to the question of the demands of his work for the purposes of section 65(6) of the EqA 2010. It might be relevant to an MFD defence within the meaning of section 69 of that Act, but that was a different matter.

Paragraphs 6.166 and 6.168; blocked aisles

266 The need to reverse a laden truck in the event of an aisle being blocked was in our view a fact which was relevant to the demands of Mr Jones' job. However, it was catered for in D9/473 ("Know Your Stuff For Mechanical Handling Equipment – Ride-

On Powered Pallet Truck/Loading Truck"). There was also a reference in D9/484 ("Know Your Stuff For Mechanical Handling Equipment – Low Level Order Picking Truck") to reversing a LLOP when it was unladen. Thus, the need to reverse a truck was plainly part of the ordinary work of an assembler and it was shown by both of those training documents.

Paragraph 6.173; absence of systematic check of Mr Jones' assessment that a product was not damaged

267 The first sentence of paragraph 6.173 sufficed. The second one, to which the claimants objected, was, we agreed, evaluative and added nothing material.

Paragraph 6.175 of the EVJD for Mr Jones; risk of injury from damaged products or packaging

268 We thought that it was obvious that an assembler would be at risk of injury from handling damaged packaging and damaged products. But of course that risk arose also in relation to a customer assistant.

Paragraph 6.176 of the EVJD for Mr Jones; exposure to "unpleasant leakages"

269 Similarly, an assembler as much as a customer assistant would be at risk of being exposed to "unpleasant leakages" of the sort referred to in paragraph 6.176 of the EVJD for Mr Jones. It was helpful that the frequency was quantified by the respondent. Once a quarter was (applying H31) "occasionally".

Paragraphs 6.181 and 6.183 of the EVJD for Mr Jones; impact of a rejected OCC code

270 The claimants questioned whether there was a need to report a rejected OCC code to a manager. We refer to a comparable situation in paragraphs 42 and 43 above. The situation to which paragraphs 6.181 and 6.183 of the EVJD for Mr Jones related was dealt with in the document at D9/581, which was the policy and procedure relating to "Reporting of Barcode and Pallet Label Errors". In numbered row 2 on page 2, the procedure where that occurred "During Assembly" was stated to be "Report problems with Barcode (Outer Case Code) when picking to Warehouse Manager". That, we thought, was conclusive of this particular dispute.

Paragraphs 6.187, 6.188, and 6.197-6.199 of the EVJD for Mr Jones; restacking cages

271 For the avoidance of doubt, the obligations of an assembler in regard to the stacking, and where necessary the restacking, of a cage were stated in the documents to which we refer in paragraphs 58-66 above.

Paragraphs 6.200, 6.201 and 6.212-6.215 of the EVJD for Mr Jones; "Monotony of Assembly" and the weights of UODs

272 The content of paragraphs 6.200 and 6.201 of the EVJD for Mr Jones was in our view irrelevant. That was because the number of units that an assembler picked from pallets was in our view a meaningless statistic if taken on its own. Even if it were combined with the average weight of the units, that was in our view of no assistance. The weights of fully-laden cages was the subject of paragraphs 6.212-6.214. We failed to see the relevance of that too, given that the cages were carried around on the forks of a LLOP, and were not pushed around by an assembler. The number of filled cages which Mr Jones had by the end of his shift delivered to a loading bay (using a LLOP to do so) was the subject of paragraph 6.215. We failed to see the relevance of that factual assertion either. If the IEs disagree with any aspect of what we say in this paragraph, then they may include such aspect in their assessment of the value of the work of the comparators. We have already (in paragraph 259 above) dealt with the requirement for accuracy (which was stated again in paragraph 6.201 of the EVJD for Mr Jones), which was in our view in any event obvious.

Paragraph 6.203 of the EVJD for Mr Jones; securing and labelling cages

273 Similarly, the need to ensure that the right label was attached to a cage (which was stated in paragraph 6.203 of the EVJD for Mr Jones) was obvious, whether or not it was supported by a page of the AMC guide. In fact, the cross-reference in paragraph 6.203 was to page 58 of the AMC Guide, and D7/2/58 referred to condensing. Not even page 58 of the document sent to us on 2 May 2024 as the Pick by Store AMC User Guide was relevant, as it concerned (1) a "host parameter" in the form of "Highlight Location if Qty=1" and (2) what happened if there was an invalid scan of a location or product barcode. In fact, the SSOWs at 5/3/5, 5/3/11 and D9/193 all said at the start of column 6:

> "On completion of the assignment, Assembler attaches destination labels to cage and disposes of any backing paper in the end-of-aisle waste bins."

Paragraph 6.206 of the EVJD for Mr Jones; tightening the straps on a roll cage

274 The safe strapping of roll cages was the subject of the document at D9/539, entitled "Safe Strapping of Roll Cages" (to which we refer in paragraph 17.22 above). That document was undated, but in the index to the bundle it was said to be dated "01/01/2017". The photograph on page 3 of the document supported the claimants' proposition that there was no evidence of a risk of a tightened strap hitting the assembler in the face. That is because (1) the straps appeared from the photograph not to be elasticated but in any event (2) there was no reference to such a risk in that document.

275 We saw, too that there was no reference in the SSOWs at 5/3/5, 5/3/11 and D9/193 to a risk of the strap hitting the assembler in the face. In those circumstances, we concluded that paragraph 6.206 of the EVJD for Mr Jones was incorrect in asserting that there was a risk of a strap snapping and "[breaking] free" so that it might "hit [an assembler] in the face".

Paragraphs 6.208-6.209 of the EVJD for Mr Jones; delivering cages to the loading bay

276 There was nothing in the SSOWs at 5/3/5, 5/3/11 and D9/193 which indicated a need to manoeuvre cages at the "assigned loading area" to which all of those SSOWs referred in column 6. Rather, the SSOWs showed that an assembler simply needed to drop the cages off accurately using a LLOP. The LLOP training pack at D9/476 said nothing relevant about that. Row number 59 of the procedure for Paperless Assembly in Stocked Depots at D9/560/9 and D9/620/10 merely required the position of "the [UODs] in a safe manner". Those two further factors therefore also supported the proposition that there was no need for an assembler for example manually to push, pull or manoeuvre cages into a safe position in the bay or bays. There was no obvious need to do more than simply ensure that a load of cages was placed in a straight line (which will have been the way in which they were placed on the forks of the LLOP) in the assigned loading area. Indeed, moving them from that straight line was likely to make them less rather than more safely stowed there. In those circumstances, we rejected the propositions in paragraphs 6.208-6.209 to the effect that an assembler had to do the things described in those paragraphs.

Paragraphs 6.211 and 6.236 of the EVJD for Mr Jones (and all other paragraphs in the EVJDs for the comparators, including, for example, paragraph 6.196 of the EVJD for Mr Pratt); moving a full roll cage by hand

277 If and to the extent that an assembler had to pull a filled roll cage, then the SSOW at for example D1/3/8 to which we refer in paragraph 190 above was applicable and stated what was required of the assembler (or, as the case may be, a loader, or, if different, a marshaller).

Paragraphs 6.221 and 6.223 of the EVJD for Mr Jones; dropping cages off at the loading bay

278 The need to withdraw fully and carefully the forks of a LLOP from under the cages which it had been carrying and were now deposited, was obvious. It was in any event stated in the SSOWs at D5/3/5, D5/3/11 and D9/193.

Paragraph 6.223A of the EVJD for Mr Jones; detaching "the straps from the third and fourth cages"

279 We could find no justification in the training materials for strapping the third and fourth of four standard cages, as was implicitly asserted in paragraph 6.223A. We concluded from what we say in paragraphs 227-235 above that only the fourth and fifth of a line of empty slim line cages on a LLOP's forks needed to be strapped together. Thus, we concluded on the evidence before us, only the straps on the fourth and fifth of a load of slim line cages would need to be "detached".

Paragraph 6.225 of the EVJD for Mr Jones; random accuracy checks

280 While random accuracy checking undoubtedly occurred, given the documents to which we refer in paragraph 175 above, we found it hard to see how driving a LLOP to the accuracy checking area and scanning the barcode there added anything material to the work of an assembler. That was because it simply involved putting the cages in a different place from the "assigned loading area".

Paragraph 6.229 of the EVJD for Mr Jones; the weight of products moved by an assembler

281 We found it hard to see how the weight of the loads carried by the LLOP driven by an assembler could be relevant in determining the demands of the work of the assembler for the purposes of section 65(6) of the EqA 2010.

Paragraph 6.230 of the EVJD for Mr Jones; hazards

282 Given what we say in paragraph 68 of our second reserved judgment (at page 25 above), paragraph 6.230 of the EVJD for Mr Jones (stating that it was part of his work as an assembler "to ensure that he carried out all related activities in such a way as to avoid the hazards associated with it and the risks arising from those hazards") added nothing material to the evidential picture of what was the work of an assembler (or any other comparator) for the purposes of section 65(6) of the EqA 2010.

Paragraphs 6.232-6.235 of the EVJD for Mr Jones; changing the battery of a LLOP

283 Paragraph 6.235 of the EVJD for Mr Jones was contested by the claimants, but only in part, and by the time of closing submissions, paragraph 6.235 was stated by them to have been agreed, as were the preceding four paragraphs. However, we looked at paragraph 6.235 first when looking through the respondent's submissions in it, and those submissions referred to it as not being completely agreed. That paragraph had to be read against the background of the two preceding paragraphs of the EVJD, which related to taking the "Assembly Truck" (i.e. the LLOP) "to the Battery Bay to have the battery changed or swap the Assembly Truck for another one that had a charged battery." Those words were taken from paragraph 6.232 of the EVJD for Mr Jones, and it was the claimants' initial contention that the only thing that happened was that the battery would be changed: not that the LLOP might be swapped. However, by the time of closing submissions, it appeared that even that aspect of the matter was agreed and the claimants accepted that there might be a LLOP swap. By the time we realised that paragraph 6.235 of the EVJD for Mr Jones was agreed, we had formed the view that it was fundamentally flawed. It had to be read with paragraph 6.234 of that EVJD, which was in these terms.

> "When he swapped his Assembly truck for another, this required him to swap over by hand, any Cages he was carrying on his Assembly Truck at the time. To do this, he lowered the forks of the first Assembly Truck to the ground and withdrew them to deposit the Cages in the ground. The Cages were left near to where the new Assembly Truck was parked so that he could load them onto its

forks. If the Cages were not in the correct position to be picked up using the MHE, they would need to be moved by hand, so the job holder ensured that he deposited them in the correct place."

284 The words of paragraph, 6.235 were these:

"The job holder then transferred the Cages to the new Assembly Truck. When moving each Cage, the job holder checked the load was safely stacked within the Cage, positioned himself with the steerable wheels on the Cage facing him and gripped the Cage firmly by the upright metal bars taking care not to pull using the straps. He then manoeuvred the Cages towards him by pulling them, assessing the weight of the Cage and then using his body weight to push the Cage. He checked his route was clear as appropriate and took care not to crash or catch his hand on other objects. To mount the Cages on the forks, the job holder tilted each Cage backwards with his foot before manoeuvring each Cage onto the forks by hand. He ensured the Cages were securely mounted on the forks of the new Truck as described in paragraphs 6.64 to 6.71 above."

285 The claimants' written closing submissions showed that they accepted that Mr Jones would transfer by hand the cages which had previously been on the LLOP that he had been driving to the new truck (with a charged battery) which he had been given.

286 D9/475, to which we refer in paragraph 93 above, showed what was required of an assembler when there was a need for the battery in the LLOP which he was driving to be changed. At D9/475/2, this was said.

"Once you have scanned a finished assignment to the correct Goods Out Bay the arm computer will display the following options menu:

Select Activity

1 Log Off
2 Next Assignment
3 Break

Before selecting option two to download a new assignment you should check the LLOP's battery gauge.

If the battery gauge indicates three bars or less you should get your battery changed before downloading a new assignment.

If the battery gauge drops to three bars whilst you are doing an assignment you should finish that assignment and drop it at the correct Goods Out Bay before getting your battery changed."

287 The pre-use check required by D9/463/15 which we have set out in paragraph 305 below applied before a LLOP was used, and it included a check that "there [was] sufficient charge shown on the battery gauge for it to be used". There was at D9/475/2 a picture of the battery gauge showing three red bars. It showed that a fully-charged battery would have ten red bars, so that a properly-functioning battery with three red bars would still have approximately 30% of its maximum charge. We saw that in paragraph 6.15(e) of the EVJD for Mr Jones (and paragraphs 6.39(e) of the EVJDs for the other ambient DC assemblers), it was said that the pre-use check was to see if the "battery level charge indicator showed less than 2 bars" and that the check was done to "minimize the risk of a flat battery subsequently disrupting his work". Reference was made there only to "the AMC Guide". In addition, in paragraph 6.232 of the EVJD for Mr Jones, there was this agreed text.

> "At least once per shift, the job holder took the Assembly Truck to the Battery Bay to have the battery changed or swap the Assembly Truck for another one that had a charged battery. He did this when one bar was showing."

288 Both of those paragraphs (6.15(e) and 6.232 of the EVJD for Mr Jones) were markedly inconsistent with D9/475/2, to which, we saw, no party referred us in closing submissions. It was also very difficult to accept that the respondent would have permitted, let alone wanted, an assembler to let his LLOP run out of battery power mid-assignment. As we say in paragraph 77 of our second reserved judgment (at pages 27-28 above), we were first given a copy of the full AMC Guide to assembly on 2 May 2024. Nowhere in it was there any statement to the effect that the pre-use check of MHE was to see whether it had "less than 2 bars" showing the remaining charge in the MHE's battery. The only references in the guide to batteries were to the AMC's batteries. We were sent at the same time on 2 May 2024 copies of the AMC guides for loaders and assemblers in fresh DCs. They also had nothing in them about MHE batteries.

289 We add for the sake of completeness that if the battery were faulty then there would be no way of knowing that unless the LLOP stopped suddenly, which would have probably have occurred mid-assignment, but in any event the possibility of the battery gauge being faulty was not relevant here unless there was a realistic possibility of it occurring. We had no evidence before us, despite the plethora of written assertions of fact before us, to the effect that any comparator had had to deal with a LLOP running out of battery power mid-assignment.

290 Thus, if Mr Jones did what is described in paragraph 6.232, paragraph 6.234 and/or paragraph 6.235 of the EVJD for him then, we concluded,

290.1 for the purposes of section 65(6) of the EqA 2010 it was an unauthorised way of working, and

290.2 it was not part of his work for those purposes.

291 That was because (1) the proposition (which for this purpose we will assume was being implicitly advanced in paragraph 6.235 of the EVJD for Mr Jones) that it was part of the work of an assembler to do what was described in paragraphs 6.232, 6.234 and 6.235 of the EVJD for Mr Jones was contrary to the content of D9/475 and (for example) the requirement to carry out the pre-use check stated at D9/463/15, and (2) that content reflected what common sense suggested would be required of an assembler. That was to avoid the need to swap a LLOP mid-assignment by (1) being alert to the charge shown on the battery while driving the LLOP and, if it went down to three bars, taking the LLOP to the battery bay after the assignment had been completed (there being sufficient charge at that point to finish the assignment and take the LLOP to the battery bay), and (2) checking the charge in the battery on the LLOP as part of the pre-use checks on a LLOP and, if it was three bars or below, refusing to take it.

292 In addition, and as a separate reason for rejecting the proposition (which we will also assume was being advanced by the respondent) that it would be part of the work of an assembler to move cages by hand from one LLOP to another, as we say in paragraph 276 above, there was nothing in the SSOWs at D5/3/5, D5/3/11 and D9/193 which indicated a need to manoeuvre cages at the "assigned loading area", and we could not believe that if Mr Jones had ever had to park the cages currently on a LLOP whose battery needed to be changed and pick them up with a different LLOP, he would have had to do anything more than (1) park and leave the cages, and then (2) run the forks of the new LLOP under the cages and press a button on the new LLOP causing the forks to rise and pick up the cages. At most, there might have been a need to move a cage slightly to one side or the other, to ensure that it was precisely in line with the others which had been on the LLOP whose battery was running out. However, even that was unlikely to be necessary, since the cages would have had at least some product on them, so that they would have been heavy and therefore unlikely to move more than minimally when deposited by the lowering of the LLOP's forks.

293 In addition, and separately, the idea that an assembler might need to "[tilt] each Cage backwards with his foot before manoeuvring each Cage onto the forks by hand" was a nonsense. That was because the forks of the LLOP would be (or at least it would always be possible for them to be) below the bottom of the cage, so that there would never be a need to tilt a cage to get it onto the forks. That was clear as a matter of practical reality, or common sense. It was also shown by what we say in paragraph 224 above, as well as what the respondent proposed for the content of paragraph 6.307 of the EVJD for Mr Pustula, which we have set out in paragraph 844 below. It was also supported very strongly by what was said

293.1 in column 6 of D9/193 (which was the SSOW relating to "PBS Assembly" to which we refer in numerous places above, starting with paragraph 17.6), where it was said that to avoid the risk of the forks on a LLOP tipping a cage over, "LLOP forks ... should remain fully lowered until completely clear of the cages that have been left behind", and

293.2 column 4 of the SSOW concerning "Loading" at D1/3/17, where this was said (in relation to a "dolly sized cage", but it was plainly applicable also to a standard cage):

> "Any adjustments to cage positioning must be performed with the truck forks in the fully lowered position."

294 The fact that the respondent was asserting that it was part of Mr Jones' work for the purposes of section 65(6) of the EqA 2010 to do what was described in paragraphs 6.234 and 6.235 of the EVJD for him as far as we were concerned therefore undermined significantly the credibility of the respondent's case about the comparators' work for the purposes of section 65(6) of the EqA 2010. As a result, it caused us to look with even more care at the rest of the respondent's evidence about the work of the comparators. That was because we found it hard to believe that Mr Jones' managers would have condoned him doing the things referred to in paragraphs 6.234 and 6.235 of the EVJD for him. We also rather doubted that he himself would have countenanced doing those things, given that it at least could, and probably would, have affected his productivity figures and therefore his bonuses. In addition, tilting a loaded cage towards oneself would probably be unsafe.

295 We concluded that the Leigh Day claimants must just have taken at face value the proposition that Mr Jones might have had to swap cages by hand in the manner described in paragraph 6.235 of the EVJD for him when his LLOP's battery was changed or his LLOP was exchanged for one with a charged battery. If that was correct then it was, we concluded, no more than an acceptance of a proposition of fact.

296 Having come to those conclusions, we looked at the other comparators' EVJDs before us. We saw that paragraph 6.573 of the EVJD for Mr Hornak, paragraph 6.634 of the EVJD for Mr Davis, and paragraph 6.585 of the original EVJD for Mr Macko and all subsequent versions up to and including the one dated 7 April 2023, were all in the same terms as paragraph 6.235 of the EVJD for Mr Jones. We saw too that paragraph 6.585 of the EVJD for Mr Macko had, on or about 14 April 2023, been deleted. However, it appeared that that was purely because that passage was repeat of what was in paragraph 6.558 of the EVJD for Mr Macko, which remained. Thus, all of the EVJDs for the comparators working in ambient DCs had the text of paragraph 6.235 of the EVJD for Mr Jones in them.

297 We then looked at the EVJDs for the fresh DC comparators. We first turned to the EVJD as it stood on 14 April 2023 for Mr Todd. That contained this passage under the heading "Craned Battery Changes".

> "6.344 The Ceiling-Mounted Crane in the Battery Bay was used to change the batteries of each of:

(a) his Ride On PPT (changing the battery at least once or twice per day);
(b) the VOPT (changing it at least once a month); and
(c) his Loading Truck (rarely).

6.345 Prior to April 2016, the job holder took the relevant MHE to the Battery Bay, where a Warehouse Operative who had been provided with the relevant training (in addition to their core skill(s)), operated the Crane to change the battery.

6.346 From April 2016, the job holder was responsible for using the Crane to change the batteries in all three types of vehicular MHE."

298 There was then a description of the manner in which a battery was changed using the crane.

299 The EVJD for Mr Pratt dealt (in the passage starting at paragraph 6.520) with "Craned Battery Change" as such only: there was no statement that before 2016, the changing of the loading truck's battery was carried by someone other than Mr Pratt.

300 Mr Pustula's EVJD dealt with craned battery changes in the same way as the EVJD for Mr Pratt did. The passage in Mr Pustula's EVJD where that was done was paragraph 6.359 onwards. Helpfully, in paragraph 6.360 of that EVJD, it was said that "On average, he had to do this once or twice every shift and it typically took 6 - 10 minutes."

301 The EVJD for Mr Young dealt with the changing by him (only) of the battery on a loading truck in the passage at paragraph 6.366 onwards of the EVJD for him as it stood on 14 April 2023.

302 In no place in the EVJDs for the fresh DC comparators was it stated, or even remotely suggested, that they would change batteries mid-assignment. While that, in our view, was helpful to the respondent from the point of view of the credibility of at least that part of those EVJDs (although there were some issues in that regard, to which we refer in paragraphs 716-731 below), it reinforced our view that paragraph 6.235 of the EVJD for Mr Jones and the paragraphs in the EVJDs for the other ambient DC comparators in the same terms were wrongly agreed to by the respondent's witnesses.

303 However, the possibility of the words of for example paragraph 6.235 of the EVJD for Mr Jones being wrongly agreed to was not raised by us with the parties, and the proposition that the words of that paragraph (or its equivalent in the EVJDs for the other comparators to which we refer in paragraph 296 above) were incorrect was not put in cross-examination to any of the persons who gave evidence for the respondent. As a result, we concluded only that if what happened as described in paragraph 6.235 of the EVJD for Mr Jones, paragraph 6.573 of the EVJD for Mr

Hornak, paragraph 6.558 of the EVJD for Mr Macko and paragraph 6.634 of the EVJD for Mr Davis, then, for the reasons given in paragraphs 290-293 above, it was not part of the work of that comparator for the purposes of section 65(6) of the EqA 2010.

Paragraphs 6.237-6.238 of the EVJD for Mr Jones; battery condition

304 Paragraphs 6.237 and 6.238 of the EVJD for Mr Jones were in these terms.

> "6.237 The job holder was alert to and reported any signs of battery wear, including damaged leads, sparks and any visible leakage or acid corrosion he identified whilst operating his MHE.
>
> 6.238 The job holder remained alert to any visible damage to the battery cables, whether across the top of the battery or connecting the battery to MHE. Any evidence of copper wire visible as a result of damage to the cables had to be treated with care to avoid the risk of electric shock and/or fires and had to be reported immediately. These incidents were rare (approximately once a year) but the job holder remained alert as described, at all times."

305 There was nothing in the documents to which we refer in paragraphs 93-101 above about the need for an assembler to be alert to visible damage to battery cables, for example. However, there was a need for a pre-use check of any MHE to include a check of the battery and its connections. For example, the pre-use safety checks at D9/463/15, to which we refer in paragraph 103 above, included this one.

> "**Battery** – Check that batteries are in good condition, connected and securely clamped in place. Check there is sufficient charge shown on the battery gauge for it to be used."

306 We thought that it was obvious that if there was damage to the insulation on a piece of electrical cable used on a piece of MHE (which would probably run at a fairly high voltage), then that piece of MHE would have to be taken out of use immediately. That thought was consistent with the following passage on page 4 of D9/509 (entitled "Know Your Stuff For Mechanical Handling Equipment – Battery Safety").

> "When a battery lead is trapped it can damage the insulation which exposes the copper core. This can lead to shorting out of the battery which will cause a fire."

307 At the top of the page 6 of that document, there was this box, which was followed by a series of boxes showing what to do next.

> 'Battery defect is found. Battery should be taken out of service immediately and identified by a "[Do] Not Use Sign"'.

308 We saw too that on page 2 of D9/509, this was said.

> "The battery leads are two copper Multi core cables that are surrounded by rubber insulation, the leads are designed to be flexible and damage resistant. The insulation is designed to prevents [sic] the cable cores from touching and shorting out the battery."

309 In the circumstances, we accepted that it was an implicit part of the work of an assembler (or any user of MHE, which was all of the comparators, of course) to be alert to the possibility of damaged battery cable insulation. However, we thought that the position was most clearly stated in D9/509, all of which was in our view relevant.

Paragraphs 6.239-6.241 of the EVJD for Mr Jones; "Battery Acid Spillage"

310 Paragraphs 6.239-6.241 of the EVJD for Mr Jones had the heading "Battery Acid Spillage". The claimants did not contest paragraph 6.239, which was about Mr Jones' awareness of the need to follow a specific procedure in the event of battery acid spillage and the training which he had received in order to do that. That was of relatively little value if it were not known whether or not, and if so how often, Mr Jones had to deal with an incident of battery acid spillage.

311 The claimants recognised that, and asked in response to paragraph 6.240 for evidence of the frequency with which "these issues were identified by operatives on loading/assembly". The response in the respondent's written closing submissions was "As per MH 6.578." That was a reference to the respondent's response to the claimants' submissions in relation to paragraph 6.578 of the EVJD for Mr Hornak. That response was in these terms.

> "The JH did not personally see an acid leak but he heard from colleagues about such a problem occurring (MH§107).
>
> Comparators VM and PE did not experience such a leak (VM§110 and PE§144).
>
> Manager CP confirms (CP§217) that this paragraph is accurate."

312 The first part of that submission was to the effect that Mr Hornak did not see an acid leak but he heard from his colleagues about it happening: probably once, we guessed. The second part of that submission related to Mr Macko and comparator "PE". There was no comparator with those initials.

313 The reference to "VM§110" was to paragraph 110 of Mr Macko's witness statement, where he said this.

> "I confirm that paragraph 6.590 of the EVJD is correct. I have never seen an acid leak."

314 Paragraph 6.590 of the EVJD for Mr Macko had been amended by the time of the hearing starting on 6 March 2023 before us. As so amended, it was in these terms.

> "In the event the job holder noticed any such damage or leakage, he was required to inform a Manager who would call a specifically trained Warehouse Operative to deal with such issues. During the Relevant Period the job holder did not identify or report any battery leakage but the job holder knew to look out for such issues and as necessary adopt the process for reporting them."

315 The reference to "PE" might have been to Mr Evans, but paragraph 144 of his witness statement related to the loading of slim line cages. The reference to "CP" was to Mr Pilley. In paragraph 217 of his witness statement, he said this.

> "I confirm that paragraphs 6.578 of Martin's EVJD and 6.590 of Vlastimil's EVJD are accurate."

316 So, there was no evidence at all before us about the frequency or otherwise with which Mr Jones encountered a battery acid spillage.

317 In the circumstances, we concluded that the only factual material which the IEs and we could properly take into account about the risk of battery acid spillage and what to do if there was one, was that to which we refer in paragraphs 98-101 above but bearing it in mind that there was before us only some hearsay evidence of a comparator that someone else had experienced a battery acid spillage. In those circumstances, the only thing that we concluded could be taken into account was that it was necessary to know what to do in the event of battery acid spillage and that the possibility of coming across such a spillage was one of the risks (which only rarely eventuated) which existed in working in a DC. We doubted that that was going to make any difference to the value of the work of the comparators.

318 In fact, there was some evidence about the frequency with which a comparator came into contact with spilt battery acid. That evidence was in paragraph 6.395 of the EVJD for Mr Young, where this was said.

> "If the job holder noticed any such damage or leakage, he immediately informed a Manager, something he did roughly 2 to 3 times a year during the Relevant Period, who would call a specifically trained operative to deal with such issues."

319 That seemed to us to add very little to the demands of the work of a comparator, in that all that the jobholder was required to do was inform his manager: not himself to clear up the spillage. Having said that, even that paragraph was inaccurate: see paragraph 949 below.

<u>Paragraphs 6.243-6.276 of the EVJD for Mr Jones; "Health and Safety" requirements</u>

320 For the most part, we could not see that there was anything that we needed to determine in the disputed parts of paragraphs 6.243-6.276 of the EVJD for Mr Jones. We did see, however, that the respondent itself in its closing submissions in relation to those paragraphs relied on its training materials to support the contentions in those paragraphs. That was done in relation to paragraphs 6.248, 6.252, and 6.253.

321 We add by way of explanation that a requirement not to do something is a prohibition rather than a job task, and that the prohibition would have to relate to the job task to be relevant. Even then, the prohibition may be obvious or be the result of a legal obligation, and in either event stating the prohibition will add nothing material to a stage 2 analysis.

322 For example, in paragraph 6.252 it was said that "The job holder ensured that all Stock was kept dry and off the ground, to prevent damage to packaging and possible contamination of Products." Assuming that that was an assertion that it was part of the work of an assembler for the purposes of section 65(6) of the EqA 2010 to ensure that all stock was kept dry and off the ground, that could relate only to what was required when the stock was moved by the assembler. The task was then to move the stock. The demands on the assembler for the purposes of section 65(6) were to move the stock with care, and of course items intended to be put on sale in a supermarket would need to be kept dry and care would need to be taken to avoid them falling onto the ground (not only in a DC but of course also in a store). But we thought that the need to take such care was obvious, both as a matter of common sense and because of the implied contractual obligation on the part of an employee to exercise reasonable skill and care in the course of doing the employee's work.

323 There was one positive obligation which we could see was relevant, and that was the obligation to be alert to signs of pest infestation, as asserted in paragraph 6.253 of the EVJD for Mr Jones. In that regard, while the respondent here asserted that there was a need for vigilance, the claimants said (comparably to the manner in which the respondent approached the claimants' assertions of a need to be vigilant) that all that Mr Jones needed to do was to report anything that he happened to see which indicated the possibility of a pest infestation. While we preferred to characterise the need as one to be alert to the possibility rather than (as asserted in paragraph 6.253) "be vigilant for signs of pest infestation", we could see that just as the claimants needed to be alert to such signs, so did their comparators.

324 Another factor which we concluded we should mention here is that of course it was part of the work of an assembler to "Clean As You Go" (as asserted in paragraphs 6.262-6.263 of the EVJD for Mr Jones) or (as asserted in paragraphs 6.260-6.261 of that EVJD) address fire hazards, just as much as it was part of the work of a customer assistant to do those things.

325 Similarly, it added nothing to say that an assembler had to communicate with managers and colleagues, as asserted in paragraphs 6.264-6.273 of the EVJD for Mr Jones. While it would be more difficult for some people than others to communicate

easily and freely with managers and colleagues, it was in our judgment an obvious part of the work of an assembler, and therefore did not need to be stated or be the subject of a finding of fact by us.

Paragraph 6.275 of the EVJD for Mr Jones; training and mentoring

326 The claimants asked for evidence to support the assertion in paragraph 6.275 of the EVJD for Mr Jones that "Around once a week, the job holder provided the benefit of his knowledge and experience to other Warehouse Operatives." The respondent's response was to say that Mr Evans gave evidence that he believed that Mr Jones would have done that, and that Mr Matthews agreed with that view. That was in our judgment of no evidential weight.

327 Having said that, it was in our view obvious that an experienced assembler might give advice to other assemblers, but whether that was in fact what happened seemed to us to be of little factual impact if, as was the case here (see paragraphs 112-113 above), the employer's training documents showed that a new assembler would be trained by a trainer, and (as was the case in relation to Mr Jones) there was no evidence that the comparator was a trainer.

328 Nevertheless, it was clear that the implied term of trust and confidence might have the effect that an experienced assembler was required to point out an obvious shortcoming in the work of a recently-employed fellow assembler. However, we were not sure whether that requirement added to the demands of the job for the purposes of section 65(6) of the EqA 2010. If the IEs are of the view that it did indeed add to those demands, then they may take it into account.

Paragraph 7 of the EVJD for Mr Jones ("Key facts including metrics")

329 We also could not see how the matters to which reference was made in section 7 of the EVJD for Mr Jones (including, for example, what "Focus and concentration", or what "Stamina", was required), even if they were true (and the evidence to support them was scant), were relevant at stage 2, i.e. to the analysis that we were obliged to carry out after the stage 2 hearing that started on 6 March 2023.

330 If the IEs disagree with us in that regard then we will review our conclusion and consider the parties' contentions on the disputed things in paragraph 7 of the EVJD for Mr Jones which the IEs regard as relevant.

Paragraphs 8.1-8.27 (the section headed "Performance and Accountability") and paragraphs 9.34-9.41 (in the section headed "Working Conditions") of the EVJD for Mr Jones

331 Similarly, we could not see how the respondent's performance management regime could be relevant at this stage. It might be relevant to a claim that there was a

material factor defence within the meaning of section 69 of the EqA 2010, but that was a different matter.

332 Here too, we say that if the IEs disagree with us in that regard then we will review our conclusion and consider the parties' contentions on the disputed things which the IEs regard as relevant.

Other working conditions and risks and hazards - the rest of paragraph 9 and paragraph 10 of the EVJD for Mr Jones

333 The only part of the rest of paragraph 9 which we thought was material was that part which dealt with "disagreeable temperatures". That part was relevant because we saw the temperatures in which Mr Jones worked as one of the relevant conditions in which assemblers worked. Having said that, we doubted the materiality of the words used in that regard in paragraph 9 of the EVJD for Mr Jones by the respondent. That was because we thought that evaluative language was unhelpful, so we thought that all that needed to be taken into account was the objective phenomena relating to the temperatures in which Mr Jones had to work. In fact, we did not see any evidence relating to those temperatures. We saw nothing material in the other parts of paragraph 9. Nor did we see anything material in paragraph 10, which concerned "Risks and Hazards". That was mainly because the latter were obvious from the tasks of an assembler and the way in which they had to be carried out, as shown by the training materials to which we refer above in this appendix. It was also because (for the reasons stated in paragraph 522 below) claimed hazards in the working environment such as poor light, were, just as much as was the case in relation to the work done by the sample claimants, hazards which (assuming they did in fact exist) must have arisen because of failures on the part of the respondent. (We refer to lighting in the context of loading in a number of places below; the first place is paragraphs 480-482.) It did not seem right to us to include in our analysis of the working conditions of either the claimants or their comparators hazards which would have arisen (if they did in fact arise) only because of a failure by the respondent to comply with its obligation to take reasonably practicable steps to ensure that the working environment was safe.

334 Equally, the actual number of, for example, accidents resulting in injury could not be relevant here. The issue was what were the risks inherent in doing the work in the environment in which it had to be done, which included the respondent's obligation to comply with its own legal requirements. We record here that that was in line with what the respondent submitted in relation to paragraph 6.194 of the EVJD for Mr Pratt (to which we return in paragraph 615 below), which was this.

> "Whether or not JH experienced any particular injury is not the point. The question is whether the activities of the JH are impacted because of the risk of it, the working environment is made up of all the circumstances in which JH works."

335 Incidentally, paragraph 10.16 of the EVJD for Mr Jones was in substance a repeat of paragraph 6.206 of that EVJD (and not paragraph 6.61, as was implied in paragraph 10.16), with which we deal in paragraphs 274-275 above.

Loading as recorded in the EVJD of Mr Hornak; other relevant determinations relating to the work of Mr Hornak

Introduction

336 Mr Hornak's work as a whole consisted almost entirely of assembly and loading. There were in the EVJD relating to his work brief references to dekitting (paragraphs 6.94-6.103) and marshalling (paragraphs 6.554A and 6.554B), but (1) dekitting was merely the taking out of a trailer any equipment which had not been taken out by the team which would usually dekit a trailer (see paragraphs 86-89 above), and (2) marshalling (see paragraphs 92.2-92.4 above) involved simply moving cages with stock on them from one area of the DC to another, and moving cages from one area of the DC to another was one of the things that an assembler did all of the time. We do not mean in any way to suggest that either task was undemanding: far from it, as can be seen from for example the documents to which we refer in paragraphs 92.2-92.4 above. We are referring here to the extent to which there was a need to make extensive reference in the EVJD for Mr Hornak, or here, to the work of dekitting and marshalling. What we needed to know was how much time Mr Hornak spent doing marshalling or dekitting, and that was the subject of paragraphs 21 and 22 of Mr Hornak's witness statement, which we did not understand to have been challenged.

337 In paragraph 21 of that statement, Mr Hornak said that he "did not perform dekitting as a separate activity, but only as part of the loading tasks". That, seen in the light of paragraph 6.96 of the EVJD for Mr Hornak, which we have set out in paragraph 409 below, which we interpreted that as a statement to the effect that (applying H31) Mr Hornak occasionally did the work of dekitting and only in the course of loading, suggested that it was an unnecessary complication to refer to dekitting as a separate task undertaken by him. In fact, for the reasons stated in paragraphs 410-412 below, there were reasons for doubting Mr Hornak's evidence about dekitting. In any event, dekitting was done by him as part of his work of loading, and we examine his evidence on dekitting in the course of examining his evidence on the task of loading.

338 In paragraph 22 of his witness statement, Mr Hornak said that about once a month he did the work of marshalling. Applying H31 that meant that he did it regularly, but he did not say (even in paragraphs 6.554A and 6.554B of the EVJD for him) how much time he would spend on it when he did it.

339 We consider below first whether what was said in relation to Mr Hornak's work added anything material to the picture of the work of assembly which we have described above (by first referring to the relevant training materials and then analysing the parties' contentions about the work of Mr Jones in the light of those materials). We

then consider in detail the contentions of the parties in relation to the work of loading as done by Mr Hornak.

The task of assembly as done by Mr Hornak

340 We found little that was additional in the parties' contentions about the part of the EVJD for Mr Hornak which concerned assembly (i.e. the parties' contentions about the things on which there was a dispute). It would have been helpful that the figure of 80% was agreed in regard to paragraph 6.427 of the EVJD for him if what was said in that paragraph had been clear. In fact, it was not. We wondered whether it was agreed that if Mr Hornak was assigned to do the task of assembly in a shift, then he spent at least 80% of his time doing the work of assembly, or whether it was that in a shift doing the work of assembly he spent 80% of his time stacking cages. The text of paragraph 6.427 was this.

> "The job holder stacked Units at varying heights in each of the Cages being Assembled to in each Assignment. These series of physical movements were required of the job holder for each Unit he assembled throughout the shift (i.e., an average of 1,161 Units on each 'full' shift on Assembly i.e., he was deployed on Assembly for 80% of more of his shift (rising to a maximum of 1,750 Units), weighing (on average) 7.72 tonnes per shift)."

341 We saw that in paragraph 3.23 of the EVJD for Mr Hornak, it was said that he "undertook an average of 6 Assembly Assignments per shift, during each full shift he Assembled an average of 1,161 Units, each weighing up to 20kg (or exceptionally up to 25kg) (an average of 5.54kg)." That did not help us understand what was meant by paragraph 6.427 of the EVJD for Mr Hornak. Rather more helpfully as far as the proportion of time spent by Mr Hornak on assembly was concerned, the parties agreed the terms of paragraph 3.30 of the EVJD for him, which stated that during the relevant period, "he was deployed on Assembly for approximately 14% of his overall working time." Otherwise, we saw nothing in the section of the EVJD for Mr Hornak or in the things said by the parties in support of their positions in relation to disputes concerning the task of assembly as done by Mr Hornak, which required us to say anything more about that task as done by him. That was because the section of the EVJD for Mr Hornak relating to assembly was so far as material otherwise in the same terms as the EVJD for Mr Jones.

The task of loading as done by Mr Hornak and the other ambient DC comparators

342 The first stage of the loading process was stated in paragraphs 6.51-6.57 of the EVJD for Mr Hornak as it stood on 15 April 2023. (We record here that that EVJD was 178 pages long, albeit in double-line spaced text. We record here too that it was stated in the EVJDs and the evidence of Mr Macko and Mr Davis that they too did loading at an ambient DC.) There were several features of the parties' positions in regard to those paragraphs which bore mention here.

343 The first is that while the claimants opposed the cross-reference in paragraph 6.55 to "the AMC Guide", that was only for the general reasons set out in paragraph 75 of our second reserved judgment (at page 27 above), but we were nevertheless unable to understand to what pages of the appendix to the EVJD for Mr Hornak which contained extracts from the AMC guide, reference was intended to be made. That was because the content of the pages to which reference was made did not match up with the cross-references. However, that did not matter as far as we were concerned because we believed that we had identified in the training materials to which we refer above all of the necessary references to the AMC.

344 The second feature of the parties' positions which bore being mentioned here arose from paragraph 6.56 of the EVJD for Mr Hornak, which was in these terms.

> "The job holder then drove his Loading Truck to the allocated Bay, being careful to park it at least 2 clear metres from the Bay door, to avoid the risk of collision between his Loading Truck and the Bay door equipment."

345 The claimants opposed the words in that sequence, proposing the insertion also of the letters "ing" after "park". This is the text which the claimants proposed, showing those amendments.

> "The job holder then drove his Loading Truck to the allocated Bay~~, being careful to~~ park<u>ing</u> it at least 2 clear metres from the Bay door~~, to avoid the risk of collision between his Loading Truck and the Bay door equipment~~."

346 In fact, the opposed words were a reflection of what was said in the SSOW at D1/3/17 and the other versions of it to which we refer in paragraph 70 above. There, in column 1, this was said.

> "Loader obtains MHE from designated park area and performs and records safety checks on equipment appropriate to truck to ensure equipment is fit for use (defect procedures apply if not). Loader travels to Goods Out bay.
>
> The Loader must stop and get off their MHE at least 2 metres clear of the bay door controls to prevent collisions between MHE and the bay door control area."

347 Interestingly, the next paragraph in the SSOW was also reflected in the next paragraph in the EVJD, i.e. paragraph 6.57.

348 In any event, as with the task of assembly, we found relatively little in the very long description in the EVJD for him of what Mr Hornak did by way of loading that added anything material to what was in the training materials, although there were many factual issues which arose from the EVJD. The training materials for loading in an ambient DC are referred to in paragraphs 68-85 above. Our conclusions on the disputed parts of the EVJD for Mr Hornak relating to loading are as follows.

Paragraph 6.64 of the EVJD for Mr Hornak; opening a trailer roller shutter door

349 Paragraph 6.64 of the EVJD for Mr Hornak concerned what a loader had to do to open a closed roller shutter door on a lorry trailer that had been parked at the loading bay. The respondent's proposed words by the time of the hearing before us were as follows.

> "To do that, the job holder leant across a gap (approximately 6-8 inches) between where he was standing on the edge of the Bay and the back of the Trailer. The job holder reached across that gap, bending down on one knee to release the Trailer door handle before pulling it up as he moved into a standing position and securing it into the Trailer roof."

350 The claimants proposed amendments to those words on the basis that the respondent over-stated the requirement by using the word "lean" when "reach" would be more accurate. In a number of places in the training materials before us, the task of opening the trailer shutter door was referred to only as "[opening] the trailer shutter using the 'D' handle" (for example D9/374/2; "Know Your Stuff For Grocery/Non-Food Good[s] Out – Loading Units of Delivery"). However, at D9/383/2 ("Know Your Stuff for Grocery/Non-Food Goods Out – Bay Door Equipment"), immediately under the heading "Operating A Dock Leveller", this was said.

> "If the trailer has a shutter door and it is closed, stand on the dock leveller and open it slowly with the handle, using the correct manual handling techniques."

351 In fact, we had ourselves seen a trailer in place when we carried out our site visits on 13 April 2023. In the circumstances, we agreed that the claimants' proposed words were a better reflection of the reality, but we also thought that the words of D9/374 and D9/383 which we have quoted added to the picture materially.

Paragraph 6.69 of the EVJD for Mr Hornak; operating the dock leveller

352 The claimants objected to the following words in paragraph 6.69 of the EVJD for Mr Hornak (they related to ensuring that the dock leveller overlapped with the floor of the trailer by at least 100mm across the full width of the trailer "to ensure a safe platform for MHE carrying Stock into the Trailer").

> "If not, the platform could slip, risking damage to Stock and MHE, as well as injury to the job holder.

353 Question and answer 4 on page 4 of D9/383 were in these terms.

> "Why is it important for the dock leveller to have sufficient overlap onto the base of the trailer?

– To stop the dock leveller slipping off the trailer when cages or mechanical handling equipment pass over it."

354 That question and its answer supported the words used by the respondent. However, at least one effect of cages or MHE slipping or falling was obvious: the possibility of harm to a cage and its contents and to the MHE. The need to guard against that was obvious. The possibility of injury to a loader was less obvious, but in any event, of course there was always the possibility of personal injury through MHE or something which it was carrying slipping. This particular dispute therefore seemed to us to be pointless because the opposed words in our view did no more than state the obvious. Thus, they could just have been ignored by the claimants, just as we thought that the IEs and we could ignore them because they added nothing material. On the other hand, taking them into account was informative, so that there was nothing wrong with them being taken into account on the basis that they did not describe any part of a loader's work for the purposes of section 65(6) of the EqA 2010, although they did help the reader to understand an aspect of that work.

A discussion; an illustration of (1) how the parties' approach to the factual issues before us was deficient and (2) what in our view they should have done

355 Having said those things, if the respondent had just referred to the final three boxes in the section on page D9/383/2 headed "Operating A Dock Leveller", then it would have stated sufficiently and incontrovertibly what was involved in the task of operating a dock leveller. We add that while D9/383 suggested that there was no requirement for the overlap to be "at least 100mm (4 inches)", as claimed in paragraph 6.69 of the EVJD for Mr Hornak, but merely "sufficient ... to prevent [the dock leveller] from slipping off as the trailer [was] loaded or unloaded", at D2/3/14, to which we refer in paragraph 88 above, it was said in column 3 that "sufficient overlap" for the dock leveller was "at least 10cm". We add too that while in paragraph 6.71 of that EVJD for Mr Hornak there was a description of what the loader was required to do by way of checking that the trailer had been reversed into the bay at the correct angle, and what was required if that had not happened, there was a description on page 3 of D9/383 of what to do if the trailer was not "straight onto the bay", in the following question and answer.

"What should you do if the trailer is not straight onto the bay, is too high or the dock leveller does not overlap far enough onto the base of the trailer?

• Close the bay door and then contact your Team Manager or the Goods In Clerk making sure you tell them which bay you are working on and what the problem is. They will then speak to the Driver or Shunter and ask them to move the trailer into the correct position."

356 Paragraphs 6.66-6.67 of the EVJD for Mr Hornak also referred to the need to check to ensure that the trailer was correctly aligned with the dock leveller. Paragraph 6.68 was blank by the time that the EVJD was finalised. However, the section dealing with

the dock leveller went on to paragraph 6.72 inclusive. We should say, however, that paragraph 6.72 stated the time that it would usually take for the trailer to be moved, which was irrelevant, but also stated that the loader would then start planning and collecting his load, which might have been relevant, but also cross-referred to paragraph 6.107. In any event, the EVJD dealt with the issue of the dock leveller in six paragraphs which were in our view unnecessary when seen against the background of the existence of D9/383, and that document also dealt sufficiently with the issue of opening the bay door, opening the trailer's doors, and closing those doors. The latter things were dealt with in paragraphs 6.58-6.65 and 6.292-6.296 of the EVJD for Mr Hornak. No party referred us either before or in closing submissions to D9/383 or its equivalent in relation to a fresh DC, which was D9/385, (although, as we say in paragraph 79 above, the respondent, in its recast case, did refer in several places to D9/385, but only by way of support for what was already in the EVJD for Mr Pratt). In our view, that document should have been the starting point for a discussion between the parties about what was the work of going to a loading bay and opening the bay door, opening the trailer door if it was not already open, operating the dock leveller and then putting away the dock leveller and closing those doors. The parties would then have been able to see whether any oral evidence was required to add to what was in that document as a statement of what was required by the respondent of a loader. We doubted very much that anything more was required by way of work and we therefore suspected that there would not have needed to be any further evidence in that regard. That was not least because we doubted that the IEs or we would need to know more than what was stated in D9/383 and D9/385.

<u>Paragraph 6.72 of the EVJD for Mr Hornak; what happened if a trailer had to be repositioned</u>

357 In contrast to the dispute about the content of paragraph 6.69 of the EVJD for Mr Hornak, to which we refer in paragraph 352 above, the dispute about the content of paragraph 6.72 of that EVJD was about something that was material. The words of paragraph 6.72 were about what happened if Mr Hornak (and, in fact, Mr Davis and Mr Macko, all of whom had the same words in the EVJDs for them) had any concerns about the positioning of the trailer at the bay door. According to paragraph 6.72:

> "Where that happened, it would usually take 10 - 20 minutes for the Trailer to be moved, which the job holder used to start the planning and collection of his load (see paragraph 6.119)."

358 Instead, the claimants proposed these words.

> "Where that happened, it would usually take 10 - 20 minutes for the Trailer to be moved, and the job holder would normally be given another load."

359 Those proposed words of the claimants were based on what was said by Mr Hornak, Mr Davis and Mr Macko in cross-examination. We concluded that the proposed words encapsulated what all of those three witnesses had said in cross-examination

about the situation. We therefore accepted it as an accurate statement of what occurred. Having said that, we rather doubted that the IEs or we needed to know that. That was because it was about what others would do, not what the loader would do, and we could not see how those factual circumstances could affect the determination of the value of the work of a loader. We consider separately, in paragraphs 432-439 below, the question of the extent to which a loader might need to plan the load.

Paragraph 6.75 of the EVJD for Mr Hornak; preparing to load

360 The dispute about paragraph 6.75 of the EVJD for Mr Hornak was about a minute (i.e. very small) matter. The one thing in dispute was whether "the job holder had to check the internal condition of the Trailer to ensure it was" "safe" or (as the claimants asserted) "ready" "for him to start his load". That was done by looking to see what, if anything, there was in the trailer by way of rubbish such as cardboard or used/discarded packaging. So, the dispute was about whether the word "safe" or the word "ready" should be used.

361 We concluded that it did not matter what word was used. In any event, the task of the job-holder in this regard was stated accurately and succinctly at D9/374/2, in this way.

> "Before you begin loading, check that:
>
> • The trailer is undamaged, clean, dry and free of any debris.
>
> ...
>
> If there is a problem when checking the trailer, report it to the Team Manager."

362 The reality was that if the trailer was damaged, dirty or wet, or there was debris in it, then it might well not be safe to use. And if it were unsafe to use then it would also not be ready to be used. But whatever the justification for the requirement to check for damage, dirt, fluid and debris, we presumed that there was a need to do something practical (as well as reporting it "to the Team Manager") if there were damage to, or dirt, fluids, or debris in, the trailer. However, it was not stated what might need to be done if the loader found that the trailer was damaged, dirty, or wet or that it had debris in it (in addition to reporting it to the team manager). Using common sense, we could see that if there was debris in the trailer then it probably could have been cleared by the loader himself. If there was damage to the trailer then the loader might have had to judge whether the trailer needed to be repaired before it was used. However, we could not see that being something which the loader would have been required to decide. Rather, we concluded, it would in that case have been necessary for the loader only to report the damage to a manager. If there was dirt in the trailer, then we could see the loader cleaning it up if it was minor, but otherwise the loader would be required to inform his manager, who would then decide what to

do (such as calling in what the respondent called a "hygiene" team to clean up the trailer). If there was water on the floor of the trailer, then, we thought, it might be minor, and the loader might be able to remove it, but if that were not possible then, we thought, the loader would be required to report the water to a manager, who would then decide how to proceed. All of those things were consistent with the requirement to "report [a problem] to the Team Manager", as stated at D9/374/2.

363 Indeed, we could not see the respondent requiring a loader to load a trailer which was wet underfoot to any significant extent, if only because of the risk of slipping and the consequent risk of injury or damage to MHE, UODs, or stock. Surprisingly, that possibility was raised by the EVJDs for, and evidence of the respondent relating to, the comparators, in the manner to which we now turn.

Paragraphs 6.78-6.80 and 6.83 of the EVJD for Mr Hornak; preparing to load continued

364 Paragraph 6.78 of the EVJD for Mr Hornak as proposed by the respondent by the time of closing submissions was in these terms.

> "The job holder also ensured it was safe for him to start his load by checking the floor of the Trailer for signs of rainwater or occasionally, ice. The rear of the Trailers were open to the elements during deliveries to Stores. The job holder paid particular attention to signs of water ingress and/or spillages during periods of heavy or persistent rain or snow as during such periods, water ingress resulted in up to 4 (out of a total of 7) Trailers per shift requiring attention."

365 We noted the assertion in that paragraph that four out of seven trailers might need attention because of water ingress during periods of heavy or persistent rain or snow. Applying a little practical common sense, we thought that such ingress would have been expected to be dealt with when the trailer was dekitted. We return to the issue of dekitting in paragraph 386 below.

366 Paragraphs 6.79, 6.80 and 6.83 of the EVJD for Mr Hornak were in the following terms.

> "6.79 The job holder decided whether the extent of any water ingress inside the Trailer and/or on the Dock Leveller was something he could deal with himself or whether it necessary for the hygiene team to address the issue(s) (in which case, he reported it to the Loading Desk in the same way as described above).
>
> 6.80 Frequently, where unsure about the risk of his MHE slipping, the job holder decided to load all UODs by hand having positioned his Loading Truck immediately in front of the Dock Leveller, which he did to ensure his own safety and that of the stock he was loading."

> "6.83 If after having assessed the condition of the Trailer and/or the Dock Leveller, he started loading using his Loading Truck but the job holder

encountered any evidence of his Loading Truck slipping during the subsequent loading process, he stopped using the Loading Truck and used a Manual Pump Truck or Pedestrian PPT to load Pallets or non-wheeled MUs instead, as these MHEs were less likely to slip (particularly given the weight of these particular UODs)."

367 The evidence of Mr Rogers as recorded in lines 2-15 of page 71 of the transcript of day 21 was that he did not recognise the practice stated in paragraph 6.79 of the EVJD for Mr Davis. The words of that paragraph were different from those in paragraph 6.79 of the EVJD for Mr Hornak, as were the words of paragraph 6.80 of the EVJD for Mr Davis. Paragraphs 6.79 and 6.80 of the EVJD for Mr Davis were as follows.

"6.79 If the job holder was confident that the amount of any water ingress was so limited that it did not prevent the safe use of MHE within the rear of the Trailer, he placed waste cardboard over any damp areas to mitigate against the risk of accidents.

6.80 Where he chose not to do that, the job holder decided to load all UODs by hand having positioned his Loading Truck immediately in front of the Dock Leveller, which he did to ensure his own safety and that of the stock he was loading. He did this for Trailers with wet floors around 15% of the time."

368 Paragraphs 6.81 to 6.84 inclusive of the EVJDs for Mr Hornak, Mr Davis and Mr Macko were in precisely the same terms, namely as follows.

"6.81 Any spillages arising from damaged Stock would also be dealt with by hygiene team if the job holder was not able to deal with the issue quickly.

6.82 If ever he was waiting for the hygiene team, the job holder continued to prepare for his load (e.g., collecting UODs) or, if asked to do so by the Manager, would carry out a different task.

6.83 If after having assessed the condition of the Trailer and/or the Dock Leveller, he started loading using his Loading Truck but the job holder encountered any evidence of his Loading Truck slipping during the subsequent loading process, he stopped using the Loading Truck and used a Manual Pump Truck or Pedestrian PPT to load Pallets or non-wheeled MUs instead, as these MHEs were less likely to slip (particularly given the weight of these particular UODs).

6.84 The job holder loaded all other UODs by hand i.e. by pulling/pushing each of them off the lowered forks of the Loading Truck at the edge of the Dock Leveller, before manoeuvring them into the correct load and row position."

369 Paragraphs 6.77 and 6.78 of the EVJD for Mr Pratt were in different words but to the same effect. They were supported by paragraph 50 of the witness statement of Mr Yates. That paragraph was in these terms.

> "I confirm that paragraph 6.77 and 6.78 of Shawn's EVJD is an accurate description of what Shawn would be expected to do. I train loaders to check the condition of the floor of the Trailers prior to and during Loading and that they are personally responsible for their own safety whilst working in the Trailer. If there is a significant amount of water on the floor, then I train them to ask for the Hygiene Team to deal with it or that they can refuse to load the Trailer. They have to make the call. If, on the other hand, there is only a little water on the floor, then they can decide to continue to load the Trailer, with or without taking the Loading Truck into the Trailer, and I know that some loaders will do that. It is their call; and they are responsible if there is an accident subsequently and they have not reported it."

370 He was not cross-examined on that. Nor was Mr Pratt cross-examined on what he said in paragraphs 41 and 42 of his witness statement, which was that (1) paragraphs 6.77 and 6.78 of the EVJD for him were accurate, (2) it was his "call as to whether [he dealt with it himself] or reported it for the Hygiene team to clean", and (3) "[i]f there was still some water and it was slippery, [he] might choose to load the UODs by hand to ensure [his] safety and the safety of the Stock". The latter assertion was not a resounding endorsement of the proposition that Mr Pratt could, or should, as part of his job go onto a wet dock leveller with a wet trailer floor beyond it, pushing heavy cages. In addition, Mr Yates' evidence in paragraph 50 of his witness statement was that it was up to the loader to decide whether to take the risk. That too was not cogent evidence that the respondent required loaders to do what was described in for example paragraphs 6.80, 6.83 and 6.84 of the EVJD for Mr Hornak.

371 The exchange between Mr Rogers and Mr Jones KC at lines 4-15 of page 71 of the transcript of day 21 bears repeating in full here.

> 'Q. Can I ask, please, that you be shown paragraph 6.79 of the job description [for Mr Davis]. In fact, if we look at 6.78, we're dealing with what's described as water ingress inside the trailer or dock leveller, do you see that?
> A. Yes, I do.
>
> Q. And at 6.79, it says:
> "If the job holder was confident that the amount of any water ingress was so limited that it did not prevent the safe use of MHE within the Trailer, he placed waste cardboard over any damp areas to mitigate against the risk of accidents."
> Is that a practice you recognise?
> A. No.

Q. So what should happen if a job holder is faced with an amount of water ingress but thinks it's still safe to use MHE in the rear of the trailer?
A. He wouldn't use the MHE in the rear of the trailer. He would push the cages on by hand, I'd assume.

Q. So instead of using MHE, he would load by hand?
A. Hmm.

Q. If we look at 6.80 it says:
"Where he chose not to do that, the job holder decided to load all UODs by hand having positioned his Loading Truck immediately in front of the Dock Leveller ..."
A. Yes.

Q. "... which he did to ensure his own safety ..."
That's what you think he should do?
A. Yes.'

372 We found that to be unimpressive evidence. If the floor of a trailer was wet, then there was a risk of slipping, and in the circumstance that Mr Rogers did not recognise the practice stated in paragraph 6.79 of the EVJD for Mr Davis, there was no evidential support, in the form of any manager's approval of it, for it to be part of the work of Mr Davis, or any other loader, for the purposes of section 65(6) of the EqA 2010 to do what Mr Davis said he did, which was to put cardboard on the floor of the trailer. Nor was there any such evidential support for the proposition that a loader was required by the respondent to load anything onto a trailer the floor of which was wet.

373 There were some strong reasons for rejecting the proposition that either of those courses of action could be part of the work of a loader for the purposes of section 65(6) of the EqA 2010. The first was that the use of cardboard, i.e. cardboard which was left on the floor of the trailer, would give rise to a major risk of tripping or a UOD being parked on an uneven floor. If the cardboard was used to dry up the water, and it was then discarded, then that would be a different matter, as the result would be that the floor of the trailer would then be dry. But if the floor were dry then the LLOP or other MHE could safely be used and the practice asserted in paragraph 6.80 of the EVJD of Mr Davis, Mr Hornak and Mr Macko would not be necessary.

374 The second reason for rejecting the proposition that a loader could ever load a trailer which had water in it was that the water would be highly likely to get on the dock leveller, which was metal, making it highly slippery. That would give rise to such a risk to safety that the respondent could not have condoned it.

375 In fact, in paragraph 6.79 of the EVJD for Mr Hornak (and Mr Macko's job description was in the same terms in this regard), it was implicitly asserted that it might be possible to use the dock leveller safely even if it had water on it. That was contrary to

our experience merely of walking on wet metal drain covers: they can be very, very slippery just to walk on. If a dock leveller were wet, then it would be unsafe for all purposes, we thought.

376 In addition, Mr Rogers merely said that he "[would] assume" that a loader would "push the cages on by hand": not that he approved of that practice, or that the respondent would approve of that practice. We saw that he agreed with the proposition which was put to him by Mr Jones as recorded in the passage set out in paragraph 371 above, that Mr Davis "should do it", "to ensure his own safety". But that was a matter of moral or legal obligation, not of fact. In addition, it was simply a repetition of the words in paragraph 6.80 of the EVJD for Mr Davis, which were also in paragraph 6.80 of the EVJDs for Mr Hornak and Mr Macko.

377 However, in paragraph 55 of his witness statement, Mr Rogers specifically said that (1) he "[did] not train people to load by hand in these circumstances", (2) it was "each individual loader's decision if he chooses to do so" and (3) the loader might do it "because, although there were concerns about the MHE slipping, he wanted to ensure he was still productive". In cross-examination, Mr Rogers went further in that on pages 73-74 of the transcript of day 21, he said that he trained people not to do it. Not that he did not train them to do it, but that he trained them not to do it. After the first part of paragraph 55 of his witness statement that we quote at the start of this paragraph was put to him ("I do not train people to load by hand in these circumstances ..."), there was the following exchange (starting at line 3 of page 73).

> "A. That's the loader's choice. That's his decision.
> Q. Okay.
> A. If he felt it safe he would take full responsibility.
> Q. Good. So just so we're clear, when you say, "I don't train people to do it", you don't mean, "I train people not to do it", you mean you just leave it to them?
> A. I train -- I train people not to do it, and if they're uncomfortable in any situation where it's excessive water, they report it. If they feel comfortable in carrying out, they do so at their own risk, but they have to take extra care.
> Q. So, sorry, now I'm again confused because you said you train people not to do it.
> A. I train people not to -- I don't train people to do it. If -- if I was training and I came in with water I would not load on that trailer.
> Q. So -- all right. So far as you're concerned, then, if you -- if you were faced with water in the trailer --
> A. Yes.
> Q. -- you would get some one to dry the trailer effectively?
> A. I would get another loader. But I'm aware that other loaders decide to load where there is water ingress.
> Q. So your position would be, "I wouldn't do it, but if you do it, it's on your own head"?
> A. Yes.

Q. And you wouldn't do it because there's a health and safety risk?
A. Yes.
Q. But you let other people incur that health and safety risk?
A. Well, I'm not letting them. That's their choice. I wouldn't see them doing it.
EMPLOYMENT JUDGE HYAMS: But you're training them not to do it?
A. I'm training them not to do it."

378 We thought that that evidence could be read only one way: as showing that if a loader loaded a wet trailer then it was done without the approval of the respondent.

379 We saw that in paragraph 88 of his witness statement, Mr Pilley said this.

> "Although I cannot confirm how often it happened to Vlastimil or Martin, I confirm that paragraph 6.80 of the EVJDs is accurate. Where an Operative thought there may be a risk of slipping when operating the MHE, he could choose to load the UODs by hand."

380 That was unimpressive evidence also: it was not to the effect that the respondent approved of a loader loading UODs by hand where there was "a risk of slipping when operating the MHE". It was also expressly to the effect that he had not see either Mr Macko or Mr Hornak do that.

381 There was in the SSOW at D1/3/17 no reference to loading cages by hand. Rather, there were references only to loading using MHE. So, for example, at the bottom of column 6, this was said.

> "Loaders must never 'power-load' (filling a trailer with un-strapped UODs) before strapping. They must load one truck load of UODs at a time, position them correctly, strap them and then exit the trailer to collect further UODs."

382 In the next column, this was said.

> "When using a four (standard) cage loading truck it may be necessary to first manually reposition the last UODs (that are closest to the racking end of the bay) into the middle of the bay. This is in order to safely manoeuvre this longer truck without having to travel too closely to the racking."

383 That passage (the impact of which was not clear to us) indicated to us (although we could not be sure about this) that even if there were any manual repositioning of UODs, then they were still loaded using a LLOP.

384 Paragraphs 39-41 of the witness statement of Mr Hornak went into some detail about the extent to which he would load UODs by hand. Read carefully, what was said in those paragraphs did not support very strongly the proposition that Mr Hornak did in fact load anything by hand, at least by himself, despite the second sentence of paragraph 39. Even the support provided by Mr Pilley in paragraph 89 of his witness

statement for the proposition stated in paragraph 6.86 of the EVJD for Mr Hornak that the latter would be given support in the form of an additional colleague to load a trailer "around once a week", was not related to the trailer being wet.

385 We could not see in any part of the training materials before us any suggestion that a loader could load a trailer which was wet inside.

386 It occurred to us that there might be some evidence before us about the possibility of a dekitter leaving a trailer with water on the floor. We saw that Mr Pustula's work involved the task of dekitting as such, i.e. and not as an alleged part of the work of loading. We saw that in paragraphs 6.294-6.298 of the EVJD for Mr Pustula as it stood at the time of closing submissions, this was said.

> "Water and Fluid Spillages
>
> 6.294 The job holder also ensured it was safe for him to start Dekitting by checking the floor of the Trailer for any rainwater or other spillages, whether as a result of:
> (a) items of Stock falling from UODs etc.;
> (b) the Trailer's exposure to adverse weather conditions during unloading; or
> (c) moisture dripping from one of the Refrigeration Units positioned within the Trailer (10, 12 and 13 metre Trailers contained 3 separate Refrigeration Units).
>
> 6.295 Water ingress and/or spillages were an issue with roughly 25% of the Trailers arriving at the DC. If left unaddressed, this could cause the job holder to lose control of his MHE as a result of it slipping on the damp surface, potentially leading to damage to the MHE and other equipment, as well as injury to the job holder. The job holder experienced his MHE slipping once or twice a year.
>
> 6.296 During periods of wet weather, the number of Trailers affected by water ingress was significantly higher i.e., it could affect every Trailer arriving into the DC on that day. Cold and damp conditions also increased the risk of ice (including black ice) forming in and around the Bays, creating a significant slip hazard for the job holder.
>
> 6.297 The job holder also checked the condition of the Dock Leveller, which may also have been exposed to water or dampness from previous loads, or ambient weather conditions from outside exposure.
>
> 6.298 In both instances, the job holder decided whether it was safe for him to continue or whether it was necessary for the hygiene team to address the issue(s) instead. If so, he reported it to the Loading Desk who called for the hygiene team, something the job holder did on average once a shift."

387 That passage suggested strongly that the dekitter would not leave a trailer with water on its floor. It also supported the proposition that if a trailer was unsafe because there was spillage on its floor, then it would not be dekitted without first being dealt with by the hygiene team.

388 We saw that on the final page of the personnel file for Mr Pratt (D1/6/1039), there was an undated page headed "Night shift loading safety briefing", which Mr Pratt had signed to say that he had "read and understood the information above". That information was so far as relevant as follows.

> "Dear colleague
>
> Recently we have had a spate of accidents whilst colleagues are operating on the loading operation and in particular on the back of trailers, in almost every occasion when a thorough investigation has taken place it has been found that colleagues have not followed their training and strictly observed the SSOW.
>
> Therefore it is of paramount importance that we as a team ensure that these processes are followed at all times by everyone that operates within the loading operation. There are some key tasks that absolutely have to be observed to ensure that colleagues operate safely and avoid unnecessary injuries. To this end we need to continue to brief the following to everyone to ensure that these disciplines are ingrained and adhered to by everyone.
>
> • Check that the trailer is dry, clean and tidy and free of debris.
>
> ...
>
> • Most importantly, always follow your training and the SSOW."

389 In all of the circumstances, we concluded that if a trailer was wet inside, then it was either safe to load or it was not: there was no half-way house in which the loader could safely load cages by hand. In fact, we rather doubted that a loader would willingly load cages by hand when they could have been loaded using MHE, but that merely supported (albeit in only a small way) our conclusion that the respondent did not require loaders to load trailers the floors of which were wet to any material extent (which, if the trailer floor was metal, would mean wet to any extent). We also concluded that if the dock leveller were to any extent wet then it would not be safe to use. Therefore, we concluded, it was not part of the work of a loader to load trailers where the dock leveller was at all wet or the floor of the trailer was to any material extent wet.

<u>Paragraph 6.82 of the EVJD for Mr Hornak; more on preparing to load</u>

390 As we say in paragraph 368 above, this was said in paragraph 6.82 of the EVJD for all three ambient DC loaders (Mr Hornak, Mr Macko and Mr Davis).

> "If ever he was waiting for the hygiene team, the job holder continued to prepare for his load (e.g., collecting UODs) or, if asked to do so by the Manager, would carry out a different task."

391 The claimants proposed instead:

> "If ever he was waiting for the hygiene team, the job holder would normally be assigned another load or task by a manager."

392 We refer in paragraphs 432-439 below to the extent to which a loader needed to plan a load. We record here that (1) we suspected that the loader would not often need to "collect UODs", since they were, as we understood it, at least usually left at the loading bay when completed, and (2) in any event if it could not be known how long the hygiene team would take to arrive and clean out the trailer, then the respondent would be likely simply to give the job-holder another task such as another trailer to load. Having said that, being assigned another task was not a fact which it seemed to us was relevant to the determination of the work of a loader for the purposes of section 65(6) of the EqA 2010. That was because the circumstances in which the task was assigned would not be relevant unless the other task was atypical, in which case the circumstances would be relevant evidence relating to the frequency with which that other task was assigned. There was no suggestion here that any alternative assignment was to do untypical work.

<u>Paragraphs 6.84-6.86 of the EVJD for Mr Hornak (and Mr Macko: the EVJD for Mr Davis omitted some of that passage); loading</u>

393 We have set out paragraph 6.84 of the EVJD for Mr Hornak in paragraph 368 above, as it had to be read along with paragraphs 6.81-6.83 of that EVJD, with which it is set out there. Paragraph 6.84 was agreed. For convenience, we now repeat its terms.

> "The job holder loaded all other UODs by hand i.e. by pulling/pushing each of them off the lowered forks of the Loading Truck at the edge of the Dock Leveller, before manoeuvring them into the correct load and row position."

394 The agreement of the claimants to that paragraph was difficult to understand, given that there would (given the factors to which we refer in particular in paragraphs 224 and 293 above) be no need to push or pull a UOD "off the lowered forks of the Loading Truck at the edge of the Dock Leveller" (i.e. just as much as there would be no need to push a UOD <u>onto</u> the forks of a LLOP). The only pushing or pulling needing to be done would be done in the course of "manoeuvring them into the correct load and row position", assuming that there was such a correct position, which we rather doubted since we could see a need to do no more than put the

UODs onto the trailer and then to put them in the best place in practical terms in the manner to which we refer in paragraphs 432-439 below.

395 In paragraph 6.85 of the EVJD for Mr Hornak, this was said.

> "During the winter, this would happen on every second load (i.e. 2-3 loads per day); in the summer, it would happen on one load per day."

396 Those words were plainly based on the final sentence of paragraph 40 of Mr Hornak's witness statement, which was in these terms.

> "On average, however, I can say that I experienced problems with slipping 2-3 times per shift in winter and approximately once per shift in summer, as accurately stated in paragraph 6.85 of the EVJD."

397 However, if Mr Hornak experienced problems with slipping (without any stated qualification) when loading UODs in any way then the task of loading in those circumstances was likely to be being done unsafely. That consideration reinforced our view that loading UODs in the wet, in any way, was not part of the work of a loader for the purposes of section 65(6) of the EqA 2010.

<u>Paragraphs 6.88 and 6.89 of the EVJD for Mr Hornak; damage to trailer curtains</u>

398 The words of paragraph 6.88 of the EVJD for Mr Hornak were also in the EVJDs for the other two ambient DC loaders (Mr Davis and Mr Macko). (For the sake of simplicity, in what follows, unless we state otherwise, any reference to something in the EVJD for Mr Hornak about loading is to be read as applying to words to the same effect in the EVJDs for both of those other loaders.)

399 It appeared from what was said in cross-examination of Mr Rogers on day 21, as recorded at pages 75-78 of the transcript for that day, that the only relevant part of the work of a loader as stated in paragraph 6.88 of the EVJD for Mr Hornak was as claimed by the claimants. That was that Mr Hornak "was trained to report any damage or tear [to either of the canvas curtains on each side of the trailer] which was 2 inches or more". So, it was not part of a loader's work, as claimed paragraph 6.88 of the EVJD for Mr Hornak, to

> '[use] his experience to assess whether any damage (ignoring any minor tearing of 2" or less) was serious enough that it could, in his view, present a risk to the security of the load whilst on the public highway.'

400 On that basis, the assertion that there was any element of judgment in the matter for the loader to exercise was wrong, and that is what we concluded.

401 The claimants agreed the next paragraph of the EVJD for Mr Hornak, i.e. paragraph 6.89 (the equivalent paragraph in the EVJD for Mr Macko differed only in regard to the frequency of the event), which was in these terms.

> "Approximately once a month, the job holder reported a tear or damage to the Loading Manager who would also examine the Trailer and decide whether the Trailer was safe or should be taken off the road pending repair. Where that happened, the job holder would be allocated to another load or to partner with another Loader to help complete his load."

402 However, the cross-examination of Mr Rogers (interspersed with some questions from EJ Hyams) as recorded on pages 74-77 of the transcript of day 21 showed that the real reason for the canvas curtain on the side of a trailer was to protect the contents from the elements: not to stop something from falling out, although the curtain might stop something loose from falling out. So, the reason for identifying and reporting curtain tears of more than two inches in length was the protection of the respondent's products, not safety. Thus in this respect also, the respondent's case was overstated. Whether the content of paragraph 6.89 of the EVJD for Mr Hornak stated anything that we needed to take into account was, however, another matter. We failed to see how the content of that paragraph stated anything more by way of the demands of the work of a loader than paragraph 6.88, which was explicitly to be alert to tears of more than two inches in length, and (since there was no suggestion that a loader could repair them) implicitly to report them.

<u>Paragraph 6.92 of the EVJD for Mr Hornak; internal trailer straps</u>

403 In column 4 of the SSOW at D9/222, concerning "Loading – Strap 2000", this was said.

> "Before loading commences, the Loader should ensure that all straps are stowed away in the correct storage position to prevent MHE/cages from travelling over and damaging them on the trailer floor. Box trailer straps are hung by the strap's ratchet handle onto the stowage hook. Curtain sided trailer straps are hung by attaching the hook at the end of the strap to the upper hanging ring."

404 Paragraph 6.92 of the EVJD (as proposed, that is, by the respondent) was as follows.

> "Having replaced any damaged straps – which normally took about 10 minutes to complete – the job holder checked that all straps were stowed safely in the correct position along the side of the Trailer to prevent the Loading Truck or any UODs becoming tangled in a strap and falling over, potentially causing damage or injury, or causing damage to the strap itself."

405 The claimants proposed this text instead.

> "Having replaced any damaged straps – which normally took about 10 minutes to complete – the job holder checked that all straps were stowed in the correct

position along the side of the Trailer to prevent the Loading Truck or any UODs becoming tangled in a strap and falling over."

406 Not even that text was apt, in our view. That is for the following reasons. If leaving the straps out had led to a realistic risk of a LLOP, for example, or any other MHE, or a UOD, becoming entangled in the strap and falling over, then we would have expected that to be stated in the SSOW at D9/222. In any event, the relevant part of the work of a loader was to "ensure that all straps are stowed away in the correct storage position". If the purpose needed to be stated, then it was in our judgment as stated in the first sentence of the extract from D9/222 which we have set out in paragraph 403 above, and only as so stated.

Paragraph 6.94 of the EVJD for Mr Hornak, concerning dekitting in general

407 While we have already (in paragraph 333 above) said something which shows that statements such as that which was in paragraph 6.94 of the EVJD for Mr Hornak in our judgment added nothing material, we refer to that paragraph here not only to illustrate that general proposition but also because the claimants proposed some alternative words for it which we regarded as also unnecessary. The text of paragraph 6.94 of the EVJD for Mr Hornak was this.

> "When dekitting Trailers, it was part of the job holder's work to carry out that activity in such a way as to avoid the recognised hazards associated with it and the risks arising from those hazards – see paragraph 10.51 for further details regarding those hazards and the associated risks."

408 That was unnecessarily said primarily because it was obviously not a part of the work of a loader for the purposes of section 65(6) of the EqA 2010 to do dekitting unsafely. In addition, the words of paragraph 6.94 of the EVJD for Mr Hornak were too general to be of any use to us or the IEs. The claimants proposed some alternative words, which in our view also added nothing relevant to the determination either of the work of a loader or the conditions in which he did it, if only because they also were too general to be of any use to the IEs or us. Those words were as follows.

> "When dekitting trailers the job holder followed his training and if concerned about any issues reported them to a manager."

Paragraph 6.96 of the EVJD for Mr Hornak

409 The words of paragraph 6.96 of the EVJD for Mr Hornak as proposed by the respondent by the time of closing submissions were these.

> "In the large majority of Trailers the Dekitting had not been completed before the job holder arrived at the Trailer (Photo T27). Where that was the case, the job holder made the decision to remove the Cages himself rather than waiting for a Dekitter to attend the Trailer, because he knew it was more time efficient for him

to do the Dekitting himself and by doing so, avoid any delay to the load whilst waiting for a Dekitter to arrive. It took the job holder on average 10 - 20 minutes to dekit a Trailer."

410 The oddity of the situation was that that paragraph was preceded by this one.

"During the period the job holder was deployed on Loading duties, the Trailers should have been Dekitted i.e., all empty Cages and Pallets packed into the Trailer to be returned to the DCs (having been used in earlier deliveries to Stores) should have been removed from the Trailer, and both the Bay and Trailer doors left open to enable loading to start."

411 The proposition that "the large majority of" trailers were only partly dekitted before they were assigned to be loaded was difficult to accept, if only because it would suggest that the respondent's dekitting arrangements were seriously defective. Mr Pustula's EVJD contained this passage about the allocation of work to him as a dekitter.

"**Task Allocation**

6.265 When deployed on Dekitting, the job holder walked to the Loading Desk so that the Manager could identify the loading Bay(s) at which there were Trailers that needed Dekitting i.e., which contained empty Cages and Dollies (roughly 80%/20% respectively) (and occasionally) Pallets returned from stores.

6.266 The job holder was instructed (verbally by the Manager) to dekit one Trailer at a time, returning to the Loading Desk on completion of all those Trailers for further instruction i.e., either with the location of further Trailers requiring Dekitting or alternatively, if all Dekitting had been completed, being deployed to another activity.

6.267 The average time required to dekit a Trailer was 15 - 20 minutes."

412 Dekitting was dealt with in relation to ambient DCs by D9/379, to which we refer in paragraph 88.2 above. If a trailer had been dekitted in accordance with that training document, then the trailer would have been completely cleared of cages and pallets and it would have been swept clean.

413 But if it were not so cleared and clean, then what did the work asserted to be required as stated in paragraph 6.96 of the EVJD for Mr Hornak add to the demands of the work of a loader? As described in D9/379, there was a need to take out empty cages and pallets. In one place (just under the heading "Removing Cages" on page 3), it was said that the cages would need to be "[pulled] into position and then [pushed] off the trailer, five at a time". At D9/402/3 (to which we refer in paragraph 88.1 above), it was said that "[r]emoving cages is done by hand," and that that was done by pulling

cages together in groups of five and then pushing them off the trailer and onto the loading bay. However, lower down the page on D9/379/3, it was said that

> "Mechanical handling equipment may be used to unload empty cages from single deck trailers, however the maximum number of empty cages that should be removed in this manner is 10."

414 In any event, (1) the work of removing cages from trailers was at least similar to that of loading the trailers and (2) if the loader did the work of dekitting, then it was as shown by D9/379, and there was no need for the detailed statement of the work in paragraphs 6.96-6.103 of the EVJD for Mr Hornak, unless there was something missing from D9/379.

415 We saw that in paragraph 6.99 of the EVJD for Mr Hornak, this was said.

> "Cages were stacked according to the colour of their base i.e. blue Cages were stacked together, black Cages were stacked together and red Cages were stacked together. Only once stacked was it safe for the job holder to insert the forks of his Loading Truck underneath them, before lifting and transporting them over the Dock Leveller and onto the Bay."

416 That implied that the loader would need to stack the cages. However, in the preceding (and in fact agreed) paragraph, this was said.

> "When Dekitting, the job holder worked mostly inside the rear of the Trailer. First, he removed the strapping used to secure the Cages (the Cages having been folded into a closed position and organised into nests according to the colour of their base) inside the Trailer during transit."

417 The policy and procedure documents to which we refer in paragraph 88.3 above (D9/577 and D9/618) referred in row 24 of the procedure section (at page 6 and page 5 respectively) to manually moving cages "one nest at a time" and then placing them "on the bay". At the top of the next page, in row 27, it was said that the "loose equipment and returns" should be moved "using MHE from the bay to the appropriate storage area", and that empty cages should be loaded "two nests" at a time and then moved "to the nearest empty cage storage area". There was no suggestion there (or anywhere else in the training materials before us) that the dekitter had to separate out the cages into their different types. We suspected that that was because only the same kind of cage could be nested together, so that nested cages were already sorted.

418 The next step, stated in row 28 on pages 7 and 6 respectively of D9/577 and D9/618, was this: "Continue to unload loose equipment and returns until the trailer is empty – following steps 22 to 27".

419 Indeed, the whole of that document suggested very strongly that if a dekitter started the job of dekitting, then it would be finished as stated both in that document and in D9/379. In addition, there was no suggestion in the part of the document of which we have set out part in paragraph 361 above (D9/374) that a trailer might not have been dekitted. Indeed, at the bottom of page 2 of that document (i.e. D9/374/2) this was said.

> "***Trailer Details***
>
> Trailers are generally allocated to loads before you start loading. If you key in incorrect trailer details on your arm-mounted terminal, you will see a 'Wrong Trailer' message on your screen."

420 That suggested that the respondent's warehouse staff would not allocate a trailer for loading until it had been fully dekitted. We did not see the word "generally" in that passage as detracting from that suggestion.

421 It was in any event in our view highly unlikely that a trailer would have been only partly dekitted. We therefore looked at the EVJDs for the fresh DC comparators, to see what, if anything, was said in them about dekitting when loading (as opposed to dekitting as a specific, separate, task). We saw that only Mr Pratt referred to the possible need to dekit a partly-dekitted trailer. That was in the following passage of the EVJD for him.

> "6.88 During the period the job holder was deployed on loading duties, the Trailers should have been dekitted i.e., all empty Cages and Dollies packed into the Trailer to be returned to the DC (having been used in earlier deliveries to stores) should have been removed from the Trailer, and both the Bay and Trailer doors left open to enable loading to start.
>
> 6.89 In most cases (80%), the Dekitting had been completed before the job holder arrived at the Trailer. However, if not, the job holder assessed whether it was quicker to remove them himself.
>
> 6.90 The job holder usually did that where there were no more than 3 stacks i.e. a maximum of approximately 24 to 30 Cages (or the equivalent volume in Dollies, Trays, MUs etc.), but where there was more than 3 stacks, the job holder reported the issue to the Loading Desk to ask that a Dekitter be called to clear the Trailer.
>
> 6.91 When Dekitting, the job holder worked mostly inside the rear of the Trailer. First, he removed the strapping used to secure the Cages (the Cages having been folded into a closed position and organised into nests according to the colour of their base) inside the Trailer during transit.

> 6.92 Cages were stacked according to the colour of their base (i.e., blue Cages were stacked together, black Cages were stacked together and red Cages were stacked together) before the job holder placed them onto the forks of his Loading Truck and removed them from the Trailer."

422 We saw, incidentally, that that passage might be regarded as being unclear since it did not say in terms whether or not Mr Pustula himself had to do anything to ensure that cages were stacked "according to the colour of their base". However, if it were read (as it could be) as a statement they had already been so stacked then it supported our suspicion that paragraph 6.99 of the EVJD for Mr Hornak, which we have set out in paragraph 415 above, was misleading in so far as it suggested that Mr Hornak (or any other loader) might have needed to sort cages before removing them from a trailer.

423 There were two other salient features of the passage from the EVJD for Mr Pratt which we have set out in paragraph 421 above which bear mentioning here. The first is that it was odd that it was suggested in that passage that there might be a need for "a Dekitter [to] be called to clear the Trailer". That was because in the asserted circumstances, there would already have been a dekitter, who would, in those circumstances, have left the trailer only partly dekitted. The second is that, contrary to the claim (1) made in paragraph 6.96 of the EVJD for Mr Hornak (which we have set out in paragraph 409 above), (2) repeated in the same numbered paragraph of the EVJD for Mr Macko, and (3) stated slightly less emphatically in paragraph 6.95 of the EVJD for Mr Davis, that in the "large majority" or (as per Mr Davis's EVJD) simply "the majority of cases", "the Dekitting had not been completed" (or, in the case of Mr Davis: "fully completed") by the time that the comparator arrived at the trailer, in the case of the fresh DC at which Mr Pratt worked, the dekitting would be fully completed at least 80% of the time.

424 The cross-examination of Mr Pratt (on pages 116-117 of the transcript of day 29) was about paragraph 47 of his first witness statement, and in substance he simply confirmed what he said in that statement. That paragraph was in these terms.

> "The Trailer ordinarily should have already been Dekitted ready for Loading but sometimes (about 20% of the time) there were still some empty Cages that needed to be dealt with. This happened, for example, if I had arrived at the Trailer for Loading before the Dekitters had finished."

425 So, that passage gave us a clue to the situation in which a trailer might not have been fully dekitted: where the dekitters had not yet finished dekitting it. But that possibility was difficult to contemplate: why, after all, might a dekitter leave the task only partly completed, when it took (as stated in paragraph 6.96 of the EVJD for Mr Hornak, which we have set out in paragraph 409 above, and paragraph 6.267 of the EVJD for Mr Pustula, which we have set out in paragraph 411 above) only 15-20 minutes to do in total? Certainly, the only other document relating to dekitting before us, which related to fresh DCs, to which we refer in paragraph 88.1 above (D9/402)

only added to the evidence suggesting that that would not have occurred. That was because at the top of D9/402/4, this was said.

> "***Empty Trailer***
>
> Once the trailer is empty, hang any remaining trailer straps on the inside of the trailer. Make sure they are secure by clipping them at the top and bottom of the trailer.
>
> The trailer will then need to be swept out. You will need to collect a broom and dust mask from the bay storage unit so it can be cleaned. It will then be ready to be loaded with units of delivery for the next delivery.
>
> If you are not required to load the trailer, you will need to return the Mechanical Handling Equipment to its correct parking area."

426 We saw too that at row number 19 on page 3 of D9/146, to which we refer in paragraph 85.1 above and which was the June 2012 version of the document concerning the policy and procedure for paperless loading, this was said.

> "Check the floor is clean and free of any debris. The floor must be cleaned before loading commences. Report to any defect to the Warehouse Manager."

427 That document was updated in April 2013, the updated version being at D9/149/2-14. In row 27 at D9/149/6, this was said.

> "Check the floor is clean and free of any debris:
> - If the floor needs cleaning inform the warehouse manager who will arrange the cleaning staff to attend or defect the trailer".

428 The final version of that document before us, dated "2018-14", had similar words in row 30, at D9/141/7, namely:

> "Check the floor is clean and free of any debris:
> - If the floor needs cleaning inform the Warehouse Service Co-ordinator who will arrange the cleaning staff to attend or defect the trailer".

429 Finally, before coming to a firm conclusion on the evidence relating to a loader doing a partial dekitting job, we reminded ourselves of what we had said in paragraph 87 above. There, we set out the following extract from the "Trainers Note" at D9/357/3:

> "Inform your trainee(s) that on occasions they may be required to ask a team member to dekit their own trailer. In doing this they must ensure that the correct job card has been swiped, allowing the team member to move between tasks."

430 That was entirely consistent with the final words in the extract set out in paragraph 425 above: a loader might be given the task of (1) dekitting a trailer, and then, having done that, (2) loading it.

431 In all of the circumstances, we concluded that it was not normally part of the job of a loader who was not assigned specifically to dekit trailers, to dekit a trailer unless he was given that task to do in relation to the trailer which he was about to load. That meant that there was normally no discretion to exercise in regard to dekitting when the loader got to the trailer. The only possible exceptions to that rule were where (1) a trailer had been inadvertently omitted from the dekitting regime, or (2) a dekitter had been called away mid-dekit, and the loader's manager had failed to "ensure that the correct job card [had] been swiped [for the loader], allowing the [loader] to move between tasks". If, however, either of those things occurred, then one would have expected the loader either to (1) inform his manager that a dekitter was required, or (2) get authorisation for dekitting the trailer himself, in the process getting the "correct job card ... swiped". But even then, there was no question of the loader being required as part of his job to decide whether or not to unload the un-dekitted trailer without authorisation from his manager to dekit it.

Load planning: paragraphs 6.107-6.162 of the EVJD for Mr Hornak

432 We accepted that there was a need to plan the positioning of UODs on the trailer onto which they were to be loaded. The planning of a load in an ambient DC was catered for by what was said in the following parts of the training materials before us:

432.1 the final three columns of D1/3/17 (to which we refer in paragraphs 70 and 71 above, as well as elsewhere);

432.2 pages 3 and 4 of D9/374, from the heading "Trailer Weight Distribution" on page 3 up to the end of page 4 (to which we refer in paragraphs 80 and 81 above);

432.3 rows 27 and 28 of the policy and procedure document concerning loading on page 4 of D9/146 (to which we refer in paragraph 85.1 above);

432.4 rows 36 and 37 of the updated version of that document at D9/149/7 (row 36 being a little more informative than row 27 at D9/146/4);

432.5 rows 40 and 41 of the further updated version of that document at D9/141/8-9; and

432.6 pages 4-5 of D9/382, to which we refer in paragraph 92.8 above.

433 Reference was made in a number of places in those training materials to the "Composite Loader Assistance System User guide", but that document was not in the bundle before us.

434 It was submitted by the claimants that the detail in paragraphs 6.107-6.162 of the EVJD for Mr Hornak was an over-complication and an exaggeration of the difficulty of planning a load. We agreed. We have set out in paragraph 80 above the key passage in the key document stating how loading should be planned. Immediately below that passage, i.e. in the middle of D9/374/3, the number of cages which could be fitted into the six kinds of trailer (we use that term to refer to the loading area of any vehicle, including rigid ones) used by the respondent for loading at the time when that document was written, was stated. The biggest single-deck trailer was a 13m trailer, and it could take a maximum of 45 cages. The smallest trailer was on a "rigid" vehicle, and its maximum capacity was 24 cages. In the case of the latter vehicle, there would be a need for "[a]t least six to nine light cages ... on both the front and rear of the trailer". That left room for a maximum of 12 heavy cages or other heavy UODs in the middle of a rigid vehicle, and the planning of that load will, it seemed to us, have been reasonably straightforward.

435 In the case of a 13m trailer, if there were nine light cages at the front and nine light cages at the rear of the trailer, there would still have been room for 27 heavy cages in the middle. The loading of a 13m trailer will therefore have been less easy to plan. However, the labels on the cages stated whether the cage was light, medium or heavy in weight. That was clear from D9/374/9, where were these two questions and answers.

> '7. Where should light cages be placed on the trailer?
>
> - At the front and rear.
>
> 8. Where should you put any pallets?
>
> - You should try to put them at the mid point of the trailer secured by cages.
>
> - Unit of Delivery labels display a weight indicator on them (light, medium or heavy), loaders can use this to aid their identification of "light" cages to load at the front of the trailer.'

436 At D9/374/4, this was said under the heading "Loading Pallets".

> "Pallets should be loaded at least 9 cages (3 rows) back into the trailer so that they can be safely unloaded onto a tail-lift using a pallet truck by the Driver at a tail-lift delivery store, without the Driver having to walk onto the tail-lift to conduct the turn. The only exception should be for unusually shaped pallets (for example a pallet with a single flat-screen TV on it) which may need to be loaded last in order to maintain overall load integrity."

437 Those were not all of the relevant parts of the relevant documents, but they were the most important ones from the point of view of determining what were the demands of the work of planning a load. We have not set out in full the contents of pages 3-4 of D9/374, but all of that section was relevant.

438 Taking those documents and in particular the parts of them to which we refer in the preceding paragraphs above into account, it seemed to us to be clear that a loader was not required to exercise much judgment in the planning of a load. He would know from the labels on the UODs whether they were heavy, medium or light. He would know that the heavy items had to be in the middle of the load, where pallets also needed to be placed. He would also know that there needed to be at least six to nine light cages at the front and rear of the trailer.

439 That did not mean that the loader was not required to exercise care: it was clear that the loader had to be particularly careful to ensure that the weight of the load was distributed evenly, with the heaviest part of the load in the middle of the trailer.

440 In the light of those materials and conclusions, we made the following findings about the disputed details asserted in paragraphs 6.107-6.162 of the EVJD for Mr Hornak.

Paragraph 6.109 of the EVJD for Mr Hornak; loader's responsibility (or otherwise) for the weight of a loaded trailer

441 Paragraph 6.109 of the EVJD for Mr Hornak was in these terms.

> "Whilst the job holder did not know the maximum weight capacity of the Trailer (in tonnes) the job holder used his experience to assess whether the combined weight of UODs allocated to his load was such that it risked exceeding the maximum weight capacity of the relevant Trailer."

442 We did not accept that that paragraph was an accurate statement of what a loader was required to do. The loader was, rather, simply required to load the UODs which were identified on his AMC. We saw no requirement in the training materials for the loader to consider whether the intended load might be too heavy for the intended trailer. If the loader thought that that might be the case then the question whether something should be done to change the situation was (we concluded, given all of the training materials and the evidence to which we refer below about this) one for the loader's manager and not the loader. If the loader raised the question with his line manager, then he was doing his job well. Did that add anything material to the demands of the job for the purposes of section 65(6) of the EqA 2010? We were not sure, and decided that if the IEs thought that it was relevant, then they could take it into account.

Paragraphs 6.110 and 6.111 of the EVJD for Mr Hornak; knowledge of the approximate weights of UODs and the need to maximise "load efficiency" by "condensing"

443 Paragraphs 6.110 and 6.111 of the EVJD for Mr Hornak were superfluous in the light of (1) the question and answer from D9/374/9 set out in paragraph 435 above and (2) the fact that condensing was dealt with separately in the EVJD (as shown from what we say in paragraph 471 onwards below). We refer further to the content of paragraph 6.111 of the EVJD for Mr Hornak in paragraphs 577-579 below.

Paragraph 6.112 of the EVJD for Mr Hornak; the claim that Mr Hornak swapped UODs between loads

444 We saw no evidence in the training materials before us to justify the assertion in paragraph 6.112 of the EVJD for Mr Hornak that a loader might swap UODs between loads. We could not see how that could work, in any event, unless there were two vehicles going to the same store on the same day. (In fact, what was said in paragraph 6.276 of that EVJD, to which we return in paragraph 518 below, showed that it would be possible only if there were another vehicle going to the same destination before the end of the loader's shift.) Mr Rogers accepted in cross-examination (in the passage recorded at pages 17-19 of the transcript of day 20) that "swapping UODs" had "never been in the training programme". He said that at line 15 on page 18. He then said (in his next sentence) that it was "just an operational function that becomes part of the role". In the rest of that part of the cross-examination of Mr Rogers, no suggestion was made that the AMC had a function which permitted changing a UOD from one load to another. There was, however, a possibility of using the AMC to move a product from one UOD to another, but that was where the UOD was part of the same load. That possibility was stated and described in the document relating to fresh DCs at D9/395, to which we refer in paragraph 92.5 above. At D5/2/113, there was a print-out of a page of an AMC user guide (it was page 4-21) which referred to moving a UOD, but only for a marshaller. The entry was in these terms.

> '**4.14 MOVE UOD**
>
> When a Marshaller wants to change the current location of one or several UODs to a different Warehouse Point, he selects the "Move UOD" function from the Marshalling Special Functions Menu. When the Marshaller selects this function, the screen described in section 3.14, "MOVE UOD" is displayed.'

445 The section starting "3.14 MOVE UOD" was at D5/2/72-75. That was stated specifically to apply to "[moving] UODs from one warehouse point to another". We could not see how that could be done by a loader without authorisation from a manager. That was accepted by Mr Davis in cross-examination on day 24, as recorded at pages 66-69 of the transcript of that day. In addition, at page 69, line 7, Mr Jones KC put it to Mr Davis that that could only happen where there was another load headed for the same store, and Mr Davis said that that was correct. He also agreed, as recorded on page 68, that "a trailer would only be too heavy where something unusual had happened where something had been left off an earlier load

and you'd been asked to include it or a heavier ... UOD had been identified as something that needed to be prioritise[d] and inserted into a load".

446 That was in accordance with our understanding from the evidence before us, which was that the respondent's computer system knew what the combined weight of the intended load of a vehicle was, so that no vehicle would have been overloaded if it had been loaded only with those things which were intended by the system to be loaded.

447 We therefore concluded that the factual assertion of the claimants about what was said in paragraph 6.112 of the EVJD was correct, and that the content proposed by the respondent for that paragraph was misleading and inaccurate in so far as it suggested that the job-holder was authorised himself to decide whether or not a UOD should be moved to another load. Thus, as far as moving a UOD to another load was concerned,

> "[a]lthough the job holder was not trained to swap UODs between loads, he would on occasion do this with the agreement of the [relevant] manager."

Paragraphs 6.115-6.117 of the EVJD for Mr Hornak; more about moving UODs

448 We agreed with the claimants, if and to the extent that they submitted that the content of paragraphs 6.115-6.117 of the EVJD for Mr Hornak was a repetition of other parts of the EVJD. That was in fact self-evident, but by way of explanation we record here that the cross-examination of Mr Evans starting at line 17 on page 21 of the transcript of day 20 showed that he agreed that a UOD could be moved from a load only by agreement with a manager. That was sufficient for the purposes of the IEs and us in relation to the movement of a UOD. (We observe here that the fact that Mr Evans was cross-examined on that issue by reference to paragraph 6.279 of the EVJD for Mr Davis was a result of the repetition and over-complication of the EVJDs for the comparators. That issue of movement of a UOD should have been dealt with in only one place, and, assuming for this purpose that they were relevant, the number of reasons for asking for the agreement of a manager to such a move should have been grouped together.)

Paragraphs 6.119-6.122 of the EVJD for Mr Hornak; initial steps in the loading process, including topping, shrink-wrapping and condensing

449 We thought that the claimants' proposed words for paragraphs 6.119-6.122 of the EVJD for Mr Hornak were apt, or accurate. The words which the respondent proposed for the paragraphs were, in contrast, in our judgment inaccurate in so far as they suggested, or implied, that the loader would make a decision about whether or not a particular UOD would be removed from the load. That, it was clear from the answers given by Mr Evans to questions asked of him as recorded in the passage from line 10 on page 26 to line 7 on page 36 of the transcript of day 20, was not a matter of discretion for the loader, but for the loader's manager.

Paragraph 6.123 of the EVJD for Mr Hornak; the kinds of UODs loaded over a 5-day period

450 Paragraph 6.123 of the EVJD for Mr Hornak contained an assertion about the mix of UODs loaded over a 5-day period. We thought that the content of that paragraph said nothing material. Thus, while the claimants opposed it on the basis that it was not based on any evidence, and we happened to agree with that proposition, we concluded that the paragraph was simply for current purposes meaningless, and should therefore be ignored.

Paragraph 6.125 of the EVJD for Mr Hornak; the kinds of UODs used during the relevant period

451 Similarly, we failed to see why it was necessary for the kinds of UODs used by the respondent during the relevant period to be the subject of a finding of fact made by us for the purposes of determining the work and its demands of a comparator within the meaning of section 65(6) of the EqA 2010.

Paragraphs 6.129 and 6.130 of the EVJD for Mr Hornak; the number and mix of cages that could go in a row

452 We thought that the precise mix of cages that could be put in a row on a trailer was at best of only marginal relevance and that the only relevant issue was the difficulty of fitting them in. That difficulty was in our view sufficiently stated by the words of paragraphs 6.129 and 6.130 of the EVJD for Mr Hornak which, we discovered from the respondent's written closing submissions (contrary to what was in the claimants' written closing submissions) were agreed in full. We have set out paragraph 6.130 in paragraph 509 below, for reasons which are stated in that paragraph.

Paragraph 6.133 of the EVJD for Mr Hornak; how pallets could be loaded

453 It was sufficient for the IEs and us to know that two pallets could be loaded side-by-side in "landscape" position (looking at them from the front) on a trailer. The words which the claimants opposed in paragraph 6.133 were (we agreed with the claimants) superfluous, and a repetition of the contentions which were made in paragraphs 6.110 and 6.111 of the EVJD for Mr Hornak, with which we deal in paragraph 443 above.

Paragraph 6:135 of the EVJD for Mr Hornak; what to put on a row with only one pallet in it

454 We could not see that it would be necessary for the IEs to know (and therefore relevant) that if a loader had an odd number of pallets to load, then the loader would have to load (for example) a heavy cage next to it. That was one of many details which we thought it could not possibly assist the IEs or us to know. It could not, as far as we could see, affect the assessment of the demands of the job.

Paragraph 6:136 of the EVJD for Mr Hornak; the "multitude of potential combinations"

455 Paragraph 6.136 of the EVJD for Mr Hornak was about the multitude of combinations that were possible when loading. The word "multitude" was too general to be of assistance, but then again so was the whole of paragraph 6.136.

Paragraph 6.137 of the EVJD for Mr Hornak; the impact of the respondent's guidance

456 We agreed with the claimants' description of the impact of the respondent's guidance on "the different ways in which UODs could safely be loaded onto Trailers", preferring it to the respondent's proposed words for paragraph 6.137 of the EVJD for Mr Hornak. Thus, we agreed with the claimants that if a loader was uncertain about how to load something then he was obliged to "seek advice from a manager" rather than "decide – using their own judgment and discretion" how to do it.

Paragraphs 6.138 and 6.139 of the EVJD for Mr Hornak; recognising common UOD combinations and a claimed requirement for mental mathematics

457 Paragraphs 6.138 and 6.139 of the EVJD for Mr Hornak had to be read together, and the combination of them was one of the most hotly-contested factual issues relating to the work of the comparators. The respondent's proposed words for paragraphs 6.138 and 6.139 were as follows.

> "6.138 Based on his experience, the job holder was able to recognise some of the UOD combinations more routinely used and recall the ways in which those combinations could normally be loaded into the respective Trailers (depending on the size of each Trailer)."
>
> 6.139 In all other cases [that is to say, not routine ones], the job holder's initial load planning assessment required him to use mental maths to work out for himself the most logical way to position the UODs within the Trailer. This was a series of additions and multiplications based on the number of each UOD type allocated to the load and how many of them could fit within the relevant Trailer size and within a single row and/or be mixed with other UOD types."

458 The claimants asserted that that was an exaggeration, and we agreed with the claimants in that regard. The planning of a load was shown by the documents and considerations to which we refer in paragraphs 432-439 above. The claimants' proposed words for paragraphs 6.138 and 6.139 (since they asserted that the latter should be deleted altogether) were stated in their closing submissions as replacement words for paragraph 6.138. The claimants submitted that their proposed words "reflect[ed] oral evidence and training materials". In our view, the training materials spoke for themselves and the claimants' proposed words were an unnecessary simplification of what was said in the training materials.

459 If the IEs require us to make any further finding of fact about the mental processing required of a loader when planning a load, then they should say so in an application under rule 6(3) of the EV Rules.

Paragraphs 6.140 and 6.141 of the EVJD for Mr Hornak; the application of the claimed mental mathematics

460 In paragraph 6.140 of the EVJD for Mr Hornak it was asserted by the respondent that if there were, for example, "35 Cages, 3 Pallets, 4 Dollies, 2 Semi Pallets and 3 MUs", then the loader would need to use "mental maths to work out the row plan and/or what level of Condensing may be necessary to enable him to get everything into the Trailer". But that made no sense to us, given that

460.1 the respondent's computer system would have planned the load, so that the only thing that the loader could be required to do is work out what went where, and

460.2 the documents before us relating to condensing, to which we refer in paragraphs 471-473 below, showed that if a loader could not condense any UOD which was at a loading bay and as a result the UOD "had to be left off" the trailer, then the UOD would simply need to be (as stated for example at D9/630/2, row 13) "scanned and moved to the designated Late Cages area at the end of the loading process".

461 Paragraph 6.141 of the EVJD for Mr Hornak was expressly stated to be another way of putting paragraph 6.140 of that EVJD.

Paragraphs 6.142-6.145 of the EVJD for Mr Hornak; weight distribution

462 The content of paragraphs 6.142-6.145 of the EVJD for Mr Hornak was contested in part. The content of paragraph 6.142 as proposed by the respondent was this.

> "It was for the job holder to determine the order in which UODs were loaded on to each Trailer in order to ensure appropriate weight distribution."

463 The claimants proposed instead these words.

> "It was for the job holder to determine the order in which UODs were loaded on to each Trailer taking into account a number of factors including attempting to distribute weight evenly across the trailer ."

464 We preferred the claimants' proposed words for paragraph 6.142, since in our view they were a better reflection of the reality of how UODs had to be loaded onto a trailer, given the documents and factors to which we refer in paragraphs 432-439 above.

465 Paragraphs 6.143-6.145 of the EVJD for Mr Hornak concerned the weights of UODs. As we say in paragraphs 56-61 of our judgment of 12 July 2023, there was before us no evidential basis for the average weights of UODs. As a result, we agreed with the claimants' objection to the figure proposed in paragraph 6.145 of the EVJD for Mr Hornak (277kg for the average weight of a cage). In fact, the average weight of a cage seemed to us to be of no real assistance, since it was unlikely to assist the IEs in assessing the demands of a loader. It seemed to us that the weight range was more likely to be relevant. The weight range figures in paragraph 6.144 of the EVJD for Mr Hornak were agreed, and we saw no reason to doubt them.

Paragraphs 6.147 and 6.148 of the EVJD for Mr Hornak; loading a 12 or 13 metre trailer

466 The way in which to load a 12 or 13 metre trailer was the subject of paragraphs 6.147 and 6.148 of the EVJD for Mr Hornak. We could not see why the IEs needed to know what was in those paragraphs, given what was in the documents to which we refer in paragraphs 432-439 above. If there was anything additional arising from the parties' disagreement about the content of paragraphs 6.147 and 6.148 of the EVJD for Mr Hornak then it was to be found in the proposition of the claimants (read in the light of the approach which they should in our judgment have taken, which is why we have added the words in square brackets) that "[i]f the job holder had any concerns about the load, he would [be obliged to] raise these concerns with a manager." Even that, though, was in our view obvious.

Paragraph 6.149 of the EVJD for Mr Hornak: avoiding overloading the axles

467 We preferred the claimants' proposed words for what was required of a loader in regard to the distribution of UODs over the axles of a trailer. That is because it was not possible for a loader to "prevent" an axle being overloaded. Rather the loader could only try to avoid such overloading.

Paragraphs 6.151-6.153 of the EVJD for Mr Hornak; placement of UODs

468 Paragraphs 6.151-6.153 of the EVJD for Mr Hornak were unnecessary given the guidance given in the documents referred to in paragraphs 432-439 above. We say that even though it might be thought that paragraph 6.153 included a helpful statement of the frequency with which the difficulty described in paragraph 6.152 occurred ("on average twice a week"). That was because

468.1 the need to cater for different combinations of UODs and the need to follow the guidance in the documents to which we refer in paragraphs 432-439 above led to the inevitable conclusion that there was a need to think about the order in which to place the UODs which the loader's AMC told him had to be put on a trailer, and

468.2 the content of 6.152 of the EVJD for Mr Davis (which dealt with the same things as were the subject of paragraph 6.152 of the EVJD for Mr Hornak) as proposed by the respondent by the time of closing submissions was useful because it showed that a loader could depart from the guidance in those documents by loading heavy cages in the front row of a load of a rigid-sided trailer, but only with the agreement of a manager.

469 Thus, we concluded that all that the IEs and we needed to take into account here was that a loader had to comply with the guidance in the documents to which we refer in paragraphs 432-439 above, and if it was not possible to so then the loader was required to seek guidance from a relevant manager.

Paragraphs 6.154-6.162 of the EVJD for Mr Hornak; more on weight distribution

470 The final paragraphs in this section on load planning, paragraphs 6.154 to 6.162 of the EVJD for Mr Hornak, in our judgment added nothing material. We saw no point in resolving the disputes about them, and we thought that the claimants' opposition to their content was justified. If the IEs believe that there is a need to resolve any of the disputes in those paragraphs then they can say that to us via rule 6.3 of the EV Rules.

Paragraphs 6.164-6.171 of the EVJD for Mr Hornak; condensing UODs

471 Paragraphs 6.164-6.166 of the EVJD for Mr Hornak added nothing to the content of D9/378, to which we refer in paragraph 73 above. Paragraph 6.167 of that EVJD, where it was said that '[w]hen Condensing Cages as part of single store load, the Units could be moved to any available full-size Cage or any Slim Line Cage not already marked as "heavy" on the UOD Label' was also unnecessary to the extent that it was a statement only of what a loader could not do. However, if and to the extent that it added to the demands of the loader who was condensing by stating that the loader was required to read the label on the destination UOD, we saw that at page 3-73 of the AMC guide for loaders, it was said that if 'the destination UOD ha[d] been marked by Denver as a "Maximum Weight UOD", then' the AMC's screen would show "Cannot condense into a Maximum Weight UOD!"'. That suggested that there was a failsafe mechanism in place in relation to the weight of the destination UOD where the loader was moving a product, so that the safety of the weight of the destination UOD was not in issue.

472 Paragraph 6.168 of the EVJD for Mr Hornak was misleading in so far as it suggested that the AMC would be silent if the loader sought to put a product into the wrong UOD (i.e. for the wrong store). In that situation, the AMC would inform the loader of that fact: that was shown by the final box on page 3 of D9/378.

473 The documents at D9/580 and D9/630, to which we refer in paragraph 17.24 above, were a step-by-step statement of what condensing involved. That statement

supplemented the process described in D9/378 by stating it in more detail. We return to D9/580 and D9/630 in paragraph 578 below.

474 As for the wording of paragraph 6.171 of the EVJD for Mr Hornak, we saw that it was the same in the EVJD for Mr Macko, but rather different in the EVJD for Mr Davis, which contained some proposed new words. The claimants opposed those proposed new words on the basis that they were not covered by Mr Davis' evidence. For the following reasons, we concluded that that the proposed new words did not add anything material in any event.

474.1 The task of condensing was in substance the same as the task of re-stacking a cage, which was part of the job of an assembler, so that the job of a loader was to that extent the same as that of an assembler, and that was in our view a fact which it was helpful for the IEs and us to bear in mind.

474.2 The fact that condensing might be required was incontrovertible. The demands on a loader of the requirement to condense were discernible from the documents to which we refer in the three preceding paragraphs above, and apart from the proposed new words for the EVJD for Mr Davis, the evidence in paragraphs numbered 6.171 in the EVJDs for all three of the ambient DC loaders was probably helpful to the IEs and us in that it showed how long a loader might need to spend condensing.

474.3 We could not see how it could assist the IEs to know whether or not the respondent's proposed additional words were correct or not. That was for the following two reasons.

474.3.1 It was not said in the proposed additional words how often "the job holder was allocated a 'merged load'". Thus, those proposed additional words stated only a circumstance without giving the IEs or us the kind of information that could assist them and us to assess the impact in practice of a loader being required to deal with a "merged load".

474.3.2 We could not see a material difference for present purposes between condensing four loads every shift (as stated in paragraph 6.171 of the EVJD for Mr Hornak) and, as asserted in the proposed additional words of paragraph 6.171 of the EVJD for Mr Davis, "as much as every load during peak periods". That was because of the schematic at H31.

<u>Paragraphs 6.172-6.175 of the EVJD for Mr Hornak; multi-store loads</u>

475 Paragraphs 6.172-6.175 of the EVJD for Mr Hornak, which were under the heading "Multi Store Loads", needed to be read in the light of the guidance given on page 2 of D9/375, to which we refer in paragraph 82 above. On that page, it was said that

"Some loads need to be loaded in sequence and for others, the sequence is not important." The document continued: "This screen has the word 'MULTI' at the top right hand of the display." In fact there was no such display shown on that page, but what was said on that page showed that the AMC would give clear instructions about the order in which UODs should be loaded where the trailer was going to contain deliveries for more than one store. It also showed that the loader was not required to fit in all UODs which were stated by the AMC to be intended to be put on a trailer. That was because of the following words, which were in the penultimate box on page 2 of D9/375.

> "If you are unable to load the units of delivery, then you can press [P1] and deliver them to a holding area. You will scan the warehouse point or key in the relevant identification number."

476 In addition, the fact that there might be multi-store cages for an assembler to assemble (as shown by D9/223, to which we refer in paragraph 17.4 above, where it was said that *"You may have up to three stores, each with its own cage. You must carefully follow the terminal screen prompts to ensure that you assemble into the correct cage."*, and as shown in the final column of D9/193 and the photograph below it; we refer to that document in paragraph 26 above) meant that it was likely that the AMC would state the specific order in which multi-store delivery cages had to be loaded. The content of pages D5/2/25-26 (where we saw on the second of those pages the statement that "Stores are displayed in sequence order"), D5/2/138, D5/2/142, D5/2/154 and D5/2/156 provided some support for that conclusion. We bore it in mind that (1) we would not have expected the respondent to want a delivery driver to have to root around in the trailer for UODs to offload and (2) we would have expected the respondent to have planned for all of the UODs for a store to be in the same place in the sequence. In the circumstances, we concluded that the claimants' proposed words for paragraph 6.172 were more accurate than those proposed by the respondent for that paragraph. The respondent's proposed words implied that the loader had even greater difficulty in deciding where to put UODs when they were going on a trailer containing loads for more than one store, than when loading a trailer which was intended to contain UODs for only one store. The claimants' proposed words were these.

> "For Multi-Store loads, the AMC identified the order of store delivery. Therefore the job holder would load all the UoDs for the final delivery first, taking into account the guidance on weight distribution set out above."

477 Similarly, essentially for the same reasons, but also bearing in mind what we say in paragraph 468.2 above about the possibility of obtaining guidance from a manager, we preferred the statement of the facts which the claimants proposed for paragraphs 6.173 and 6.174 of the EVJD for Mr Hornak. Thus, among other things we accepted that the impact of the subject-matter of paragraph 6.173 was that it was easier, and not harder, for the loader in one respect to load a multi-store delivery.

478 Paragraph 6.175 of the EVJD for Mr Hornak was useful for its statement that the difficulties to which the respondent referred in the preceding three paragraphs of the EVJD occurred only rarely. Otherwise, we agreed with the claimants that the general assertions in paragraph 6.175 of the EVJD added nothing material to the factual picture for the IEs' and our purposes.

Working inside trailers: paragraphs 6.178-6.183A of the EVJD for Mr Hornak

479 Paragraph 6.178 of the EVJD for Mr Hornak stated what were to us at least obvious things arising from the fact that a trailer is necessarily a confined space.

480 Paragraph 6.179 of that EVJD asserted that the environment at the back of a closed trailer was "poorly lit", but then in paragraph 6.180 it was said that "it was not the case that the job holder was unable to work safely or that he was unable to identify obstructions or spills", although it was then said that "his ability to do that was hindered by the lack of light in the rear of the Trailers".

481 One of the factors to which the claimants did not refer in their response to those paragraphs and paragraphs 6.181-6.182 of the EVJD for Mr Hornak, which were of a similarly general nature, was that there should not have been any "obstructions or spills" in a trailer when it was ready for loading. That factor was clear from what we say above, principally in paragraphs 361 and 389. In addition, while it was said in paragraph 6.181 of the EVJD for Mr Hornak that "Poor visibility inside the Trailers also heightened the job holder's need to focus and concentrate throughout the loading process, but particularly when reversing laden MHE into Trailers as well as when pushing, pulling, turning, manoeuvring, and strapping UODs into position inside the Trailer", laden UODs were quite large, so it would have been fairly easy to see them at least.

482 In any event, in our view it was an inescapable conclusion that it was incumbent on the respondent to ensure that there was sufficient light for a loader to see what he was doing. That was because of the requirement imposed by the Health and Safety at Work etc Act 1974 to take reasonably practicable steps to ensure that the work could be done safely. As a result we concluded that it could not be determined by us that a loader was required to work in insufficient light when loading a trailer. We therefore accepted with one exception the claimants' proposals for the resolution of the factual disputes raised by paragraphs 6.179-6.182, namely to have only the claimants' proposed words for paragraph 6.179 as a statement of the relevant facts. The exception was that we thought that the need to work in a confined space with only just enough light was relevant, but that those words sufficiently captured that factor, if one bore in mind the nature of the work of loading a confined space with UODs on MHE forks and then manoeuvring the UODs into place.

483 As for the possibility of "lacerations to the job holder's hands, despite wearing safety gloves" caused by "[e]ven minor damage to the metal structure of Cages", as asserted in paragraph 6.183 of the EVJD for Mr Hornak (and repeated in the

paragraphs with the same number in the EVJDs Mr Macko and Mr Davis), while we accepted that such "lacerations" could occur in that way, we also concluded (as stated in paragraph 63 of our judgment of 12 July 2023) that the same thing could necessarily happen to a customer assistant in a store, i.e. all of the sample claimants. However, given what was said in the extract from D1/3/17 which we have set out in paragraph 71 above, it was not the respondent's expectation that a comparator (or a claimant) would experience such lacerations, although in practice the damage on cages might not at first be noticed. So far as relevant, we thought that the situation was best described for the purposes of section 65(6) by saying that the respondent did not require claimants or comparators to use damaged cages.

484 Paragraph 6.183A of the EVJD for Mr Hornak (concerning moving roll cages) added nothing to the relevant SSOWs appended to all of the comparators' EVJDs, for example at D1/3/3 and D1/3/4.

Restacking: paragraphs 6.184-6.194 of the EVJD for Mr Hornak

485 The job of restacking cages required adherence to the cage stacking training to which we refer in paragraphs 58-66 above. There was no need to do more than bear that in mind when considering the factual situation described in paragraphs 6.184-6.194 of the EVJD for Mr Hornak. In so far as what was said in those paragraphs related to what anyone else might do, it was in our judgment irrelevant here.

486 We saw that the respondent accepted that paragraph 6.193 of the EVJD for Mr Hornak should be deleted. As for what was said in paragraph 6.194 of that EVJD, it described what had to be done in the use of the AMC, which, given what we say in paragraph 16 of our second reserved judgment (at pages 7-8 above), was better described by a cross-reference to the AMC user guide and/or relevant training materials. It appeared that the content of pages 31 and 32 of D5/2 was sufficient for that purpose.

The breaking down of pallets: paragraphs 6.200-6.202 of the EVJD for Mr Hornak

487 The work of breaking down a pallet was normally done by an assembler in the manner to which we refer in paragraphs 262-263 above. We were therefore surprised to see the assertion in paragraphs 6.196-6.199 of the EVJD for Mr Hornak, with which the claimants agreed, that a loader might need to do the job of breaking down a pallet. In any event, the work to which we refer in paragraphs 262-263 above was straightforward and adequately described there.

488 The work of breaking down a pallet was described by Mr Pilley in paragraphs 113-116 of his witness statement as "handballing". We refer in paragraph 85.4 above to the respondent's documents showing what was involved in building a pallet by handballing, but that was plainly a different task.

489 It was not clear to us whether there was any difference (or, perhaps, any relevant difference for the IEs' purposes) between handballing in this context and picking from a breakdown pallet as described in paragraphs 262-263 above. If there was a difference, then it will in all probability have related to the number of cages into which a pallet's contents needed to be distributed. But that number was not stated in paragraphs 6.200-6.202 of the EVJD for Mr Hornak.

490 What was said in paragraph 6.202 of that EVJD (and the same paragraph of the EVJD for Mr Macko) differed slightly from what was said in the equivalent paragraph of the EVJD for Mr Davis, which was paragraph 6.203. Ignoring the issue of the weight of the units which might be moved (which, of course, varied), it was said in the EVJD for Mr Davis that the work of handballing in this context might take 10 to 20 minutes, whereas for Mr Hornak and Mr Macko it was said that it might take between 15 and 60 minutes.

491 We could see no mention of breaking down pallets as part of the loading process in any training documents. On the oral evidence before us (and there was, unsurprisingly, none to the contrary from the claimants), we were nevertheless obliged to conclude that it was part of the loading process and that it involved sustained effort from the loader. However, whether it took 10, 15, 20 or 60 minutes to do it, seemed to us to be irrelevant for present purposes, bearing in mind (1) the schematic at H31 and (2) the fact that the difference in the amount of time taken might have resulted from the differing skills and abilities of the three ambient DC comparators in question. If the IEs disagree then they can apply to us under rule 6(3) of the EV Rules for a determination of the time that the task typically took.

<u>Paragraph 6.209 of the EVJDs for Mr Hornak and Mr Macko; paragraph 6.210 of the EVJD for Mr Davis: trunked UODs</u>

492 In substance, the task of marshalling was no different from the task of loading. Both were driven by commands on the AMC and involved moving UODs with MHE from one place in the DC to another. If and to the extent that it was necessary to take into account what the ambient DC loaders did by way of marshalling, we thought that the document which was directed nominally at fresh DCs, D9/394, was applicable to the work of the three ambient DC loaders, and that the IEs and we both could and should regard what was said in that document as informing us of all that needed to be known about the task of marshalling.

493 However, it was said by Mr Hornak in paragraph 22 of his first witness statement that he did more than what was stated in that document, as he said that he went to trailers and unloaded trunked deliveries. As far as we could see, that was both unloading <u>and</u> marshalling. Mr Hornak also said in that paragraph that the trailer on which the "UODs imported from other warehouses" would often be "tilted, that is I had to push the shipping units uphill, which was especially tiring for my legs." However, that made no sense to us, since all of the training materials which we had seen made it absolutely clear that it was imperative that the trailers and the dock levellers were

level and because, as we say in paragraph 517 below, if there were ever a problematic slope on a trailer, then the person using it would be required to inform a manager who would be required to arrange for the trailer to be adjusted so that its floor was level.

494 It was relevant that Mr Pilley did not, in paragraph 118 of his witness statement, say that Mr Hornak unloaded trunked UODs: only that he went and got them "from the OTB Grid". Mr Pilley did, however, in that paragraph approve (in incomplete wording) paragraph 6.209 of the EVJDs for Mr Hornak and Mr Macko.

495 The cross-examinations of Mr Hornak and Mr Pilley as recorded on, respectively, pages 109-110 of the transcript of day 28 and pages 186-187 of the transcript of day 23, showed that (1) Mr Hornak's oral evidence did not support the proposition that he unloaded trunked UODs from their incoming trailers, and (2) Mr Pilley had no personal knowledge of the content of paragraph 6.209 of the EVJD for Mr Hornak and Mr Macko.

496 In the EVJD for Mr Davis, the equivalent of paragraph 6.209 of the EVJDs for Mr Hornak and Mr Macko was paragraph 6.210. The whole of paragraph 135 of the witness statement of Mr Evans bears repeating here. It was as follows.

> "[ED 6.210] I confirm that paragraph 6.210 of Ernie's EVJD is accurate. Ernie read UOD Labels to locate the relevant UODs and either transported them to a stand down lane at a Grid Location or, alternatively, directly to the Loading Bay for immediate Loading and despatch. This was the method of work in Magor Trunk, and it differed from the system at Magor DC where UODs were delivered to the Bay by colleagues undertaking Assembly activities. It was also what Ernie did when Marshalling in Magor DC."

497 We could not understand how reading a UOD label would help to locate a UOD, as the label ought to be on the UOD already. That oddity was apparently recognised by the respondent by the time of closing submissions as paragraphs 6.209 of the EVJDs for Mr Hornak and Mr Macko and paragraph 6.210 of the EVJD for Mr Davis were stated by the respondent in its closing submissions in relation to Mr Hornak's work to have been "amended as [a] pragmatic concession" to the following words.

> "As part of every second Loading Assignment the job holder used the AMC to locate the relevant UOD and transported it to the loading Bay for immediate loading and despatch."

498 The fact that Mr Evans had approved paragraph 6.210 of the EVJD for Mr Davis and repeated its content explicitly in paragraph 135 of his witness statement undermined his credibility. This was one example of a factual assertion in an EVJD which should never have been made, and a statement in a witness statement supporting it which should also never have been made.

Priority cages: paragraph 6.213 of the EVJD for Mr Hornak

499 The next dispute related to a paragraph which was about something which probably did not need to be mentioned in the EVJD in any event. That paragraph was about the need for a loader to find "lost sales" UODs or "starred UODs" before being able to continue to load. The work of loading must have included (i.e. it was obvious that it did include) finding the UODs to load if they were not already at the loading bay. The fact that there were some priority UODs which could not be left off the load added nothing material in our view to the work of a loader. If the IEs disagree with that analysis then they can take into account the fact that the loader would need to find one or more UODs as part of the work of loading. That was the purport and effect of paragraph 6.213.

500 We add that we saw that the claimants appeared nevertheless to have accepted the validity of the content of paragraph 6.213. We say that because the only dispute which they maintained about that paragraph concerned the reference in it to the AMC guide.

Scanning and loading UODs; paragraphs 6.215-6.286 of the EVJD for Mr Hornak

Introduction; paragraphs 6.218 and 6.220 of the EVJD for Mr Hornak

501 Many parts of paragraphs 6.215-6.286 of the EVJD for Mr Hornak were agreed. However, even those parts that were agreed were on occasion in our view unreliable. For example, in paragraph 6.218 as agreed, this was said.

> "All other (wheeled) UODs collected by the job holder were positioned by him by hand before the forks of the Loading Truck could be safely inserted beneath them. The job holder was able to carry up to a maximum of 4 UODs i.e., MUs or Dollies (or 5 Slim Line Cages) on the Loading Truck forks before returning to the loading Bay and loading them on to the Trailer."

502 We could not understand why it might be necessary for UODs to be moved more than minimally, given that they will have been deposited by a LLOP fully laden and in a place from which they could be simply picked up by the loading truck's forks being put beneath them and the forks raised. A factor which supported that conclusion was that, especially where the UODs were in the loading bay, there will have been only a short distance to travel to the trailer.

503 Similarly, while it was obvious that a loader would have to be "confident that all UODs were securely positioned on the [LLOP's] forks before attempting to move them", as claimed in paragraph 6.220 of the EVJD for Mr Hornak, we thought that a fully-laden UOD was unlikely to be insecure, if only because of gravity.

Paragraph 6.221 of the EVJD for Mr Hornak; the impact of a failure to do the job properly on the respondent's stock management system

504 Paragraph 6.221 of the EVJD for Mr Hornak added nothing to the statement of the work of a loader contained in the training materials, and nothing for the purposes of the IEs in so far as it stated the impact on the respondent's stock management system of a failure to use the AMC properly. We thought that that impact was obvious, and did not need to be stated, or, if stated, it needed to be stated only once. We do not mean in any way to suggest that it did not matter if a loader (or any other comparator) caused false information about stock to be created or left on the respondent's stock management system. Far from it. It mattered hugely, as the respondent's stock management system, or Denver, was of central and critical importance to the respondent's business.

Paragraph 6.222 of the EVJD for Mr Hornak; ensuring that the UODs were stable when lowered

505 While it was not clear from the claimants' closing submissions in relation to paragraph 6.222 of the EVJD for Mr Hornak, the respondent's closing submissions on that paragraph made it clear that they had accepted the claimants' position except in regard to the use by the respondent of the word "carefully". We accepted that the work had to be done with care, but we also thought that that was obvious.

Paragraphs 6.224 and 6.227 of the EVJD for Mr Hornak; (1) Does "manoeuvring" include "pushing and pulling"? (2) Did all slim line cages need to be put onto trailers by hand?

506 The claimants opposed the inclusion of the words "pushed, pulled and" before the word "manoeuvred" in the text of paragraph 6.224 of the EVJD for Mr Hornak, which concerned what happened when a cage or dolly was put into a trailer. Paragraph 6.227 of the EVJD concerned loading slim line cages, and in that paragraph the words "pushed, pulled and" before the word "manoeuvred" were not opposed by the claimants. In fact, we rather doubted the accuracy of both paragraphs of the EVJD. In relation to paragraph 6.224, that is because we understood that MHE with cages or dollies on could be driven onto a trailer and that the cages or (as the case may be) dollies could be dropped onto the floor of the trailer, near to wherever they were to be secured. In addition, in paragraph 6.227 it was said that "the job holder did this by pulling, pushing, and manoeuvring each of them off the lowered forks of the Loading Truck at the edge of the Dock Leveller before manoeuvring them into the correct load and row position". Given what we say in paragraph 394 above, that assertion did not bear scrutiny.

507 However, those factual issues were not explored before us. In any event, we accepted that a certain amount of movement of UODs by hand was required, and we agreed with the claimants that the word "manoeuvre" included pushing and pulling. The dispute about the use of the words "pushed" and pulled" was another dispute which should not have been maintained. In what follows, if we make no reference to a dispute about the text of this sort, it is because we concluded that it did not need to be resolved because the additional words were, as claimed, unnecessary. If,

however, we concluded that the additional words added something, then we say that below.

Paragraph 6.229 of the EVJD for Mr Hornak

508 By the time of closing submissions, it was stated by the respondent but not the claimants that paragraph 6.229 of the EVJD for Mr Hornak was agreed and that it had been agreed by the respondent that paragraph 6.231 of that EVJD (which was really a repetition of the words in paragraph 6.229 to which the claimants objected) should be amended in the manner sought by the claimants. For the avoidance of doubt, we thought that what was said in columns 4 and 5 of the SSOW at D1/3/17 about the wheels of slim line cages, from which, we guessed, paragraph 6.229 had originally been drawn and then expanded, was sufficient to state this aspect of the work of a loader.

Arrangement of rows of slim line cages: paragraph 6.230 of the EVJD for Mr Hornak

509 The claimants objected to the content of paragraph 6.230 of the EVJD for Mr Hornak on that basis that it was "Evaluation/analysis". It was a short paragraph, but in our view it said something potentially relevant in saying that a loader had to exert "force" to "squeeze the final" slim line cage into a row on a trailer. Whether or not it was accurate was, however, not clear to us. Indeed, paragraph 6.230 of the EVJD for Mr Hornak was in our view unnecessary and in reality repetitious, given that this was said in paragraph 6.130 of that EVJD (which, as we say in paragraph 452 above, by the time of closing submissions was agreed).

> "It was possible to load 4 black Cages and 5 red Cages in a single row, although there was then less than 2 to 3 inches left between the 2 ends of the row and the sides of the Trailer."

Paragraphs 6.238-6.239 of the EVJD for Mr Hornak: loading merchandising units and dollies

510 The detail in paragraphs 6.238-6.239 of the EVJD for Mr Hornak related to the extent to which a loader might need to "raise the forks to a height lower than the maximum" when picking up an MU or a dolly, and the manner in which the forks were moved. In substance, the parties were in agreement that the forks might need to be raised to less than their maximum "to minimise the risk of [the MU or dolly in question] falling over. The words of paragraph 6.239, were, however, the subject of a substantial objection. We agreed with the claimants that the words of that paragraph were wrong, but not for the reasons on which the claimants relied. In that paragraph, this was said.

> "The job holder gently moved the forks up using the hand controls to ensure they were stable and that any wheels were above floor level, using his experience to mitigate the risk of topple during movement."

511 However, this was said at D9/476/6.

> "**Use of the Load Lifting Forks:**
>
> - Lifting and lowering speeds are preset. To lift, press the raise load lifting forks button on the control handle until the desired height is reached. To lower, press the lower load lifting forks button on the control handle.
>
> - Cages/dollies should be aligned in a row before reversing under them and then raising the forks to the safe travel height."

512 Thus, the assertion that there was a need for any kind of gentleness in regard to moving the forks was mistaken and misleading. For the avoidance of doubt, that was because the LLOP's forks moved at a preset speed.

Paragraphs 6.247-6.250 of the EVJD for Mr Hornak; tightening the strap ratchets

513 We thought that the description of strapping loads in non-Strap 2000 trailers was sufficiently stated (1) on pages 5 and 6 of D9/374 and D9/393, and (2) in columns 6 and 7 in the SSOW at D1/3/17.

514 As for the Strap 2000 system, the steps required to be taken by a loader were stated clearly in the SSOW at D9/222,

515 Of course the IEs were able to take into account anything which was agreed in paragraphs 6.247-6.250 of the EVJD for Mr Hornak, if that went beyond what was in the SSOWs to which we refer in the preceding paragraphs above and it was regarded by the IEs as adding something material for present purposes. For example, the number of times that a loader might have to strap a row of UODs per shift might be relevant. However, that would be capable of being calculated by reference to the number of vehicles or trailers loaded and their length, and those things would vary from shift to shift. In addition, the schematic at H31 suggested that that kind of detail was unlikely to be relevant.

Paragraph 6.252 of the EVJD for Mr Hornak; the risk of a rivet coming out of its socket

516 We saw that Mr Davis had (as recorded in lines 6-25 on page 88 of the transcript of day 24) given oral evidence which contradicted the proposition that rivets came out of their sockets at any time. We saw too that Mr Hornak's evidence (as recorded in the passage from line 8 on page 115 to line 9 on page 117 of the transcript of day 28 and in paragraph 68 of his witness statement) was only that he had once, and only once, during his time as an employee of the respondent, experienced a rivet popping out and as a result a strap hitting him. He did not report it, he said, so there was no corroboratory evidence for that assertion. But his reason for not reporting it was that

"nothing serious happened" to him. Thus, the risk of a rivet popping out when pulling a load-securing strap in a trailer was low.

Paragraphs 6.260-6:262 of the EVJD for Mr Hornak; what happened if a trailer floor started to slope because of the weight of products loaded on it

517 We could not see how the respondent could in practice have permitted a trailer floor to remain sloped to any extent because of the weight of goods on it. In any event, we concluded in the light of the oral evidence of Mr Davis and Mr Hornak as recorded on day 24 (at pages 89-93) and day 28 (at pages 117-118) respectively, that the words proposed by the claimants for paragraph 6.260 were a better reflection of reality than those proposed by the respondent. That meant that what was said in paragraphs 6.261 and 6.262 was inaccurate. For the avoidance of doubt, the assertions made in paragraphs 6.260-6.262 of the EVJD for Mr Hornak that he would in practice have to deal with "a slight downward incline" which increased as the trailer was loaded and that he therefore would have to be "extremely careful when pushing a Cage over the ramp, because of the risk that it could topple over or cause damage to its wheels", were untrue. That was because if the floor of a trailer ever became sloped to such an extent that it materially affected the task of loading, then the loader would understandably go (and in our judgment would be required to go) to his manager and ask for the trailer to be adjusted so that its floor was again level.

Paragraphs 6.276-6.278 of the EVJD for Mr Hornak; overspill

518 We have already referred (in paragraph 460.2 above) to the issue of running out of space for UODs on a trailer (showing that if something had to be left off the trailer then it simply had to be "scanned and moved to the designated Late Cages area at the end of the loading process"). In paragraph 6.276 of the EVJD for Mr Hornak, an additional detail was asserted by the respondent, and that was that if there was "overspill", by which was meant such a lack of space, then the loader (and we preferred the initial proposed words of the respondent, which we now quote) "was required to investigate whether another load for that same Store was on the delivery despatch schedule at another time before the end of his shift." Given what we say in paragraph 460.2 above, which was about the same thing, there was no such requirement. We mention paragraph 6.276 here in part because we agreed with the claimants that the only kind of investigation that could have been said to be required was to look at the AMC.

519 In fact, paragraph 6.276 set the scene for what was said in paragraphs 6.277-6.278 of the EVJD, which contained a description of what the loader would then do. Since it was plainly an authorised way of working, we accepted that what was described in those paragraphs was part of the work of a loader for the purposes of section 65(6) of the EqA 2010, but with one reservation we also preferred the words of the claimants to describe that work to those which were proposed by the respondents in those paragraphs. The reservation was that the time that it might take to walk to the Loading Desk (5 minutes) might be relevant.

Paragraphs 6.280-6.282 of the EVJD for Mr Hornak; swapping UODs

520 If and to the extent that it was relevant for the IEs and us to know that a loader might, once a week, inform his manager that he (the loader) thought that a load might be too heavy to be capable of being loaded legally, then we agreed with the claimants' submissions about the words to be used in paragraph 6.280 of the EVJD for Mr Hornak in recording that fact. However, we saw from paragraph 6.281 of that EVJD that it would only be feasible to do that when there was a "later load" as described in paragraph 6.276 of the EVJD. We also thought that it was clear even from paragraphs 6.280 and 6.281 as originally drafted that paragraph 6.282 was wrong in suggesting that the loader had the power to decide whether to move a UOD from one load to another. Rather, it was for the loader's manager to make that decision. That was clear from paragraph 6.278 of the EVJD for Mr Hornak and what Mr Davis said in cross-examination as recorded on pages 100-101 of the transcript of day 24.

Paragraph 6.287 of the EVJD for Mr Davis: loading tobacco

521 The job of a loader loading tobacco was to lock the cage after he had accessed it. That was agreed by Mr Davis at pages 97-99 of the transcript of day 24. That was all that the IEs or we needed to know about the job of a loader loading tobacco.

Paragraph 6.293 of the EVJD for Mr Hornak: the frequency with which a roller door might stick

522 We could not see how, as a matter of law, the value of the work of loaders (bearing in mind the fact that there were many of them) could vary according to the incidence of difficulties with the equipment used by the loaders resulting from the equipment being faulty. That was because in our view it could not be correct as a matter of law to say that an employer could make an employee's work more valuable for the purposes of section 65(6) of the EqA 2010 by making it harder for the employee to do his or her job by failing to keep equipment used by the employee in good order or, if alternative equipment could be used, providing such alternative equipment. In our view, the value of the work had to be assessed on the assumption that the employer would either keep the equipment in reasonably good repair or, where it could not be so kept and it was possible to do so, immediately replace the equipment.

523 Of course, that principle, if correct, cut both ways, so that a failure to ensure that for example cages were in good order could not increase the value of the work of a customer assistant in a store for the purposes of section 65(6) of the EqA 2010 just as much as a failure to ensure that roller shutter doors were in good order could not increase the value for those purposes of the work of a loader.

524 For those reasons, we declined to make a finding about the factual dispute stated in paragraph 6.293 of the EVJD for Mr Hornak. In any event, we assumed that the IEs

would be able to assess the effort involved in opening a trailer's roller shutter door and would take into account the fact that sometimes such a door would stick.

Paragraph 6.296 of the EVJD for Mr Hornak; the risk of a leg getting stuck in the gap between a trailer and bay door

525 We thought that the (we thought rather low) risk of a loader getting his leg stuck between a trailer and the bay door was one of the ordinary incidences of the job of a loader, but that it was just one of the risks of the job, in the same way that working in the environment of a DC with battery-driven trucks being driven around was a risk of the job of an assembler.

526 Whether the risk of a loader's leg slipping into the gap between the edge of the loading bay and the back of a trailer added anything of value for present purposes was a matter for the IEs. We doubted that this was the kind of risk which would need to be taken into account at a stage 2 hearing, but without expert evidence on the matter, we could not come to a conclusion on the issue.

Paragraphs 6.298-6.299 of the EVJD for Mr Hornak; the Encrypta unit

527 We were sure that the fact that there was a security device "to enable the driver to identify whether the load had been tampered with during delivery" as stated in paragraph 6.298 was irrelevant for present purposes. The role of a loader was to do what was required in relation to any security device of the sort used by the respondent, such as the Encrypta unit. The reason for the existence of the unit was not in our view relevant here. If the IEs disagree with us on this issue then they must of course take into account the content of paragraphs 6.298-6.299 of the EVJD for Mr Hornak.

Paragraphs 6.302-6.304 of the EVJD for Mr Hornak; how to "close" a load on the AMC

528 The content of paragraphs 6.302-6.304 of the EVJD for Mr Hornak was either drawn directly from the respondent's training materials, or it was a simple statement of the manner in which an AMC had to be operated. We saw that there was at D9/374/7 a statement which related to the content of paragraphs 6.302-6.304, as there was at D9/375/2. We refer to both of those training documents above in a number of places. In addition, the specific sequence which gave rise to the content of paragraphs 6.302-6.304 appeared to be at D5/2/83-89. If that was correct, then there was no room for a factual dispute about what was required of a loader when "closing" the load on an AMC. In fact, it appeared that the parties were in substantial agreement about what was required of the loader.

Paragraph 6.308 of the EVJD for Mr Davis; was Mr Davis required to input the temperature of a refrigeration unit into which he was loading ambient products?

529 We were somewhat bemused by the fact that there was a dispute about the words used in paragraph 6.308 of the EVJD for Mr Davis. That was because the parties were in practical terms in agreement that he had to input the ambient temperature onto his AMC in the circumstances described in paragraph 6.308 of that EVJD. We saw incidentally that the proposition that he needed to do so was supported by what was said at D5/2/52 and D5/2/87 (although those pages were not conclusive), but in any event what was in issue was a requirement of the use of an AMC: one of many. We rather doubted that this kind of detail was relevant to the determination of the value of the work of a loader, but if the IEs regard this detail as relevant then of course they can take it into account.

Paragraph 6.309 of the EVJD for Mr Davis: the fact that for a period of about a year a manager checked the ratchet strapping on a load

530 In contrast, we were of the clear view that the fact that a manager either (1) for any period of time or (2) always checked the work of an employee, was outside the scope of the inquiry at a stage 2 hearing, and possibly also a final hearing within the meaning of the EV Rules. Thus, we concluded that the content of paragraph 6.309 of the EVJD for Mr Davis, relating to the claimed fact that because of a number of incidents in the DC's yard, "as well as a more serious incident on the public highway (involving another DC) where stock fell from the back of a Trailer as a result of the Trailer and its contents not being sufficiently secured", a manager checked the strapping on every load, was irrelevant for present purposes. If the IEs disagree with us, then they can take into account the claimed factual circumstances, which for want of contrary evidence and the absence of a reason to reject them, we accepted.

Paragraph 6.305 of the EVJD for Mr Hornak; the impact of the weighbridge

531 The relevance for present purposes of the possibility of an axle being found, when a lorry was weighed at the respondent's weighbridge, to be overloaded and returned to the DC, was not clear to us. It was the necessary consequence of the requirement not to overload the axles, so if that requirement was relevant, then it was already catered for in our factual determinations above, in particular what we say in paragraph 467 above, read with what we say in paragraphs 80 and 92.8 above.

Paragraphs 6.307-6.309 of the EVJD for Mr Hornak: more on trailer weights

532 We agreed with the claimants that the content of paragraphs 6.307-6.309 of the EVJD for Mr Hornak added nothing material to the factual situation. That was for the following reasons. Paragraph 6.309 was plainly irrelevant here. Paragraph 6.308 was in reality part of paragraph 6.307, and paragraph 6.307 was in our judgment no more than a statement of the obvious if and to the extent that it was truly possible for a loader to tell whether or not a trailer "was likely to be overweight in any respect, whether overall or because the contents of the load were likely to make it difficult to achieve the weight distribution required for that particular Trailer". However, we observe that a manager would be unlikely to be any more able than a loader to know

whether or not that was so. In addition, we suspected that the respondent's computer systems, which would know everything that was intended to be in a load, would be able to tell whether or not the load was likely to be overweight, so that there would be no need for a loader to alert his manager to the loader's perception that the load might be overweight.

Paragraph 6.314 of the EVJD for Mr Hornak: the order of deliveries to convenience stores

533 Given the factors to which we refer in paragraphs 475-478 above, there was nothing material in paragraph 6.314 of the EVJD for Mr Hornak.

Paragraphs 6.318-6.320, 6.325, 6.357 and 6.366 of the EVJD for Mr Hornak: dual working and double-deck trailers

534 The claimants disputed paragraph 6.318 of the EVJD for Mr Hornak on the basis that "[t]he SSoW was not the formal document setting out the procedure" for loading double-deck trailers. They did not, however, say what was that formal document. It was, we thought, D9/382, to which we refer in paragraph 92.8 above. We also thought that that document stated all that needed to be said about the things which were the subject of paragraphs 6.318-6.320, 6.325, 6.357 and 6.366 of the EVJD for Mr Hornak. That was not least because that document showed what had to be done, in what sequence, and the fact that there would always be two trained loaders loading a double-deck trailer, so that by implication they would both be responsible for any errors, but they would both be helped by the fact that they could consult the other on any problematic issues. Whether there would have been any such problematic issues was another matter, given the content of D9/382.

Paragraphs 6.328-6.332 of the EVJD for Mr Hornak; more on double-deck trailers

535 Similarly, with one exception, the content of paragraphs 6.328-6.332 of the EVJD for Mr Hornak seemed to us to add nothing material to what was in D9/382. The exception was the description in paragraphs 6.326-6.328 (the first two of which were agreed, we were aware) of how topping of cages was required and the amount of product which might be moved by the loaders in the process. There was no reliable evidence before us about the weight of products moved in that process, however. Nevertheless, we concluded that the fact, if it were such (and since it was agreed and there was no reason to doubt it, we treated it as such) that there was a need to top about 25% of cages, stated sufficiently that aspect of the demands on a loader of helping to load a double-decker.

Paragraphs 6.340, 6.344, 6.348 of the EVJD for Mr Hornak; moving UODs by hand in the course of loading a double-deck trailer

536 We thought that paragraphs 6.340, 6.344 (through its proposed final words, which included an assertion that if the hydraulic lift platform was too high or too low then there was a risk of "damage to the Trailer and to other UODs or a situation whereby

[the loader] had to push UODs uphill") and 6.348 of the EVJD for Mr Hornak were factually incorrect if and in so far as they asserted that the respondent required loaders to put all UODs other than pallets and "solid based MUs" onto the hydraulic lift platform by hand. That is because this was said at D9/382/5.

> "Pallet and picking trucks can be used to carefully position units of delivery onto the scissor lift, however only pedestrian pallet trucks can be used to load onto the trailer itself, and even then only on the lower trailer deck."

Paragraphs 6.342 and 6.343 of the EVJD for Mr Hornak; raising and lowering the hydraulic lift

537 In paragraph 6.342 of the EVJD for Mr Hornak, it was said that because visibility was poor on the lower deck due to lack of light, that meant that the person operating the lift had to take "additional care when lowering the Hydraulic Lift platform". In fact, the lift was raised or lowered simply by using the up and down buttons (this was clear from, for example, D9/382/8). While we could see that there was a need to be careful in doing that job, any error was easily correctable by pushing the other button.

538 Paragraphs 6.343 and 6.344 of the EVJD for Mr Hornak were surplusage. That was for the following reasons. Paragraph 6.343 added nothing material by saying that it was important to get the lift in the right place. That was obvious, as was the consequence (stated in the second part of paragraph 6.343 and the whole of paragraph 6.344) of the lift not being level with the floor of the part of the trailer into which the UODs were being loaded. In fact, the statements in paragraph 6.344 (ignoring for this purpose the final words of the paragraph, to which we refer in paragraph 536 above, which, given what we say in paragraph 493 above, we could not accept in any event) of the consequences were no more than an explanation of the first statement, so they were repetitious.

Paragraphs 6.354 and 6.355 of the EVJD for Mr Hornak; the process of loading upper and lower decks

539 Contrary to what was said in paragraphs 6.354 and 6.355 of the EVJD for Mr Hornak, the process of loading the upper deck was not the same as that for loading the lower deck. That was because of what was said at the bottom of page 4 of D9/382, which was this.

> "Remember when loading a double deck trailer you should always load the bottom deck first.
>
> You should start with the heavy units of delivery, then medium units and finally light units of delivery, before loading the top deck; this will ensure that the trailer has not got all of the weight on the top deck.

> If the bottom deck is filled with heavy units of delivery, you should place any remaining heavy units of delivery on the top deck, but make sure they are evenly distributed across the deck.
>
> If product pallets are to be loaded, they must always be placed on the bottom deck of the trailer."

540 Having said that, we accepted that all UODs other than pallets (since pallets would not be loaded on the upper deck) would need, given what we have set out in paragraph 536 above, to be loaded by hand on the upper deck.

541 Those things were sufficient to state the factual position to which paragraphs 6.354 and 6.355 of the EVJD for Mr Hornak referred.

The "burden of accountability and responsibility"; paragraphs 6.363-6.377 of the EVJD for Mr Hornak

542 We found the statements of responsibility on the part of a loader at paragraphs 6.363-6.377 of the EVJD for Mr Hornak to add nothing material to the assessment of the work of a loader and the conditions in which it was done. The fact that there might be particularly severe consequences financially for the respondent of an error made by a loader was not in our judgment relevant at this stage. The same was true of the risk of damage or injury on the part of an assembler: a slight error of judgment in the driving of for example a LLOP could cause much damage and disruption financially, or, rather worse in our view, could maim or kill a fellow-employee. However, our judgment, in the absence of authority on the point, was that those things were not relevant at a stage 2 hearing. If the IEs think that those things are relevant at this stage, then they can say so in their report to us, and we will hear submissions on the relevance of that to which the respondent referred as a "burden of accountability and responsibility".

Key facts including metrics relating to loading; paragraphs 7.1-7.7 of the EVJD for Mr Hornak

543 Paragraphs 7.1-7.3 of the EVJD for Mr Hornak were general assertions about the relevance of the content of paragraphs 7.4-7.7 of that EVJD, so they were simply submissions, and not even remotely evidential. The only potentially relevant factual thing mentioned in paragraphs 7.1-7.3 was that Mr Hornak worked 7 hours 20 minutes a day, but we did not understand that to be the subject of a factual dispute. Nor did we see it as being material, although if the IEs disagree with us on that, then they can take the working day of Mr Hornak (and that of any other comparator or of a sample claimant) into account.

544 We were baffled by some of the assertions in paragraphs 7.4-7.7 of the EVJD for Mr Hornak. One of those was that, as stated in paragraph 7.6, the "average total weight handled by the job holder during a full shift of Loading (in 2017/18) was 70 tonnes". It

seemed clear to us that Mr Hornak did not personally lift 70 tonnes, and if that was the case then there was no relevance in the statistic.

545 Equally, for the same reasons as those stated in paragraph 542 above and paragraph 67 of our second reserved judgment (at page 25 above), the value of the stock moved by Mr Hornak, which was the subject of paragraph 7.4 of the EVJD for him, was irrelevant to the issue of the value of the work done by him and the conditions in which it was done.

546 The assertion that the work was physically demanding for the reasons stated in paragraph 7.5 of the EVJD for Mr Hornak was understandable, but it added nothing material for present purposes. That was because (1) it was obvious that the work was physically demanding, given that the job of a loader involved manoeuvring a number of UODs, but, crucially, (2) the issue here was what were the demands, not whether or not the work was "demanding".

547 The number of steps walked by a loader in a full shift might have been relevant, but we failed to see how the precise number of steps walked (which was the subject of paragraph 7.7 of the EVJD for Mr Hornak) would matter. That was not least because it might be easier to walk for some of the time than to stand in one place, so that the key thing might be the need to stand for some or all of a working day, but on the basis that walking might well be easier than standing at, say, a till. This is something which we will leave to the IEs to assess.

The work of Mr Davis in relation to "Unloading Trunked Goods and Marshalling"; paragraphs 6.384-6.442 of the EVJD for Mr Davis

Introduction

548 The only other findings of fact which we needed to make in relation to the tasks of the ambient DC comparators related to the work done by Mr Davis in unloading trunked goods and marshalling. Those things were dealt with in paragraphs 6.384-6.442 of the EVJD for him.

Marshalling

Paragraph 6.385 of the EVJD for Mr Davis; the overview

549 The substance of paragraph 6.385 of the EVJD for Mr Davis was agreed. What was not agreed was some words relating to responsibility. In fact, we thought that they did no more than state the obvious in that by doing the work of unloading trunked deliveries and marshalling he was responsible for what happened when he did it. Of course those words added nothing material. But in any event, the training materials to which we refer in paragraphs 92.2, 92.3, 92.4 and 444 above in relation to marshalling, and in relation to trunked deliveries in paragraphs 161-163 above, showed that the process was driven by the AMC worn by the person doing those

things. That showed that the person doing them would be free from criticism if he just did what he was told to do by the AMC.

Paragraph 6.390 of that EVJD; the impact of the fact that incoming trailers had roller doors

550 It was agreed that the roller shutter doors of the incoming trailers were of the same sort as those to which we refer in paragraphs 349-351 above.

Paragraphs 6.391-6.393 of the EVJD for Mr Davis; unloading trunked goods in

551 We could not see anything in paragraphs 6.391-6.393 of the EVJD for Mr Davis which added to what was said in the documents to which we refer in paragraphs 161-163 above. In regard to undoing the strapping, which was the subject of paragraph 6.393, we thought that the words at the top of column 4 on D1/3/16 were sufficient to state the demands of the task.

Paragraph 6.397 of the EVJD for Mr Davis; placement of the UODs once they were unloaded

552 We found it unsurprising that unloaded UODs which were intended to be delivered to stores from the DC at which the unloader worked had to be put in specific places. We saw nothing relevant (in the sense that a finding of fact about it could affect our determination of the demands of the work of an unloader) in the pages of the AMC Guide to which reference was made in paragraph 6.397 of the EVJD for Mr Davis.

Paragraph 6.407 of the EVJD for Mr Davis; the risk of congestion around Bay 68

553 It was also unsurprising that there might be congestion in parts of the DC at which an unloader worked where loaders were collecting for example the unloaded trunked UODs. We could not see that the possibility of such congestion was a factor which bore on the evaluation of the work of the unloader. If the IEs disagree with us in this respect then they can simply take into account the possibility of such congestion.

Paragraphs 6.409, 6.412, 6.414 and 6.417 of the EVJD for Mr Davis; late cages and “lost sales” UODs

554 The work of a marshaller in regard to late cages and overspill cages was, we understood, driven by the AMC. There was therefore in our view no need for a specific reference to that work in the evaluation by the IEs of the work of a marshaller, since the work differed in no substantial way from that of an assembler driving a LLOP with UODs on its forks, following instructions on the assembler’s AMC. If the IEs disagree with that analysis then they may take into account what was stated in the documents to which we refer in paragraph 85.5 above, namely D9/584 and D9/629. However, those documents, to which we now turn in detail, supported our conclusion that dealing with late cages was, for Mr Davis, not different in substance from the work of a loader.

555 The first aspect of the documents at D9/584 and D9/629 which was relevant here related to the issue of responsibility, if and to the extent that paragraphs 6.409 and 6.412 asserted that it was primarily that of a loader or a marshaller to ensure that late cages (or "lost sales" UODs: we did not see any difference between the two; we refer to lost sales UODs in paragraph 78 above) were sent to stores as a matter of priority as soon as possible after they were missed off their intended delivery. That assertion was not correct because it was said in the second bullet point on the first page of both D9/584 and D9/629 that it was the respondent's "Late Cages Policy" that "Warehouse managers ensure that late units of delivery are sent to Store on the next available delivery."

556 However, it was also stated on those pages that it was part of that policy that "[t]eam members will physically check the late cage area", and that might have been thought to be a responsibility of a team member because it was said a little lower down on the same page that "Team members must move late units of delivery on the loading system using the move unit of delivery function." However, this was said on the next page, under the heading "Late Cages Procedure", to be a responsibility of the "Team Member":

> "1. When loading your vehicle:
>
> - The Load Summary screen on your arm computer will inform you if there are any late units of delivery for the stores you are loading for
>
> - Any late units of delivery take priority over the other available units of delivery
>
> 2. Travel to the late cage area and collect the units of delivery and return to the loading bay
>
> 3. Load the late units of delivery
>
> 4. Continue to load following the Paperless Loading process".

557 That showed that it was the responsibility of a loader rather than a marshaller to load late UODs. If, however, Mr Davis did that work as part of the work of a marshaller because of an arrangement to that effect at the DC at which he worked, then it was simply an aspect of the work which would normally be done as a loader.

<u>Dealing with overcrowded loading bays; paragraphs 6.418-6.423 of the EVJD for Mr Davis</u>

558 The task described in paragraph 6.418 of Mr Davis' EVJD (monitoring the available space on the loading bays, in particular to see when assemblers "had dropped filled Cages into the loading bay before the Loader had completed his previous load") was not, as far as we could see, catered for in the training materials. The words originally

proposed by the respondent in paragraph 6.418 of that EVJD were at first sight acceptable as a factual assertion of that task for the purposes of an equal value claim, as long as it was in fact a responsibility of a marshaller to monitor loading bays for overcrowding.

559 We found no reference in the documents before us relating to the work of the comparators to overcrowding as such. There were references to "congestion", but none that we could see that were relevant to the work of a marshaller.

560 We therefore asked ourselves to what extent the evidence of the respondent's managers supported what was said in paragraphs 6.418-6.423 of the EVJD for Mr Davis. Only Mr Evans gave evidence on what was said in those paragraphs, and his witness statement contained only this passage on the matter.

> '***Dealing with Overcrowded Loading Bays ("Double Baying")***
>
> 219 [ED 6.419 & 6.420] I confirm that these paragraphs are accurate.
>
> 220 [ED 6.421] Ernie was responsible for (i.e., in charge of) re-organising the Loading Bay grid in such a way that the Cages were clearly grouped according to the load they were allocated to. Wherever possible, he also had to create enough space so that all Cages, irrespective of the load they were allocated to, could all be accommodated safely within the same Loading Bay but without mixing different loads.
>
> 221 [ED 6.423] I confirm that this paragraph of the EVJD is accurate.'

561 Mr Evans did not explain in paragraph 220 of his witness statement how Mr Davis came to be "responsible for (i.e., in charge of) re-organising the Loading Bay grid in such a way that the Cages were clearly grouped according to the load they were allocated to." However, there was no reason to doubt the assertion that it was an additional responsibility of Mr Davis, so we accepted the factual assertion in paragraph 6.418 of the EVJD for him that it was such a responsibility.

562 We agreed with the claimants, however, that the content of paragraphs 6.419 and 6.420 was surplusage, in that they referred to things which were not in issue at a stage 2 hearing.

563 As for paragraph 6.421, its original wording was in our judgment apt.

564 Paragraph 6.423 was helpful in so far as it referred to the issue of frequency, but unhelpful in so far as it referred to the issue of the weight of cages moved. That was because they were moved by using MHE, so their weight was irrelevant. In addition, the task of moving them was no different from the task of moving any other UOD using MHE.

Full cage restacking; paragraph 6.426 of the EVJD for Mr Davis

565 The work of a loader included the full restacking of a badly-loaded cage. That is a task to which we refer in paragraphs 58 and 485 above. The fact that it was done by Mr Davis "at least once or twice per night shift" for "up to 10 minutes" was therefore the only relevant factual assertion in paragraph 6.426 of the EVJD for him. That fact was agreed, we saw.

Unloading UODs from overweight trailers; paragraphs 6.427-6.434 of the EVJD for Mr Davis

566 We saw that the section of Mr Davis' EVJD which concerned the unloading of UODs from overweight trailers described work which was in almost all respects of precisely the same sort as that which was done by a loader except and to the extent that Mr Davis had to exercise some judgment in deciding which UOD(s) to remove. We doubted, however, that there might be a need to remove (as it was asserted in paragraph 6.428; that paragraph was accepted by the claimants) "2.5 tonnes". That was not least because it was said in (for example) paragraph 7.17 of the EVJD for Mr Hornak that the average weight of an assembled standard cage was 302kg. In paragraph 7.17 of the EVJD for Mr Davis, it was said to be 292kg. Thus, 2.5 tones was over eight standard cages, and we rather doubted that a marshaller would have to remove the weight of eight standard cages from a trailer.

567 In any event, the parties agreed some aspects of the section on unloading overweight trailers in the EVJD for Mr Davis. It was, however, objected by the claimants that there was "no evidence" in support of the assertion in paragraph 6.427 of that EVJD that it was part of the work of Mr Davis to remove UODs from overweight trailers. That paragraph was supported by paragraph 223 of the witness statement of Mr Evans. The content of that paragraph was characterised by the claimants as "just a bare assertion", but that was in our view an insupportable assertion. The paragraph contained evidence in the form of the words "[ED 6.427] I confirm that the contents of this paragraph are accurate", but it was flimsy. Nevertheless, there was nothing to counteract it and no reason to doubt it. We therefore accepted it. The fact that the content of paragraph 6.428 of the EVJD for Mr Davis was agreed was, however, for the reasons stated in the preceding paragraph above, problematic. However, if it was possible to unload the UODs in question using MHE, then the number of UODs which needed to be removed was not important. We thought that it was not just possible but likely that the marshaller would use MHE for the task. That was both because it was the obvious thing to do and because of what was said at the start of column 4 of D1/3/17, which was this:

> "When loading using MHE, the Loader must check route is clear before moving, must sound horn each time he exits the trailer and always looks in the direction of travel."

Paragraphs 6.435-6.442 of the EVJD for Mr Davis; working at Magor Trunk

568 We saw that in paragraph 3.37 of the EVJD for Mr Davis it was said that "[t]he work [which he did at Magor Trunk] differed from his work at Magor DC as the job holder travelled to the waiting lanes using a Loading Truck, located the correct UODs to load and transported them to the Goods Out Bays himself" and in paragraph 3.35 of that EVJD that the work consisted of "both unloading and loading duties".

569 That sounded rather like the work which Mr Davis did at Magor DC. In any event, given that Mr Davis did not personally lift and move "Pallets, MUs or Dollies" (since he used MHE to lift and move them), the question whether or not 80% of the UODs loaded by him at Magor Trunk were "Pallets, MUs or Dollies" (which was the subject of paragraph 6.442 of the EVJD for him) did not need to be determined by us.

570 As for the impact of Mr Davis working with a partner all the time at Magor Trunk, even when loading a single deck trailer, that was in our view unlikely to be relevant for present purposes, but if the IEs disagree then they can take into account the claimed fact (asserted in paragraph 6.441 of the EVJD for Mr Davis) that he "built working relationships with his loading partners".

The work of the fresh DC comparators

Introduction

571 The work of the fresh DC comparators differed from that of the ambient DC comparators only in the following ways.

571.1 When assembling cages, the comparators in the fresh DC drove pallets round to locations in the DC at which they deposited packaged products in cages. In ambient DCs, the cages were driven round and packaged products were collected from pallets and put into the cages.

571.2 The comparators in fresh DCs worked in a temperature-controlled environment, in sections of the DC which were intended to be kept at +1 and +12 degrees centigrade respectively, which involved having to negotiate roller shutter doors between the two sections.

572 In addition, as we understood it, the average weight of UODs was less in a fresh DC than in an ambient DC. Whether that was relevant was not clear to us, so we regarded it as capable of being material, and therefore we concluded that if our understanding about that average weight was correct, then that average weight was a matter for the IEs to take into account if they thought that it was relevant.

Loading in a fresh DC as stated in the EVJD for Mr Pratt

Introduction

573 The job of loading in a fresh DC differed from the job of loading in an ambient DC only in that the products loaded in a fresh DC were loaded into refrigerated compartments on the vehicle in question. We refer to that difference in paragraph 92.1 above. We refer to other differences between the task of loading in the two kinds of DC in the rest of paragraph 92 above, although in some places we refer to a document which was stated to apply to fresh DCs and then say why we found that its content was applicable also to ambient DCs.

574 We add that the terms of the EVJD for Mr Pratt (who was the only one of the fresh DC comparators who did loading) relating to loading were either the same as, or very similar to, those which were in the EVJDs for Mr Hornak, Mr Macko and Mr Davis.

575 We therefore refer below in this section only to those disputes in regard to the EVJD of Mr Pratt in so far as it related to loading which had not already been dealt with by us, ignoring for this purpose minor differences in the text.

The EVJD for Mr Pratt in so far as it related to loading

Paragraph 6.98 of the EVJD for Mr Pratt: an overview of what loading in a fresh DC involved

576 We thought that paragraph 6.98 of the EVJD for Mr Pratt was helpfully informative as an overview of the things that a loader had to take into account when planning a load at a fresh DC. However, only the final two factors (namely (e) and (f)) were additional as compared with loading in an ambient DC. Having said that, it would in our view have been in one sense easier to plan a load in a fresh DC, if only because there would have been even less room for deviation from the obvious course to follow in relation to the placing of the UODs. That was because if, say, two chambers were used, then the placement in general terms of the load was simplified in that part had to go in one chamber and the other part in the other chamber, so that it might approximately halve the number of questions arising about placement.

Paragraphs 6.104 and 6.218-6.227 of the EVJD for Mr Pratt; condensing UODs

577 There was more detail in paragraph 6.104 of the EVJD for Mr Pratt than in paragraph 6.111 of the EVJD for Mr Hornak, but they both related in substance only to the question whether or not a loader was required to consider whether to condense cages, i.e. combine the contents of more than one cage. Paragraph 6.111 of the EVJD for Mr Hornak stated simply that he was "required to maximise load efficiency i.e., to ensure that the maximum amount of Stock was contained in the load (Condensing)." In paragraph 6.104 of the EVJD for Mr Pratt, this was said:

> "The job holder was required to maximise load efficiency i.e., to ensure that the maximum amount of Stock was contained in the load (see paragraphs 6.218 to 6.227 on Condensing UODs). It was for the job holder himself to determine whether and if so, how to do that."

578 Mr Pratt was cross-examined on the impact of D9/580, to which we refer in paragraph 17.24 above. Of course Mr Pratt could not disagree with what was said in D9/580, and if he had disagreed with its contents then we would have been very surprised. In any event, the key part of it for the purpose of assessing whether or not there was any discretion on the part of a loader about whether to condense and how to do so, was in our view the third bullet point in the first box on page 1, which was in these terms.

> "Units of Delivery, half-full or less are to be condensed or to have other Units of Delivery condensed onto them."

579 Thus, there was no discretion at least where a UOD was half-full or less. In addition, as Mr Pratt was forced to agree in cross-examination (as recorded on pages 148-149 of the transcript for day 29), (1) it was said in the first bullet point in row 2 on the first page of D9/580 that "Warehouse Managers must ensure that partially full cages are condensed prior to being loaded", and (2) the other bullet points in that row all pointed towards it being the responsibility only of a manager to ensure that all possible condensing was done. It was also clear from that row that the condensing had to be done using the AMC.

580 There might have been scope in some cases to take the contents of a UOD which was more than half-full and distribute them between other UODs destined for the same store as long as (as stated in the sixth and final bullet point in the first box of page 1 of D9/580) heavy items were not put on top of light ones. There was room for error in that regard in that row 13 on the second (and final) page of D9/580 was in these terms.

> "Any Units of Delivery which are not able to be condensed and are left off must be scanned and moved to the designated Late Cages area at the end of the loading process".

581 That was, as far as we were concerned, a sufficient and comprehensive statement of what was involved in deciding whether to condense UODs, both at a fresh DC and an ambient DC.

582 We add that if we were wrong in coming to that conclusion, then the resolution of the disputes between the parties on the factual assertions in paragraphs 6.218-6.227 of the EVJD for Mr Pratt was in our view unlikely to affect the assessment by the IEs of the value of the work of a loader. In any event, we now record that we accepted the claimants' submissions on all those disputes. Thus, we accepted their proposed words as recording accurately the factual situation described in those parts of those paragraphs of the EVJD which were disputed. Having said that, it appeared that the disputes were not about the underlying facts, but, rather, about additional things such as whether or not something was important (as asserted in paragraph 6.225 of the EVJD).

Paragraph 6.113 of the EVJD for Mr Pratt: placement of pallets

583 We doubted that the precise way in which a loaded pallet could be loaded onto a trailer was material. What was material was the fact that there was a need to exercise some judgment in that regard and that (as asserted by the respondent and not disputed) a loader might use an empty pallet on its side to fill any gaps. The latter process would necessarily involve the loader in moving a pallet by hand, the impact of which for present purposes we leave it to the IEs to assess.

Paragraphs 6.117- 6.135 of the EVJD for Mr Pratt: possible mixing of UODs

584 We agreed with the claimants that the content of paragraph 6.117 of the EVJD for Mr Pratt was incorrect in so far as it implied that there was much room for discretion in the placing of UODs on a trailer. For example, at the top of D9/393/5, this was said.

> "When loading dollies and merchandising units ensure that:
>
> - single dollies/merchandising units are loaded between cages that is, cage – dolly/merchandising unit – cage;
>
> - up to four dollies/merchandising units can be loaded in a row
>
> - dollies/merchandising units are never loaded in the final row".

585 Having said that, we could see that there was a need to decide where to put the UODs, even if in most cases it would be obvious to the loader where in the trailer the UODs would need to go at least in general terms, if only because of the need to do what was described by way of weight distribution at pages 4-5 of D9/393.

586 Paragraphs 6.118-6.135 of the EVJD for Mr Pratt contained merely other ways of saying what we have just stated, i.e. in the preceding paragraph above, and therefore added nothing material.

Collecting UODs; paragraphs 6.136-6.138 of the EVJD for Mr Pratt

587 We saw that the task of collecting UODs for loading was driven by the AMC. We concluded in the light of that fact and because we preferred the more straightforward text proposed by the claimants for paragraphs 6.136-6.138 of the EVJD for Mr Pratt, that what the claimants proposed by way of factual findings for the things described in those paragraphs was more apt than the text which was proposed by the respondent.

Paragraph 6.141 of the EVJD for Mr Pratt: moving between chambers and through the gateway between them

588 We could not see how the precise number of times that Mr Pratt moved between the +1 and the +12 chambers could be material to the IEs' assessment of the value of the work done by him. Thus, we declined to decide whether it was, as claimed by the respondent, as many as 70, or, as claimed by the claimants, as many as 50 times per shift. If we were forced to decide that question, then we would accept the evidence of Mr Pratt in paragraph 70 of his first witness statement, which was that the number was 50, and prefer that evidence to that of Mr Bates, whose "evidence" on this was in reality an estimate based on certain factual propositions. That "evidence" was in paragraphs 159 and 160 of Mr Bates' first witness statement. In fact, the "evidence" of Mr Pratt was necessarily an estimate also, but at least he was the person moving between the chambers.

Paragraphs 6.142-6.149 of the EVJD for Mr Pratt; using the roller shutter door between the chambers

589 While this should be apparent from what we say above, the impact of the roller shutter door between the +1 and the +12 chambers is stated sufficiently in paragraph 44 above. For the avoidance of doubt,

589.1 that includes the content of the documents to which reference is made that paragraph (44), and

589.2 we rejected the submission of the claimants stated in response to paragraph 6.149 of the EVJD for Mr Pratt that the "SSOWs ... are irrelevant".

Paragraph 6.150 of the EVJD for Mr Pratt: the impact of moving between the +1 and the +12 chambers

590 We preferred the words proposed by the claimants for paragraph 6.150 of the EVJD for Mr Pratt as a statement of a relevant fact. The words proposed by the respondent for that paragraph were, we agreed with the claimants, in part analytical and evaluative. The impact of the need to move between a +1 chamber and +12 chamber will be a matter for the IEs to decide so far as relevant.

Paragraph 6.160 of the EVJD for Mr Pratt; the frequency with which he encountered over-height cages

591 We agreed with the claimants on the content of paragraph 6.160 of the EVJD for Mr Pratt. The respondent's objection to us taking into account the evidence of Mr Pratt which showed that what the claimants were saying was right, was that the evidence was given "[i]n response to a closed and leading question (contrary to the medical advice)". There was no medical advice before us on that issue, in the sense that there was no "advice" from a medical doctor, or even an opinion from one, before us. There was, however, in the bundle a written "cognitive assessment" of Mr Pratt made by a "consultant clinical psychologist and forensic psychologist", concerning among

other things (as stated in paragraph 12.6 at page X/2.6/14) the possibility of "interrogative suggestibility".

592 In fact, we found Mr Pratt's evidence to have been given freely and that he both rejected propositions with which he disagreed and did so without any sign of a difficulty in doing so. We add that it would as far as we could see probably be wrong as a matter of principle for a psychologist's or a medical doctor's evidence about the mental state of a witness to affect a court's or a tribunal's view of the truth of the witness's evidence. That is clear from what is said in paragraphs 33-12 and 33-13 of *Phipson on Evidence*. In any event, while we proceeded with great caution in analysing the evidence of Mr Pratt and any other witness in relation to whom it was said by a party that there were reasons for such caution, we found the evidence of Mr Pratt to have been given without any overt indication of any difficulty on his part in declining to accept propositions with which he disagreed. In addition, the evidence given in cross-examination by Mr Bates as recorded on page 25 of the transcript of day 27 was consistent with the factual proposition for which the claimants contended so far as relevant to paragraph 6.160 of the EVJD for Mr Pratt. Thus, we accepted the claimants' submission on the material factual dispute which was maintained in regard to paragraph 6.160 of the EVJD for Mr Pratt, which was this.

> "The job holder confirmed in evidence that this [i.e. him encountering over-height cages] did not happen on every load, and that if it had been that often something would have been done about it [i.e. with the assemblers]."

<u>Paragraph 6.163 of the EVJD for Mr Pratt: what happened if the forks on a LLOP were "uneven" in height</u>

593 Paragraph 6.163 of the EVJD for Mr Pratt needed to be set out in its entirety for the dispute that arose from it to be appreciated.

> "It was up to the job holder to decide which MHE to use. Prior to lifting a Pallet, the job holder checked the condition of the Loading Truck forks for any evidence of uneven height between the forks which could make movement of the Pallet more difficult and potentially dangerous. Where that happened, he used a Ride-On PPT or (if not available or when loading a Double Deck Trailer) a Pedestrian PPT."

594 The reference there to a "Loading Truck" was (as was clear from for example paragraph 4.11 of the EVJD for Mr Pratt) to a LLOP. We saw that at D9/476 (to which we refer above, principally in paragraphs 117 and 220) this was said on page 4 (internal pages 6 and 7).

> "Before using MHE you should check for and ask yourself the following questions:
>
> ...

- Load Lifting Forks - Are there any cracks? Are the forks properly aligned?

...

Only when you are satisfied that the equipment is safe should you attempt to use it.

...

If you think that the equipment is unsafe then you must tell a Warehouse Manager to let them know what is wrong with it so that they can arrange for the equipment to be marked as defective and for it to be repaired."

595 So, a loader could not just choose to leave, unreported, a LLOP which he regarded as unsafe. And if the LLOP's forks were "of uneven height" then they would not be "properly aligned", so the LLOP would then need to be reported to a manager. And if a LLOP was the first port of call for a loader for moving a pallet, then one would have thought that there was a reason for that.

596 But even then, D9/476 indicated that a "Ride-On PPT" was the same as, or at least equivalent to, a LLOP. That was because D9/476 referred on page 2 to the persons who should deliver the training referred to in that document (which was stated to relate to LLOPs) as "Experienced operators of the ride-on powered pallet truck/loading truck".

597 However, we thought that the key here was what the respondent required loaders to use when moving pallets to (as the heading to paragraph 6.162 of the EVJD for Mr Pratt showed) the loading bay. At page 11 of D9/463 (to which we refer principally in paragraph 104 above), which was internal page 9, in the box in the top half of the page there was a description of what MHE was used for what purpose, and it seemed from that box and the text on the preceding page (namely "we have a number of different types of MHE – each designed to do specific jobs"), that only a "Loading Truck" would be used for "trailer loading". The "Ride-on Powered Pallet Truck" was said in the box in the top half of D9/463/11 to be used for "trailer unloading", and the entry in that box for the "Pedestrian Powered Pallet Truck" showed that it was to be "used for assembly in Fresh distribution centres."

598 We therefore thought that the proposition that a loader would be required by the respondent to use a Pedestrian Powered Pallet Truck to move pallets where a LLOP would be better used to do that, was likely to be true only if there were no LLOP available. So, we doubted that there was any real discretion to be exercised by the loader as asserted in paragraph 6.163 of the EVJD for Mr Pratt. What was clear was that he could not move the pallet without MHE, so that he was required to operate such MHE as was available to do it, and that the precise form of the MHE used was unlikely to affect the IEs' assessment of the demands on him in doing so. In case

they disagree with us in that regard, however, then we say now that the respondent required a loader to use the most helpful and easy-to-use MHE which was available, and not to use MHE which was inappropriate to move one or more pallets.

Paragraphs 6.166, 6.167, and 6.171-6.175 of the EVJD for Mr Pratt; taking care and acting safely

599 Given what we say in paragraphs 65-68 of our second reserved judgment (at pages 24-25 above), we saw nothing additional in paragraphs 6.166, 6.167, and 6.171-6.175 of the EVJD for Mr Pratt in so far as they all referred to the need to take care and act with reasonable skill when transporting products around the DC using MHE. There was one additional fact which might be relevant to the IEs' assessment of the value of the work of Mr Pratt as a loader, and that was that driving around the Danish Trollies and flower buckets referred to in paragraphs 6.171-6.175 of the EVJD for him might have required even more skill and care than normal. We leave it to the IEs to decide whether that added anything material to the demands place on a loader in a fresh DC.

Paragraph 6.180 of the EVJD for Mr Pratt; loading slim line cages

600 In paragraph 6.180 of the EVJD for Mr Pratt, it was asserted that because of the "narrow design" of slim line cages, "and the fact their wheels would often stick, they were prone to topple over". The claimants' submission in response to that, based on what Mr Pratt said in cross-examination, was that "The job holder confirmed that as long as he followed his training, which he did, it would have been difficult to get a slim line cage to topple over."

601 That was not how we read the passage of the cross-examination in question (which was at pages 161-163 of the transcript of day 29). That was because the proposition with which Mr Pratt agreed was that "it would have been difficult to get a slim line cage to topple over while you're moving it a short distance through the trailer". In any event, the respondent's position was that a slim line cage was more prone to toppling, which we thought was incontrovertible, and that additional care was therefore required when moving slim line cages. We agreed with the respondent on that point, but the degree of additional care was not clear and in any event whether it was going to affect the IEs' assessment of the value of the work of a loader was a different question. We observe here that if a slim line cage was more prone to toppling than a standard-sized cage in a DC then it would also be more prone to toppling in a store. As a result, it may be the case that the only thing that the IEs might see as relevant here would be the risk of toppling when a slim line cage was moved using MHE, but that risk would have been mitigated by the steps taken in the manner described in paragraph 227 above in relation to paragraph 6.69 of the EVJD for Mr Jones.

Paragraph 6.181 of the EVJD for Mr Pratt; what happened if the loading truck started slipping

602 We could not see why paragraph 6.181 of the EVJD for Mr Pratt was included, given paragraph 6.78 of that EVJD, to which we refer in paragraphs 369 and 370 above. Paragraph 6.181 of the EVJD indeed said nothing about the circumstances in which the loading truck started slipping. The truck slipping could be only because of water or other liquid on the floor (which is the situation to which paragraph 6.78 of the EVJD related and with which we deal in paragraphs 364-389 above). Thus, what was said in paragraph 6.181 of the EVJD for Mr Pratt was in our judgment simply repetitious.

Paragraph 6.183 of the EVJD for Mr Pratt: the risk of an incline in a trailer

603 For the avoidance of doubt, we deal with the subject-matter of paragraph 6.183 of the EVJD for Mr Pratt in paragraph 517 above.

Paragraphs 6.185 and 6.186 of the EVJD for Mr Pratt: the impact of the cold conditions in which fresh DC loaders worked

604 We accepted that the fact that a loader in a fresh DC was working in a relatively cold environment would, in some circumstances, mean that the loader might feel the cold more, in the circumstances described in paragraph 6.185 of the EVJD for him, and that that was a relevant condition in which the loader worked.

605 However the impact on Mr Pratt personally as described in paragraph 6.186 of the EVJD for him was in our view at best only peripherally relevant. That was because we thought that the IEs would know what additional demands would be placed on a person working in a fresh DC with chambers kept at different (relatively low) temperatures. It was also because we thought that that impact would be obvious.

Paragraphs 6.187-6.190 of the EVJD for Mr Pratt: the internal lighting in the trailers

606 We concluded (for the reasons stated in paragraphs 333 and 522 above) that we could not properly take into account lighting conditions in the trailers into which Mr Pratt loaded UODs if the absence of light made it unsafe to work there. That was because we could not see how a failure by the respondent to ensure that its employees could work in sufficient light could properly be taken into account by the IEs or us. In fact, the respondent's position stated in the first part of paragraph 6.190 (ignoring the respondent's intended replacement of the words "had to take" by the word "took") was this.

> "Whilst it was not the case that the job holder was unable to work safely, his ability to do that was clearly hindered by the lack of light in the rear of the Trailers. This meant that he had to take extra care, including for example, having to focus particularly carefully when looking for potential obstructions or spills to ensure that he was able to identify them."

607 If and in so far as it was permissible for the IEs and us to take into account those lighting conditions, then we saw that the respondent accepted (in its closing submissions in support of paragraph 6.187 of the EVJD for Mr Pratt) that at least "a few refrigerated trailers" had interior lights. It was counter-intuitive (or, perhaps it was better to say, unattractive) for the respondent to submit that there was insufficient light in the trailers, and that the IEs and we should take that into account as a condition in which the work of the comparators was done, while the respondent at the same time recognised that there was scope for that insufficiency to be remedied.

608 In addition, in bright sunshine, we suspected that there might well be plenty of light in the trailers.

609 We thought by way of analogy about working in a mine. There, miners would probably normally be expected to have a torch in a helmet, so that wherever they looked, there would be sufficient light, but that there might not be sufficient light to see objects in the way without looking down unless the employer put in sufficient overhead lighting. The cost of putting in sufficient lighting might then be a relevant factor.

610 Here, the evidence given in cross-examination by Mr Bates, as recorded at pages 27-28 of the transcript of day 27, included that "there were lights on the bays that ... could be angled to shine in".

611 Those considerations led us to conclude that if and to the extent that the amount of light in a trailer could lawfully be taken into account at a stage 2 hearing, the latter evidence had to be taken as showing that the respondent did not require its loaders to work in dim lighting conditions and that it was not part of the work (for the purposes of section 65(6) of the EqA 2010) of any of the comparators who did anything inside trailers in the course of their employment to do it in poor lighting.

<u>Paragraph 6.192 of the EVJD for Mr Pratt: tight tolerances in the trailer</u>

612 We thought that the dispute about the tightness of the tolerances at the sides of a rigid trailer, raised in relation to paragraph 6.192 of the EVJD for Mr Pratt, added nothing to the factual situation as described by us in paragraph 509 above. In any event, we thought that there would be a need for cages to be almost wedged into a trailer in order to minimise the risk of them moving when in transit, so that if only for that reason, it was an inescapable conclusion that there would be tight tolerances at the sides of a trailer. In addition, we thought that the designer of the trailers must have known about the risk (to which paragraph 6.192 of the EVJD for Mr Pratt referred) of the framework to which ratchet straps were attached being bent inwards slightly by the force exerted on the framework by the straps and would be likely to have catered for that risk in the design of the trailer.

613 We add that if the only result of the tight tolerances was that there was a need for greater care when pushing UODs into a row in the trailer, then that might not affect

the demands of the work, and might instead relate only to the way in which the work was required to be done. That was because it would merely result in the work being done more slowly, which would reduce the value to the respondent of the work done, and because that seemed to us to be irrelevant at this stage.

614 Having said those things, we record now that the claimants' proposed words for paragraph 6.192 were in the circumstances in our view apt to describe the factual background, and, in case they were relevant, we accepted them.

Paragraphs 6.194-6.195 of the EVJD for Mr Pratt: the risk of lacerations caused by damaged cages

615 We have already commented in paragraph 63 of our judgment of 12 July 2023 and in paragraph 483 above on the fact that if damaged cages risked lacerating the hand of Mr Pratt, as stated in paragraph 6.194 of the EVJD for him, then that risk applied to the sample claimants who moved cages. But, as we point out in paragraph 483 above, the respondent did not in fact require loaders to use damaged cages. In any event, by the time of closing submissions, the respondent had accepted (as recorded in the final version of paragraph 6.195 of the EVJD for Mr Pratt) that Mr Pratt's hands were not lacerated as "[t]he job holder avoided any lacerations to his hands due to wearing protective gloves."

Paragraphs 6.206-6.207 of the EVJD for Mr Pratt: shrink-wrapping of cages

616 It was clear from for example D9/427, to which we refer in paragraph 92.12 above, that a fresh DC loader might need to shrink wrap cages. That was not the subject of the dispute raised by the claimants in relation to paragraphs 6.206-6.207 of the EVJD for Mr Pratt. Rather, it was the fact that in those paragraphs, the reason for the shrink-wrapping was stated and because cross-reference was made to the AMC Guide. As is clear from what we say in paragraph 77 of our second reserved judgment (at pages 27-28 above), the latter objection could not be sustained as a matter of principle. Having said that, we could not find anything in the AMC guides that were before us about how to shrink-wrap. As for the reason for the shrink-wrapping, that was not relevant if it was stated how often there was a need to shrink-wrap a row of UODs. It was so stated: it was said to be once a month. Accordingly, for different reasons from those relied on by the claimants, we agreed with the claimants that the references to the AMC guide and the reasons for shrink-wrapping stated in paragraphs 6.206 and 6.207 of the EVJD for Mr Pratt should be ignored by the IEs.

Paragraph 6.213 of the EVJD for Mr Pratt: the reason why full width bulkhead panels were more difficult to move

617 Contrary to the submissions of the claimants, we thought that the fact that the full width bulkhead panels had "overlapping fold in side panels" was in fact relevant, if only because it would enable the IEs to assess the extra effort involved in moving

those panels as compared with moving a single (as opposed to a full width) bulkhead panel.

Paragraphs 6.214-6.215 of the EVJD for Mr Pratt; moving a bulkhead

618 We thought that the content of paragraphs 6.214-6.215 of the EVJD for Mr Pratt added nothing material for present purposes. That was because what was said in those paragraphs was implicit in the factual background, which was shown best by D9/393, D1/3/5 and D9/656, to which we refer in paragraphs 81 and 92.1 above.

Paragraph 6.216 of the EVJD for Mr Pratt: setting the temperature of the compartments on a refrigerated trailer

619 The content of paragraph 6.216 of the EVJD for Mr Pratt was inconsistent with the section entitled "Setting Trailer Temperatures" at D9/393/3. Reference was made in paragraph 6.216 of the EVJD to "pages 50, 51 and 96 of the AMC Guide", but there was nothing at pages 50, 51 and 96 of D1/2 which appeared to us to detract from what was said at D9/393/3. In any event, we concluded that what was required in this regard was as described at D9/393/3.

Overspill; paragraphs 6.228-6.235 of the EVJD for Mr Pratt

620 The reasons for the "overspill" which was the subject of paragraphs 6.228-6.235 of the EVJD for Mr Pratt (the word "overspill" was used, as stated in paragraph 6.228, to describe the problem of there being more UODs intended to be delivered to a store than could be fitted safely into the trailer which the loader was loading) were stated in paragraph 6.229. The key here was what was involved by way of work for a loader when there was such overspill. Only if giving the IEs and us the reasons for the overspill might assist our understanding of the demands of the work and the relevant conditions in which it was done, could those reasons be relevant. We could not see how those reasons could assist here in that way.

621 In many cases above, we have for the sake of brevity merely said that we preferred one or other party's proposed words to describe the factual situation which was the subject of a part of an EVJD. We could have done that with paragraph 6.230 of the EVJD for Mr Pratt. Instead, so that we give to any reader of this document who does not have immediate access to the parties' submissions a flavour of the kind of dispute that we had to determine, we now state in detail why we preferred the claimants' case on that paragraph. We add that that paragraph had to be read along with the following paragraphs of the EVJD, so we refer here also to those paragraphs.

622 Paragraph 6.230 of the EVJD for Mr Pratt was in these terms.

> "The job holder's ability to efficiently plan and implement a load was a key factor in minimising such situations, but where such situations did arise, the decision as

to which UODs should be excluded from the load was at the discretion of the job holder. "

623 That was opposed by the claimants for the following reasons.

"1. There was no load planning in any meaningful sense.
2. There was no 'discretion' in any meaningful sense - the job holder just left off whatever would not fit onto the trailer, as long as any priority UODs were included in the load.
3. 'efficiently' and 'key factor in minimising' are evaluative and/or irrelevant to what happened in practice."

624 The claimants proposed instead these words.

"When this happened, the job holder would leave off whichever UODs he had not put onto the Trailer except that, if one of those UODs had been categorised by the LPH system as 'Wave 1' , the job holder would make sure that that UOD was loaded even if that meant taking off or not loading a different UOD."

625 The respondent's submissions on the paragraph were these.

"This is not analysis, evaluation or comment. The correct factual position is found in the [evidence] of JH [{E3/1/20}, paragraph 105], Mr Bates [{E4/1/35}, paragraph 184] and Mr Yates [{E4/23.1/17}, paragraph 82]

Mr Bates confirms the matters which SP would consider in determining which UODs would be left behind.

Mr Yates states; *"I train loaders that if they have to leave product off due to a lack of space, then they should prioritise the short life products (Wave 1). If there is insufficient space for the +12 UODs that are available, then it is for the loaders to determine which Wave 2 (longer life products) are prioritised."*

Mr Bates states the suggested alternative wording does not properly reflect the things [JH] considered when deciding which UODs to leave behind; and confirms the matters which SP would consider in determining such".

626 Paragraph 6.233 of the EVJD for Mr Pratt (which was agreed) was simply that "Where he identified that a load was at risk of overspill, the job holder ensured that Wave 1 UODs were given priority." That of course detracted from the general proposition that the loader had a discretion in deciding what not to put in a trailer.

627 Waves 1 and 2 were defined in paragraph 6.231 of the EVJD for Mr Pratt, which was also agreed. Mr Pratt's knowledge of those waves was the subject of paragraph 6.232 of the EVJD for him, and it was agreed by the claimants except to the extent that it stated that "If needed, he used his AMC to identify whether a UOD contained

Wave 1 stock." That proposition was opposed by the claimants on the basis that by scanning a UOD the loader could identify whether or not a UOD contained Wave 1 products, "although he became aware of the Wave categorisation of all Products without the need to refer to the AMC (which confirmed the relevant Wave) and identified the relevant Wave simply by looking at the UOD content." We had some difficulty seeing why there was any factual dispute about paragraph 6.232 in those circumstances, but there was another factor here which was relevant. That was that there would have been no need for paragraphs 6.231 and 6.232 if the parties had instead agreed that the training materials in the hearing bundle showed that the relevant "Wave" was shown by a scan of the label on a unit. By way of example D9/251 (to which we refer in several places above, but principally in paragraph 27) had, on page 7, pictures of the screen on an AMC resulting from a scan of a case holding Gala apples, and those apples were stated on the screen to be "Wave: 1A". That therefore showed that Wave 1 products would be easily ascertainable by using the AMC if the loader was unsure (which was unlikely) to what wave a cage belonged.

628 Mr Bates' evidence in relation to the discretion claimed by paragraph 6.230 to exist was in paragraphs 184 and 185 of his first witness statement, and the latter contained the only explanation which assisted us. Paragraph 185 was in these terms.

> "In relation to [S6.230], the suggested alternative wording does not properly reflect the things Shawn considered when deciding which UODs to leave behind; even with the caveat in relation to ensuring all Wave 1 products were included in the load, it isn't right to say that he would just leave off whatever he hadn't already loaded. We expect them to consider the things described in [S6.234] in particular, making sure that all fast selling products go on the trailer and that there is enough of a spread of products to avoid the store being left in a position where it has an entire section or display left empty, which does not look good to customers (see [S6.235])."

629 The factors referred to in paragraph 6.234 of the EVJD for Mr Pratt were agreed. They made sense to us, and we could therefore see why they were agreed. For the sake of clarity, we now set out the terms of paragraph 6.234 as it stood by the time of closing submissions.

> "When determining which Wave 2 UODs should be removed from the load, the job holder took into account factors such as preferring foodstuffs over flowers/plants, as well as considering the perishable nature of certain Products. The job holder also decided whether to reduce the number of some or all Product types included in the delivery in order to ensure that the store or stores (in the case of a multi-store delivery) received the widest possible range of different Products and that customers were not left without any Products of any particular type."

630 Paragraph 6.235 of the EVJD for Mr Pratt was in these terms: “The decisions the job holder made in relation to what to include in the final load therefore directly impacted upon the availability and range of Products for the stores and the customer.” That was so general as to be of no relevance or value here. So, the only material paragraph in the sequence in question relating to the discretion for which paragraph 6.230 contended was paragraph 6.234. That paragraph was informative, but it was agreed.

631 We therefore concluded that paragraph 6.230 of the EVJD for Mr Pratt said nothing material, in that it added nothing to what was in paragraph 6.234, and the claimants were right in saying that the respondent had asserted that there was a meaningful discretion to be exercised by a loader, when there was in reality room only for the exercise of discretion in the manner stated in paragraph 6.234. In addition, the agreement of the terms of paragraph 6.233 meant that the claimants’ proposed words for paragraph 6.230 (which we have set out in paragraph 624 above) were repetitious.

632 In those circumstances, we concluded that paragraph 6.230 was unnecessary in that it said nothing material. In short, it was surplusage.

Paragraph 6.236 of the EVJD for Mr Pratt: what happened when there were “Multiple Loads [going] to a Single Store”

633 Paragraph 6.236 was about what happened if “multiple deliveries were dispatched from the DC to a single store during a single night shift” and one or more UODs “from the same Aisle location for that store had already been recorded as collected by another loader”. Cross-reference was made by the respondent in that paragraph to page 60 of the AMC Guide. The claimants opposed that cross-reference in the same way as they did in all other such cross-references, namely on the basis that the AMC Guide was “irrelevant”. For the first time when going through the parties’ contentions about the work of a comparator, we found that the cross-reference might have been apt if it were read as a cross-reference to the AMC guide on loading which was sent to us on 2 May 2024. (D1/2/60, to which paragraph 6.236 of the EVJD for Mr Pratt ostensibly referred, was about condensing and had nothing relevant in it.) That was because page 60 of the full AMC guide to loading (internal page 3-18) appeared to be relevant. It was about “available UODs”. Whether it added anything material to what was said in paragraph 6.236 of the EVJD for Mr Pratt was, however, not clear to us.

634 There was another dispute about the content of paragraph 6.236 of that EVJD, and it was about the frequency with which the circumstances described in that paragraph occurred. The respondent said that it was about once a month. The claimants contended that it was instead “Around twice during the whole of the Relevant Period – i.e. around once every three years” that “multiple deliveries were dispatched from the DC to a single store during a single night shift.”

635 Here, we thought that the frequency with which "multiple deliveries were dispatched from the DC to a single store during a single night shift" where one or more UODs "from the same Aisle location for that store had already been recorded as collected by another loader", was irrelevant in itself. However, it was relevant that a loader had to be alert to the possibility of it happening, and had to know what to look out for if it did happen. And, indeed, if the frequency were as the claimants asserted, then that meant that it was harder for the loader to remain alert to the possibility than if it were a relatively frequent event. But, in conclusion, the factor which in our judgment needed to be taken into account by the IEs and us in relation to what was said in paragraph 6.236 of the EVJD for Mr Pratt was the need to be alert to the possibility, not the number of times it happened, and the reason why there was that need was because it was a real as opposed to a fanciful possibility.

Paragraph 6.237 of the EVJD for Mr Pratt: what happened when there was another load being prepared for the same store

636 In fact, paragraph 6.236 of the EVJD for Mr Pratt may well have been intended to be read simply as an introduction to paragraph 6.237 of that EVJD, where it was said that when the circumstances described in paragraph 6.236 occurred, "the job holder was free to liaise with the loader responsible for loading the additional Trailer(s) destined for the same store to agree with him how best to allocate the +1 and +12 UODs to be delivered to that store between the two or three loads". In fact, there was nothing about that on internal page 3-18 of the AMC guide to loading (to which we refer in paragraph 633 above).

637 In any event, the claimants said that the words which we quote in the preceding paragraph above from paragraph 6.237 of the EVJD for Mr Pratt were an over-complication. The claimants' proposed replacement words for paragraph 6.237 in its entirety were these.

> "When that happened, the job holder was able to speak to the loader who was loading the additional Trailer(s) and they could decide who would collect from which aisles, eg one would collect all the +12 UODs and the other the +1 UODs."

638 However, there was in paragraph 6.237 of the EVJD for Mr Pratt a sentence stating the reason for the two loaders speaking to each other, and the claimants opposed it on the basis that it was "Analysis /evaluation/comment" and therefore "Irrelevant". In fact, the sentence was of some value in that it showed why the two loaders might liaise and therefore what they might usefully discuss and agree. That sentence was as follows.

> "This was done to ensure that the collection and loading of those UODs was as efficient as possible, bearing in mind the location of the Trailers in the Bay relative to where the UODs were being held within the Warehouse, whilst keeping in mind the need to ensure that the weight distribution within each of those loads could be managed effectively."

639 There was nothing as far as we could see in the training materials that related to the situation. In those circumstances, we found the words proposed by the respondent for paragraph 6.237 of the EVJD for Mr Pratt to be of some slight assistance by way of explanation of the factual background, but we also found that the cross-reference in paragraph 6.236 of that EVJD to page 60 of the AMC Guide was not helpful.

<u>The section in the EVJD for Mr Pratt headed "Closing and Sealing Single Deck Trailers": paragraphs 6.238-6.271</u>

Paragraphs 6.238-6.241 of the EVJD for Mr Pratt

640 We now revert to stating our conclusions in a more succinct way. Paragraphs 6.238-6.241 of the EVJD for Mr Pratt were disputed only in part.

641 Here, we found accurate cross-references to the relevant appendix to the EVJD containing extracts from the AMC Guide (D1/2). Both cross-references in paragraphs 6.238 and 6.241 were apt, and informative. They were therefore relevant.

642 As for the rest of the content of paragraphs 6.238-6.241 of the EVJD for Mr Pratt, we saw that there was a detailed description of the task of "Completing and Closing a Load" at D9/149/11-13 and (the updated version) at D9/141/12-14. We refer to those documents principally in paragraph 85.1 above. The tasks stated in rows 72-79 and rows 76-83 respectively at D9/149/11 and D9/141/12 were, we thought, rather better and more helpfully stated than the content of paragraphs 6.238-6.241 of the EVJD for Mr Pratt, albeit that the precise manner in which the AMC was operated was not stated in those rows, so that they were helpfully amplified by the references to the AMC Guide (i.e. D1/2) if, that is, the IEs needed to know that much detail. We doubted that they did. Rather, we thought, the IEs needed to know only that there was a sequence to follow on the AMC when closing a load on a trailer physically, and that that sequence was not straightforward, requiring the loader to pay close attention to the AMC's screen.

Paragraph 6.260 of the EVJD for Mr Pratt

643 Paragraph 6.260 of the EVJD for Mr Pratt was repetitious in that it referred to the need of a loader to "balance heavy UODs (including Pallets and MUs) both towards the centre of the Trailer as well as laterally", and that need was the subject of the training materials to which we refer in paragraphs 432-439 above. We add for the avoidance of doubt that we could see no difference between the need to balance an ambient DC delivery and the need to balance a fresh DC delivery, at least in principle.

Paragraph 6.264 of the EVJD for Mr Pratt

644 The next potentially material difference between the parties concerned paragraph 6.264 of the EVJD for Mr Pratt. The claimants' proposed amendments relied on the applicability of the AMC to the task. The evidence given in cross-examination, as relied on by them (it was given by Mr Pratt as recorded on pages 183-184 of the transcript of day 29 and Mr Bates as recorded on pages 176-178 of the transcript of day 26 and pages 37-38 of the transcript of day 27) showed that they were right. The AMC drove, or at least in large part directed, the process of loading where there was a multi-store delivery.

Paragraph 6.270 of the EVJD for Mr Pratt: deliveries to more than two stores

645 In our view the claimants wrongly objected to the proposition in paragraph 6.270 of the EVJD for Mr Pratt that a loader had "no alternative but to set both Chambers at +1 and use shrouds or shrink wrap to protect certain Products, if included in that load". That objection was in these terms: "'had no alternative' exaggerates what the facts of what the job holder did [were]". That was an odd objection, in our view. If a loader had no alternative to doing something then he had no discretion. In many places the claimants objected to the proposition that a comparator had a discretion. Here, it was said that the loader had no discretion. In any event, we could not see why it was asserted that the content of paragraph 6.270 exaggerated the facts of what Mr Pratt did.

646 We observe here that (1) in our view a loader had only limited discretion, but in any event where he had any kind of discretion, the key question was whether there was any "decision-making" within the meaning of section 65(6) of the EqA 2010 to be done by the loader, and (2) the latter question was one for the IEs to consider in the first instance.

647 The other disputed parts of paragraphs 6.238-6.271 of the EVJD for Mr Pratt (i.e. ignoring for this purpose the objections to the references to the AMC Guide) were about minor matters of a sort which we had already had to make a number of determinations. Having said that, we now record that we agreed with the claimants' submissions on those disputed parts.

<u>Shrouds and shrink-wrapping: paragraph 6.273 of the EVJD for Mr Pratt</u>

648 Paragraph 6.272 of the EVJD for Mr Pratt referred to the need for a shroud where bananas were put into a +1 trailer. Paragraph 6.273 was an explanation of the reason for using a shroud in those circumstances. Paragraph 6.272 was agreed. As a result, opposition to paragraph 6.273 was difficult to understand. However, the explanation in both paragraphs of the work was less informative than the content of D9/389, to which we refer in paragraph 92.9 above, which stated comprehensively the obligation to use shrouds (in regard to which, of course, there was no discretion) and made clear the reason for the use of shrouds. Given that factor, we thought that D9/389 should be regarded as a sufficient statement of the obligation to use shrouds

(which, we saw, the parties agreed, as stated in paragraph 6.274 of the EVJD for him, Mr Pratt did "about once or twice a week").

Loading double-deck trailers: paragraphs 6.278-6.315 of the EVJD for Mr Pratt

649 We deal with loading a double-deck trailer in an ambient DC in paragraphs 534-541 above. The only differences between loading in an ambient DC and in a fresh DC related to the fact that the double-decker trailers were refrigerated.

650 Loading a double-decker trailer in a fresh DC was the subject of D9/421, to which we refer in paragraph 92.8 above. It was in the same terms as D9/382, which was the basis for our findings in paragraphs 534-541 above, except that at the bottom of page 4, D9/421 referred to "frozen food units of delivery", "+1 units of delivery" and "+12 units of delivery", and stated what was required when loading those UODs.

651 There were considerable differences in the text, but not as far as we could see in the substance, of the sections of the EVJDs for Mr Hornak and Mr Pratt relating to loading a double-deck trailer. For the sake of brevity we therefore merely say here that the demands of a loader when working with a colleague in loading a double-decker trailer were as stated in D9/421 and that any dispute which the IEs see as being about something relevant to their role in this case about any part of paragraphs 6.278-6.315 of the EVJD for Mr Pratt should be read in the light of (1) what is said in D9/421, and (2) what we say in paragraphs 534-541 above. If the IEs believe that there is a need for us to determine any dispute about paragraphs 6.278-6.315 of the EVJD for Mr Pratt in that (1) they believe it to be about something material and (2) they cannot see how it had to be resolved in the light of what we say in paragraphs 534-541 above, then they can apply to us for that determination under rule 6(3) of the EV Rules.

The "Burden of Responsibility": paragraphs 6.316-6.330 of the EVJD for Mr Pratt

652 What we say in paragraph 542 above applies here also. We add that the fact that (as stated in paragraph 6.324 of the EVJD for him) Mr Pratt was taken to task in 2017 for mistakenly placing a dolly containing meat in a +12 chamber, was irrelevant here.

Mr Pratt's work of assembly

Introduction

653 As with the work of assembly in an ambient DC, the work of assembly in a fresh DC was best seen primarily by reference to the training materials. We refer to those materials in paragraph 17 above.

The manner in which we resolved the disputes maintained in relation to paragraphs 6.331-6.468 of the EVJD for Mr Pratt

654 It will be apparent from what we say above that we thought that the EVJD for Mr Pratt should have been written with those materials in mind and on the basis that those materials stated definitively at least most of the elements of the task called by the respondent "assembly".

655 Regrettably, because of the way in which the EVJD was written and the way in which the parties had disputed its contents, we found ourselves obliged to deal with many factual disputes which should in our view not have arisen, or been maintained. We have already dealt with the disputes raised and maintained by the parties in relation to the task of assembly in an ambient DC, but because the task of assembly in a fresh DC was in some respects different, we could not just say that the disputes maintained by the parties in relation to assembly in a fresh DC were to be seen as being resolved in the same way as those which we resolved in relation to assembly in an ambient DC. We therefore now turn to the disputes which were maintained in relation to the work of assembly as carried out by Mr Pratt and which we concluded should be resolved by us expressly.

Undertaking assignments: paragraphs 6.332-6.338 of the EVJD for Mr Pratt

Paragraph 6.332; the summary of the work of assembly

656 We agreed with the claimants that the word "continuous" in paragraph 6.332 of the EVJD for Mr Pratt was incorrect. The summary in that paragraph of the work of assembly was sufficient and more accurate without that word.

Paragraphs 6.333 and 6.335-6.338 of the EVJD for Mr Pratt; congestion; the MHE Highway Code and related matters

657 We also agreed with the claimants in regard to paragraph 6.333 of the EVJD for Mr Pratt: the final sentence of that paragraph was misleading and unnecessary. The number of operatives driving around will have varied from time to time, and the demands of the work will have varied accordingly. That was obvious, and was in fact spelt out in paragraph 6.335 of the EVJD, probably unnecessarily, including by saying that Mr Pratt had to comply with the MHE Highway Code. We have already referred to the MHE Highway Code and related issues in paragraphs 106-107 above. The proposition, maintained in paragraph 6.338 of the EVJD for Mr Pratt, that he "had to make repeated 180-degree twists of his body from side to side and also turned his whole body whilst moving Pallets around the Warehouse to ensure that he was not going to collide with any Cages or other UODs on either side of the Assembly Aisle or with other Operatives and/or their MHE", was, we agreed with the claimants, an exaggeration. We thought that the physical demands of driving for example a loaded LLOP in a DC would be clear to the IEs.

Paragraph 6.334 of the EVJD for Mr Pratt; the weight of a Pedestrian Powered Pallet Truck

658 Similarly to what we say in paragraph 281 above about the irrelevance of the weight of units carried on a LLOP used by an ambient DC assembler, we thought that the weight of a Pedestrian PPT, whether with our without an average load (which was the subject-matter of paragraph 6.334 of the EVJD for Mr Pratt), was irrelevant for present purposes.

Paragraph 6.339 of the EVJD for Mr Pratt: the effect of logging onto the AMC

659 Assuming (which we rather doubted) that the content of paragraph 6.339 of the EVJD for Mr Pratt described something relevant for the purposes of section 65(6) of the EqA 2010,we thought that the claimants' proposed words for that paragraph sufficiently stated the impact of logging onto an AMC and pressing the "next assignment" button.

Paragraph 6.340 of the EVJD for Mr Pratt: the proportion of time spent in the +1 chamber and the +12 chamber

660 We accepted what the claimants said about the proportion of time spent in the +1 chamber stated in paragraph 6.340 of the EVJD for Mr Pratt, which was that there was no objective evidence to support the assertion that it was either 63% (which was the figure in the first four versions of that paragraph) or (as asserted in the final version of the paragraph) 75%. In fact, it might well have helped Mr Pratt to spend most of his time in one or other chamber, as he would have needed to adapt to the different temperatures less frequently than otherwise.

661 In any event, we thought that it was sufficient for present purposes for the IEs to know that the JH would have had to move between the two chambers, and the frequency with which he would have to do so. That frequency was agreed, but on the basis of what objective evidence we could not see. It too was the result of a guess, we thought, but since the figure was agreed and there was nothing to undermine it, we accepted that it was as agreed, namely four to five times per shift.

662 We add that we failed to see the relevance of the word "night" before "shift" in paragraph 6.340 of the EVJD for Mr Pratt.

Voice-guided assembly: paragraphs 6.341-6.344 of the EVJD for Mr Pratt

663 Contrary to what the claimants submitted, we thought that the use of the word "discretion" in paragraph 6.343 of the EVJD was helpful. That was because it showed that an assembler could choose whether or not to use the voice-guiding function on an AMC. Thus, an assembler who found it helpful to use that function could choose to use it, and vice-versa. We suspected that paragraph 6.344 was irrelevant in the light of that finding, but we concluded that if the IEs find its content helpful, then they can take it into account.

Collecting pallets and related matters: paragraphs 6.345-6.351 of the EVJD for Mr Pratt

Paragraph 6.345 of the EVJD for Mr Pratt; overview and use of the roller shutter door

664 We refer in paragraphs 44 and 589 above to the impact of the roller shutter door between the +1 and the +12 chambers. The extract which we set out in paragraph 44 above and a picture in the document at D1/3/12 from which it was taken showed that even if an assembler were pulling a Pedestrian PPT, he would have to (as the parties had agreed by the time of closing submissions) use the roller shutter door and could not walk through the (ordinary, hinged) door to the side of the shutter door.

Paragraph 6.346 of the EVJD for Mr Pratt; the need for care when putting the forks of a Pedestrian PPT under a pallet

665 We agreed with the respondent that the word "carefully" was (contrary to the claimants' submissions) not inappropriately used in paragraph 6.346 of the EVJD for Mr Pratt. That was because it was obvious that some care would be required when putting the forks of a Pedestrian PPT below a pallet but also because the SSOW relating to the related situation of the use of a LLOP to which we refer in paragraph 17.6 above, namely D9/193, referred in column 6 to the need to take "great care not to clip the wheels on dropped off roll cages (particularly when dropping off slim line cages) with the forks".

Paragraph 6.356 of the EVJD for Mr Pratt; what mental arithmetic involved

666 We thought that the explanation in the second sentence of paragraph 6.356 of the EVJD for Mr Pratt of what mental arithmetic involved was unnecessary. However, the sentence was helpful if and in so far as it showed that there might be a need to multiply a two-digit number such as 24 by a two-digit number, such as 15. Whether mental arithmetic would be required was not clear, however, given that an electronic calculator might usefully have been made available, or simply permitted, by the respondent. We return to this issue in paragraphs 671 and 762 below.

Paragraph 6.366 of the EVJD for Mr Pratt: pallet breakdown

667 The claimants' objections to the content of paragraph 6.366 of the EVJD for Mr Pratt were not based on evidence but, rather, the lack of it, and deduction. Their submissions were that

667.1 there was no evidence that the assembler breaking down pallets for the purpose of putting their contents on cages for a particular store that could not receive pallets printed the labels for the cages himself, and

667.2 the product would not be of "various weights" as it appeared that paragraph 6.366 of the EVJD for Mr Pratt related to a pallet containing only one product.

668 Those submissions were apparently well-founded, but rows 41-49 at pages 6-7 of D9/154 (to which we refer in paragraph 17.12 above) and the same rows on pages 7-8 of the updated version, at D9/575, showed that if a new cage was needed, then there was a need for the assembler to print out a label. In addition, other parts of both versions of that document showed that there might be more than one product on a pallet. As a result, we concluded that the words of paragraph 6.366 as proposed by the respondent for the EVJD for Mr Pratt were apt, although they were insufficiently informative about the frequency with which the situation arose, or the frequency with which a pallet might contain more than one product. Presumably the frequency stated in paragraph 6.363 of the EVJD for Mr Pratt applied to what was said in paragraph 6.366 of that EVJD.

Multi-product pallets: paragraphs 6.367-6.372 of the EVJD for Mr Pratt

Identifying products

669 We found the words proposed by the respondent for paragraphs 6.367-6.369 of the EVJD for Mr Pratt to be a marginally more accurate description of the situation which they described than the words proposed by the claimants. That was because the latter words in our view would, if adopted, have made the factual situation marginally less clear. Similarly, while we saw that the respondent's amended cross-reference in paragraph 6.367 appeared to be correct if it was read as referring to D1/2/122 (which was in fact page 3.16 of the AMC user guide for picking by line), we did not see that page as being more than marginally illuminating for present purposes.

670 We were, however, not at all sure that the IEs and we needed to know precisely how the job of an assembler was done when there were multi-product pallets. If they and we did need to know that, however, then it was relevant that Mr Pratt said in paragraph 147 of his first witness statement that paragraph 6.369 of the EVJD for him was "an accurate description of how [he] had to concentrate to ensure [that he properly differentiated between] Products that were different but similar and looked the same from the packaging" and that the need to do that arose "most shifts whenever [he] had a multi Pallet."

Counting the units on a pallet

671 Whether (as stated in paragraph 6.372 of the EVJD for Mr Pratt) Mr Pratt or any other assembler counted mentally rather than using a calculator was in our view irrelevant. If it is relevant for the IEs to know that arithmetic was required then, if it was in fact so required (which, as we say in paragraph 666 above it might not have been) was, we thought, all that needed to be known by the IEs and us.

The task of assembly in a fresh DC in general terms; paragraphs 6.373-6.468 of the EVJD for Mr Pratt

Introduction

672 Many parts of the very detailed factual description in the EVJD for Mr Pratt of what was involved in the task of assembly in a fresh DC were agreed. A number of the parts that were the subject of dispute were also disputed in relation to the work of an assembler in an ambient DC.

673 We add that some disputes arose in different contexts but were about the same thing. A good example of that was such disputes as were maintained about the task of re-stacking as described in paragraphs 6.188-6.194 of the EVJD for Mr Hornak (to which we refer in paragraph 485 above). That description of the task of re-stacking arose in relation to the task of loading, but it was applicable also to the task of assembly in any kind of DC. It was dealt with in paragraphs 6.421-6.428 of the EVJD for Mr Pratt, in regard to which, in fact, there was little dispute between the parties.

Multiple unit assembly; paragraph 6.396 of the EVJD for Mr Pratt

674 Paragraph 6.396 of the EVJD for Mr Pratt was the subject of a dispute because of the inclusion by the respondent in it of the underlined words in this (the first) sentence.

> "Throughout each Assembly Assignment, the job holder identified and selected the correct Units as well as the right number of those Units to be Assembled from his Pallet.

675 In addition, the following sentence was proposed by the claimants to be replaced.

> "During the Relevant Period, this could include assembling up to 100 (boxed) Units into one UOD for one store or other large multiple counts for different Cages/stores, with the job holder pressing a button on his AMC each time he stacked 10 units into the Cage until he reached the required number of units to be assembled."

676 The replacement words proposed by the claimants for the whole of paragraph 6.396 of the EVJD for Mr Pratt by the time of closing submissions were these.

> "Throughout each Assembly Assignment, the job holder selected the right number of Units to be Assembled from his Pallet. During the Relevant Period, this could include assembling up to 100 (boxed) Units into one UOD for one store or other large multiple counts for different Cages/stores, with the job holder pressing a button on his AMC each time he stacked 10 units into the Cage until the AMC, which kept track of the total, showed a number less than 10 to indicate that he had reached the required number of units to be assembled."

677 As with many other disputes between the parties, this dispute was about the extent to which the comparator had to make decisions or pay attention to what he was doing, and whether or not the AMC drove or at least assisted the work in question. Here, we found that the respondent over-stated the room for discretion and sought to persuade us that the work was more complicated than it in fact was. The difference between the parties was not enormous, but we agreed with the claimants on what the task was, and what were the demands of the task. As a statement of the task and its demands, we therefore preferred the words proposed by the claimants.

Paperpick assignments: paragraphs 6.404-6.405 of the EVJD for Mr Pratt

678 The task of allocating stock in the circumstances described in paragraphs 6.404-6.405 of the EVJD for Mr Pratt as the carrying out of a "Paperpick" assignment, consisted in distributing the stock in question evenly between the UODs for the stores to which the stock was going. That task could not have been done effectively unless it was known how many stores would receive a share of the stock. Thus, the number to be allocated would be the total number of units divided by the number of stores. If the assembler were responsible for working that figure out then he would then need to calculate by using simple arithmetic the appropriate number. However, Mr Pratt's own initial evidence in the interview of which there was a record at D1/5 was (as recorded in lines 19-20 on page 67 of that record, at D1/5/17) this.

> "It tells you on the paper how much you need to pick for a certain store."

679 Also, on page 27 of the transcript of day 30, Mr Pratt accepted that a paperpick assignment occurred "less than once a year", and agreed to the propositions that

679.1 'a manager would give you a list of store locations [and] would say something like, "Please put two or three units from this pallet into each of these locations"', and

679.2 "that would be written on the paper", i.e. "the written printout",

679.3 "the only problem comes if you start to run out of stock before you've managed to put two or three items in each of the cages", and

679.4 "that is where you would split what you had left evenly between the stores that were left", so that

679.5 "essentially [you would be] just trying to make sure that each store gets at least one of the thing you're assembling".

680 That evidence was not contradicted by any other evidence, including the parts of the witness statements of Mr Pratt and Mr Bates on which the respondent relied in its closing submissions, namely paragraphs 160-161 of the first witness statement of Mr Pratt and paragraph 251 of the first witness statement of Mr Bates. It was therefore

impossible to understand why the respondent insisted in its closing submissions on its proposed text for paragraphs 6.404 and 6.405 of the EVJD for Mr Pratt, which was as follows.

> "6.404 If the job holder was allocated a 'paper pick' Assignment – which happened less than once a year during the Relevant Period and was where Stock could not be traced in the system but was nevertheless allocated for delivery to stores the job holder ensured there was an even distribution of Units across all the stores identified to him, depending on the number of Units ordered and the number available on the Pallet.
>
> 6.405 Whilst the Assembly Manager might provide some guidance to the job holder, it was up to him to decide how best to allocate them, usually distributing them on a pro rata basis whilst also ensuring that each store received at least one Unit of that Product wherever possible."

681 The claimants proposed instead these words.

> '6.404 Less than once per year, the job holder was allocated a "paper pick" Assignment. This meant that the detail of the Units to be Assembled into Cages was provided on paper and the Assignment was undertaken without the use of an AMC.
>
> 6.405 The Assembly Manager told the job holder how to carry out the task, e.g., the need to share 2 to 3 Units from the Pallet to the Cages for each large store. The job holder followed these instructions. If it became clear to the job holder during the Assignment that there were insufficient Units on the Pallet to adhere fully to the instructions provided, the job holder would usually distribute the remaining Units on a pro rata basis so that each store received at least one Unit where possible.'

682 Given Mr Pratt's evidence, given both in initial interview and in cross-examination, we concluded that those words proposed by the claimants were correct.

Paragraph 6.418 of the EVJD for Mr Pratt: the impact of layer pick assignments on PI rates

683 Even if PI rates imposed by the respondent were capable of increasing the value of the work done by a comparator, given the evidence of Mr Pratt in cross-examination as recorded in lines 6-9 on page 29 of the transcript of day 30 that he did not know whether layer pick assignments were taken into account when PI targets were set, we could see why the claimants asserted that the impact of being slowed down by a layer pick could not be relevant at this stage.

The impact of the imposition of productivity targets generally and the relevance of other, similar, factors

684 It was at this point that we considered that we were able to come to a reliable view on the impact of PI rates at this stage (i.e. a stage 2 hearing). We therefore reflected on and reviewed the question of the impact of PI rates on the demands of the work required by the respondent to be done by the comparators. It was in our view an inescapable conclusion that PI rates had no effect on those demands. That was because the work was what it was, and the imposition of productivity targets could not in itself affect that work. We came to that conclusion by reasoning from what we regarded as basic principles, and we reviewed it by looking again at the passages which we set out in paragraphs 111-113 above. Those passages confirmed for us that a performance target was entirely separate from the task to which it was applied.

685 The only relevant question was therefore whether or not the imposition of productivity targets affected the relevant conditions in which the comparators worked. We could not see how it could. That was because if it could do so then an employer could, by imposing any kind of productivity target, increase the value of the work done. That could not in our judgment be correct.

686 Separately, by way of reflection and in order to see the situation in the round, we considered on a preliminary basis, i.e. without having heard from the parties on this question, whether the existence of productivity targets could give rise to a valid material factor defence within the meaning of section 69 of the EqA 2010. On that (preliminary) basis, we thought that it was only if the productivity targets were lawfully imposed, that is to say consistently with the implied term of trust and confidence, that they could give rise to a material factor defence within the meaning of section 69. That question is one on which the parties may wish to address us at the material factor defence hearing which we have listed to take place in September and October of next year, 2025. But in any event, a productivity target was, on our understanding, not relevant at this stage.

687 We add that the potential consequences of a failure to do a job well, or correctly, must in our view be irrelevant to the demands of the job. Those potential consequences might be a material factor justifying a difference in pay, but that was not relevant at a stage 2 hearing.

688 The same was true of risks to the health and/or well-being of an employee. We could not see how an employer could properly be said to increase the value of an employee's work by making him or her work in unsafe conditions. In addition, an employer is under obligations imposed by the Health and Safety at Work etc Act 1974 and regulations made under that Act. Those obligations apply to the work of a claimant as well as a comparator, and unsafe working practices of an employee in any environment cannot consistently with recognising those obligations add to the value of the work done by that employee.

689 We also came to the conclusion that the physical conditions in which work was done could not properly be said to increase the value of the work unless the physical

conditions increased "the demands made on [the job-holder] by reference to factors such as effort, skill and decision-making" within the meaning of section 65(6) of the EqA 2010. There was, we saw, no authority on the point, but it was in our view another inescapable conclusion. If there was a difficulty arising from the point, then it was going to arise in the application of section 65(6) in practice.

Mr Pratt's work of assembly (continued)

690 We now resume our determinations of the disputes maintained in relation to part of the EVJD for Mr Pratt describing the work of assembly as done by him.

Paragraph 6.444 of the EVJD for Mr Pratt; pushing fully-laden dollies or MUs to the marshalling lane

691 We first refer to a dispute the value of maintaining which was not clear to us, but which we resolve for the avoidance of doubt. At the end of paragraph 6.443, this was said (and it was agreed).

> "In order to [push the fully loaded Dollies (or MUs with 6 Trays stacked on top of them) across the Aisle to the Marshalling Lane], the job holder rotated them by 90 degrees in order to maximise space ready for collection from the Marshalling Lane."

692 As proposed by the respondent by the time of closing submissions, paragraph 6.444 was as follows.

> "This rotation was difficult because the job holder had to push against the natural direction of the wheels on the Dolly (or MU), which created resistance. As a result, the job holder used repeated manoeuvres to get them in to the right position, all whilst working in a confined space amongst other fully loaded Dollies."

693 That paragraph was opposed by the claimants on the basis that it should be deleted. The reasons for that opposition were stated in the row for that paragraph in the claimants' closing submissions, which was in these terms.

> "1. What is being described is rotating a stable platform which has wheels, two of which rotate, by 90 degrees; that is not a difficult thing to do.
>
> 2. The rotating wheels on the Dolly or MU do not have a 'natural direction'.
> 3. The Dolly or MU would be located next to the Assembly aisle before being pushed towards the Marshalling lane – it would not be in a confined space."

694 We found it difficult to see how there could be a "natural direction" for wheels of a dolly or MU, but we accepted that we and the IEs should take into account the

possibility of resistance from wheels which were initially not in a helpful position, even though such a possibility was in our view obvious.

695 Nevertheless, we accepted the claimants' assertion that as "[t]he Dolly or MU would be located next to the Assembly aisle before being pushed towards the Marshalling lane – it would not be in a confined space".

Paragraph 6.447 of the EVJD for Mr Pratt: scope for adding Wave 2 products to a Wave 1 UOD

696 One dispute which was material concerned paragraph 6.447 of the EVJD for Mr Pratt. The original words of paragraph 6.447 had to be read in the light of the preceding two paragraphs. The whole of that sequence was originally this.

> "6.445 When undertaking an Assignment from a Pallet containing Wave 2 produce, the job holder was instructed not to assemble Units from that Pallet into a UOD already loaded with Wave 1 produce. Any attempt to scan a Unit into any of those UODs was rejected by his AMC.
>
> 6.446 If there was no UOD (i.e., a Cage or Dolly) already open for Wave 2 produce, the job holder had to open an entirely new UOD in the usual way (see paragraphs 6.436 to 6.444 above).
>
> 6.447 The one exception to the above rule applied for a period of around 60 to 90 minutes after the start of the job holder's night shift, by which point all UODs set up to take Wave 1 produce had automatically closed on the system. During that window, if the job holder found any Wave 1 UODs that had not been closed and had room for him to do so, he could assemble a Wave 2 Product into that Wave 1 UOD."

697 The claimants' proposed words for paragraph 6.447 were these.

> "The one exception to the above rule applied for a period of around 60 to 90 minutes after the start of the job holder's shift, by which point all UODs set up to take Wave 1 produce had automatically closed on the system. During that window, a manager could keep a Wave 1 UOD open for more product. If the job holder found any Wave 1 UODs that had room for him to do so, he could try to assemble a Wave 2 Product into that Wave 1 UOD; if management had kept that UOD open then he would be allowed to do so, but if it had been closed then he would not. This was all controlled by the AMC."

698 Thus what the claimants proposed was to add words which made it clear that (1) there would be a UOD containing wave 1 produce which remained open only because of a decision made by a manager to keep it open, and (2) the whole process would be governed by the AMC. We agreed with those proposed additional words, which were a helpful statement to the effect that the loader did not, as might have been thought as a result of reading paragraph 6.447 of the EVJD for Mr Pratt (i.e. as

written by the respondent), have any discretion in regard to adding Wave 2 products to a Wave 1 UOD.

The task called by the respondent "inside pallets"; paragraphs 6.484- 6.494 of the EVJD for Mr Pratt

699 There was little which was in dispute in regard to the work of Mr Pratt which the respondent called "inside pallets". In so far as there was such dispute, we now state our conclusions.

Paragraph 6.485 of the EVJD for Mr Pratt

700 We agreed with what the claimants said in regard to paragraph 6.485 of the EVJD for Mr Pratt and that their proposed (fewer) words were a better description of the work in question.

Paragraph 6.489 of the EVJD for Mr Pratt (and paragraph 6.323 of the EVJD for Mr Pustula and paragraph 6.385 of the EVJD for Mr Todd)

701 It was submitted by the respondent (via some proposed new words for paragraphs 6.489 of the EVJD for Mr Pratt, paragraph 6.323 of the EVJD for Mr Pustula and paragraph 6.385 of the EVJD for Mr Todd) that we should accept the proposition that the pallets which were moved about in the course of doing the job of Inside Pallets "could weigh as much as twice their normal weight" when they were exposed to the rain. We could not see any cogent evidence before us about the precise extent to which a pallet's weight might increase when it was wet, but we rather doubted that the weight of a wet pallet would double as compared with its weight when dry. The claimants submitted that the weight might increase "slightly". We could not say that an increase in the weight of a pallet which had to be moved by hand was irrelevant, but we could not assess the impact of the increase in the absence of cogent evidence about its extent. We left it to the IEs to take into account the possibility of an increase in weight, but concluded that the increase would be rather less than was asserted by the respondent.

Paragraph 6.494 of the EVJD for Mr Pratt

702 in the second part of paragraph 6.494 of the EVJD for Mr Pratt, which was not in the first version of that EVJD before us, which was at D1/1, there was the following assertion.

> "A further task that the job holder's Manager asked him to do while on Inside Pallets was to fill Trailers with Pallets using a Ride-On PPT. This would usually happen at least once every time the job holder was assigned to Inside Pallets. The job holder had no direct supervision nor did he use his AMC when completing this task."

703 Those words were also inserted into paragraph 6.330 of the EVJD for Mr Pustula. Mr Bates gave evidence supporting those words in both EVJDs, in the form of paragraph 286 of the first witness statement, which was in these terms.

> "The only other thing I would have asked them to do was to fill a trailer with pallets using a Ride-On PPT. During the night shift, there was normally at least one trailer arriving to collect pallets, whether to return to a supplier or taken to the RSU for recycling. Shawn would have done this if these trailers arrived whilst he was deployed to Inside Pallets."

704 The respondent's own evidence (in paragraph 3.29 of the EVJD for Mr Pratt) was that he did the thing called "inside pallets" only six times in six years. As a result, at most Mr Pratt can have put pallets onto the back of a lorry, no more than six times in that period. The claimants submitted (on the basis of the cross-examination of Mr Bates recorded on pages 86-88 of the transcript of day 27) that Mr Pratt did that work at most only once or twice during the relevant period. We agreed. In those circumstances, we concluded that he did it "rarely" within the meaning of the schematic at H31. As we understood it, the work was stated in row 12 of the procedure part of the document at D9/562 to which we refer in paragraph 90 above, which was at D9/562/3 and was in these terms.

> "Put the empty pallets onto the container/trailer using the mechanical handling equipment loading two stacks side by side, 1 stack with the 1200 side showing and one with the 1000 side showing, Alternate this down the container until you have loaded 24 stacks 360 pallets in total".

MHE battery changes; paragraphs 6.503-6.543 of the EVJD for Mr Pratt

Paragraph 6.503 of the EVJD for Mr Pratt: avoiding the battery of a Pedestrian PPT running out mid-assignment

705 It was stated by the respondent in paragraph 6.503 of the EVJD for Mr Pratt that if he was using a Pedestrian PPT then he had to change the battery if the charge indicator "dropped to below two bars". That was agreed by the claimants.

706 We saw no statement in the training materials before us about the number of bars which could be permitted by a comparator to show on the battery charge indicator on a Pedestrian PPT before the battery needed to be replaced. There was, however, this statement at the top of page 2 of D9/468, to which we refer in paragraph 96 above and which was entitled "Know Your Stuff For Mechanical Handling Equipment – Crane Operated Battery Changing".

> "Each piece of MHE used in our distribution centres has a battery gauge which indicates the remaining power for that battery. Generally when this gauge reaches 1/8th of its total, the battery will need changing."

707 Perhaps of most importance for present purposes, there was this statement slightly lower down on the same page.

> "You will find that your truck needs its battery changing when it is no longer able to raise or lower loads. Although it cannot raise or lower loads, the battery will have sufficient charge for the truck to be taken to the battery changing area in your distribution centre. Take your truck to a battery changing station or pod as soon as you suspect the battery is running down."

708 Whether or not the battery indicator was in practice allowed by for example Mr Pratt to go as low as two bars on a Pedestrian PPT as asserted (and agreed) in paragraph 6.503 of the EVJD for him, we concluded on the basis of the factors to which we refer in paragraphs 286-288 and 291 above that it was part of the work of a comparator for the purposes of section 65(6) of the EqA 2010 to take all steps which could reasonably be taken to avoid the MHE which he was using running out of battery power in the middle of an assignment.

Changing the battery: paragraphs 6.514-6.517 of the EVJD for Mr Pratt

709 As we say in paragraph 97 above, changing the battery on a pedestrian-powered pallet truck was described in 18 steps with pictures for each step at D1/3/13, which in our view was a reliable and comprehensive statement of the task of changing a Pedestrian PPT battery.

Battery care; the proposed words of paragraphs 6.518 and 6.538-6.540 of the EVJD for Mr Pratt

Paragraphs 6.518 and 6.538-6.540 of the EVJD for Mr Pratt

710 We state our conclusions on the factual assertions in the proposed new second sentence of paragraph 6.518 of the EVJD for Mr Pratt and paragraphs 6.538-6.540 of that EVJD in paragraphs 304-309 above. (The proposed new sentence was this: "Any copper wire visible as a result of damage to the cables had to be treated with care to avoid the risk of electric shock and/or fires, and had to be reported immediately.")

Craned battery changes; paragraphs 6.520-6.537 of the EVJD for Mr Pratt and related issues

Paragraph 6.520 of the EVJD for Mr Pratt; craned battery change

711 We refer in paragraph 96 above to the changing of a battery using a crane. The documentary evidence to which we referred there suggested that the comparators did not change their batteries using cranes. In considering whether Mr Pratt did that work, we took into account D9/212 (to which we refer in paragraph 99 above), which was dated 18/09/2017. It was entitled "Health and Safety Risk Assessment:

Warehouse: Battery Change". It had six numbered rows, only two of which were relevant here. The first was row 2, which related to the "Activities / tasks carried out" in relation to "Crane battery change". In the column with the heading "What are the existing control measures?", the first two bullet points on that row were these.

> "• Battery person carries out pre-op checks on crane, including tightness of chain bolts, slings in good order and that control buttons are working properly.
> • MHE Operator stands clear of the battery change operation in the designated area at all times."

712 The second bullet point after that was this.

> "• Whilst operating the crane, the Battery person remains constantly vigilant to avoid collision between moving machinery / batteries and themselves / others."

713 A little further down, there was this bullet point in the same box.

> "• Colleagues are trained on battery change using a crane as part of Know Your Stuff for MHE training."

714 However, unlike what was said in the next numbered row, row 3, which related to the activities and tasks carried out in relation to "Battery car battery change", there was no suggestion in row 2 that for example an assembler might be trained to change batteries using a crane. In row 3, the possibility of the MHE operator also being trained to do the job of changing the battery was catered for. That was in the following two bullet points, which were the seventh and eighth bullet points in the box in the column headed "What are the existing control measures?".

> "• Battery Bay Operative carries out pre-op checks on the battery change area (clean and tidy) and on the battery changing car and ensures that controls are working properly.
> • If the MHE Operator is not also the trained user of the car, they go to the designated waiting area (or a safe area if there isn't a designated area) and wait there until the Battery Car Operative indicates that the truck is ready for collection."

715 So, the training materials indicated that the respondent did not, ever, expect a person doing the job of for example assembly, such as Mr Pratt, to use the crane to change the battery on any MHE which the person was using.

716 However, no witness for the respondent was cross-examined on the basis that no comparator did the task of (as described in the heading to paragraph 6.520 of the EVJD for Mr Pratt) "Craned Battery Change". No party referred in the hearing to D9/468. No party referred in closing submissions to D9/468.

717 We then checked the EVJD for Mr Pratt to see if there was a specific reference to him having been trained to do craned battery changes. In paragraphs 4.20-4.21 of that EVJD (for the avoidance of doubt we refer here to the version at D1/1.1/31), this was said.

> "4.20 Battery change for the Pedestrian PPT was taught as part of the Pedestrian PPT training course. The training in respect of changing the battery on the Loading Truck was delivered in a practical training session in the operation of the Overhead Gantry Crane with a written assessment.
>
> 4.21 In addition, on 5 March 2017 there was battery changing training and a briefing over an hour when there was training on short lead batteries, the use of the extension leads and the updated policy and procedure for battery acid spillages. The job holder signed to indicate that he had been fully trained on these matters."

718 No date was given for the training to which reference was made in paragraph 4.20. We saw that there was in that paragraph no suggestion that there was any evidence to show that Mr Pratt had received that training. Read literally, it did not say that he had. There was no other reference in the EVJD for Mr Pratt to receiving training in the changing of batteries, including being trained in the use of a crane to do so.

719 We then checked the 1039-page personnel file for Mr Pratt, which was at D1/6. The first place where we found records of training given to him was in the section starting at page 667 (i.e. D1/6/667) and continuing to page 679. There were more such records at pages 729-740, and 797-800. There was nothing in those documents which showed that Mr Pratt had received training either in battery charging or the use of a crane to do so (or otherwise). At page 875 there was a "Training Record Card" for Mr Pratt, with a start date of 12 November 2007, showing the training which he had received during that year. None of the entries recording a "Skill/Module of Training" listed there related to the changing of batteries, let alone the use of a crane to do so. At page 892 there was a document with the title "Hinckley Fresh Food Depot – Picker & Pallet Truck Validation". There was no reference there to changing the battery of the truck, although there was a reference to "switch[ing] off the charging unit before [taking] the truck or battery off charge".

720 There was at D1/6/896 a completed document entitled "Know Your Stuff For Mechanical Handling Equipment – Pedestrian Powered Pallet Truck – Checking You Know Your Stuff – Handout 2 – Theory Test". There was no reference in that document to battery changes. There was a "Practical Test Marking Sheet" for that truck dated 20 May 2008 for Mr Pratt at D1/6/898. No reference was made there to the truck's battery. There was at page 899 of D1/6 onwards a series of records of training given to Mr Pratt. Only at page 1015 did we find a reference to training on battery changing. It was a single page document, and it was entitled "Battery Changing Brief". It was dated "5.3.17" and it was, clearly, the document to which

reference was made in paragraph 4.21 of the EVJD for Mr Pratt. There were on it Mr Pratt's name and signature and that of the trainer under the following statements.

720.1 "I have been fully trained on the short lead batteries and understand the use of the extension lead."

720.2 "I have also been briefed on the updated policy & procedure for Battery Acid spillages."

721 That was all that was said on that page, i.e. in that document. There was no other reference in the 1039 pages of the personnel file for Mr Pratt at D1/6 to training in the changing of batteries and no reference of any sort to him being trained in the use of a crane.

722 We then turned to the evidence concerning the other fresh DC comparators. Two of them also worked at Hinckley. That was Mr Pustula and Mr Todd. Both of them said that they did craned battery changes. However, there was evidence in their personnel files of them having received training to do that. Mr Todd's situation was more straightforward, because (as we record in paragraph 297 above) it was said that he had only started to do craned battery changes in April 2016. At pages 400-402 of D3/9 (which contained the personnel file for Mr Todd), there was a document evidencing training on the use of a crane as a battery attendant. It was headed "Battery Attendant Crane/Slinger Theory Test", and it was a "Validation Question Test Sheet". That document was dated "21/4/16". In paragraph 153 of his witness statement, Mr Todd said this.

> '[EVJD 6.346 / ROD 564] The Claimants say it is misleading and comment to say that I was "responsible" when using the battery Crane. From the point when I started using the crane in 2016 (I cannot remember the exact date) I was responsible for changing the batteries in my own MHE, rather than it being done by a specifically trained Warehouse Operative. Operating the crane involves responsibility because, when you are lifting a battery, it can swing around in the air. There tend to be quite a lot of unmanned trucks in the area (especially in the morning) and there can be a number of other people waiting to change batteries or collect a truck.'

723 Mr Pustula's personnel file had at D2/8/365-368 a document of the same sort as the one at D3/9/400-402. In fact, D2/8/365-368 included a fourth page, which was plainly missing from the copy of the personnel file for Mr Todd which was before us. The document at D2/8/365-368 was dated "3/2/2016" on both its first page and its last page. So, like Mr Todd, Mr Pustula appeared to have had some training in 2016 on the use of a crane to change batteries on a LLOP or similar truck. However, what Mr Pustula said in paragraphs 84 and 85 of his first witness statement showed that it was not the norm for a loader or an assembler working at Hinckley to do a craned battery change:

"84 I confirm that I have read the text of paragraph 6.359 EVJD and I confirm its wording and that it is the true factual position. Loaders were often not authorised to change batteries in their Loading Trucks, so I had to do it for them. I was removed from my duties for this purpose, was called through a speaker and had to immediately stop my work and carry out a replacement with a crane. I didn't like those situations.

85 I confirm that I have read the text of paragraph 6.360 EVJD carefully (I had time to do so) and I have no doubt that it is the true factual position and that it correctly specifies the time required to change the battery in the Loading Trucks. I maintain and confirm that the battery replacement in the Loading Truck with a crane usually took 6-10 minutes (not 3 minutes). When I gave an estimated battery replacement time of 3 minutes during my conversation with the Claimants' lawyers, I understood that I was being asked about the time it took for the batteries to be replaced in the Electric Powered Pallet Truck ("PPT") and not in the Self-Propelled Pallet Truck PPT."

724 For the sake of completeness in regard to the situations of the fresh DC comparators, we record here that it appeared that Mr Young used a battery car to change batteries on his loading truck. That was clear from what was said in paragraph 6.369 of the EVJD for him. There was no reference in the EVJD to him using a crane to change batteries. However, there was a reference to the risks arising from changing a battery using a crane. That was in paragraph 10.30B of the EVJD for him at G/313.7/155, which was in the following terms.

"The Risk Assessment for *"Battery Change"* [TSC26250 – September 2016] identifies the following sub activities and Risk Ratings (in order of risk level):

- Using Mechanical Handling Equipment – Amber 3/3 (9)
- Crane Battery Change – Amber 2/3 (6)
- Pod Battery Change – Amber 2/3 (6)
- Dealing with tipped batteries/battery spills – Amber 2/3 (6)."

725 The reference there to "TSC26250" was to the number given by the respondent to the document in its disclosure process. The document was a spreadsheet with text (and only text) in it, and it was in the bundle as D9/28. In fact, it was the precursor to D9/212 to which we refer in paragraphs 99 and 711-714 above. As a statement of a small part of what was in the document at D9/28, paragraph 10.30B of the EVJD was accurate. However, it was irrelevant to the work done by Mr Young and, we concluded, what he was employed by the respondent to do. That was because he did not do craned battery changes.

726 In order to see what approach the respondent had taken in regard to the replacement of LLOP batteries by the ambient DC comparators, we looked at the EVJD for Mr Davis and his personnel file, which was at D5/6. We saw that in paragraph 4.23 of the EVJD (at D5/1.2/45-46) this was said.

> "The job holder received training in the safe practices and procedures for battery changing as part of his initial and refresher training for each item of powered MHE he operated - the Loading Truck (a LLOP), the Pedestrian PPT and the Dekit LLOP. Furthermore, the job holder had training on battery charging and changing on the following occasions:
>
> 20.01.2010 Battery Brief
>
> > The job holder received training, lasting approximately 20 to 30 minutes on a new method of work whereby Warehouse Operatives could change MHE with depleted batteries for a new vehicle. This required the job holder to deposit the Cages on the vehicle with the depleted battery in a safe location and collect them subsequently with the new MHE (after having undertaken all appropriate Pre-Op Safety Checks on the new vehicle).
>
> 27.01.2011 Battery Change Enhancement
>
> > The job holder received one-to-one training (lasting approximately 20 to 30 minutes and held in the Battery Bay) on a new system for battery changing, which was designed to make the process faster."

727 The first reference in Mr Davis' personnel file to him being trained on battery changes that we could see was at page 124 of D5/6. The document there was headed "Training Record Form – Picking Truck" and was dated "5/10/04". There were 18 "subjects" in the left hand column in the table. One was this: "Battery room" but there was nothing on the page to indicate what training was given in that regard. On the next page, however, i.e. D5/6/125, there was a question "Who is responsible for disconnecting the battery from the charger and why?" The words "Battery Man" were written by hand in answer, but they were crossed out with the initials "ED" above the crossing-out, and on the right the letters "NA". All of the rest of the answers but one on that page were ticked. The other one not ticked was also crossed out, with the initials ED above it. The question was "Where must you return your MHE at the end of your shift?". Mr Davis had written "Tracka Board", and that had been crossed out, with the following words on the right written in: "Battery Room". We thought therefore that "NA" meant either "no answer" or "not applicable".

728 There was a record on page 204 of D5/6 of Mr Davis being given a "battery brief" on 20.01.10, but no indication of the content of the brief. There were what appeared to be full records of the training given to Mr Davis both during the relevant period and otherwise in D5/6. There was nothing else in those records which referred to battery changing. In addition, in paragraph 6.634C of the EVJD for Mr Davis, which was at D5/1.2/151, this was said.

> "The job holder engaged with Specialist Battery Operatives when having the battery changed on his Assembly and Loading Trucks. If there were other

> Warehouse Operatives ahead of him in the queue, the job holder waited for others to have their batteries changed before it was his turn."

729 So, if Mr Davis did indeed receive the training described in the first part of paragraph 4.23 of the EVJD for him, which we have set out in paragraph 726 above, then he did not use it.

730 In those circumstances, we concluded that, subject to the possibility of a reconsideration of the point in the light of submissions made in response to what we say here, we had to conclude that it was not part of the work of Mr Pratt to change MHE batteries using a crane. We accepted, however, that it was part of the work of Mr Todd to do that, but only after April 2016. We also accepted that it was part of the work of Mr Pustula to do craned battery changes, but only after he received the training shown by the document at D2/8/365-368, so only after 3 February 2016.

731 If and to the extent that it was part of the work of a comparator to do craned battery changes, then it was in our view imperative to bear it in mind that the manner in which the change had to be done was stated authoritatively in D9/468 and the SSOW at D1/3/9 (to both of which we refer in paragraph 96 above). We could not see in for example at least the disputed parts of paragraphs 6.359-6.376 of the EVJD for Mr Pustula anything which added materially to what was in those two documents (especially bearing in mind the value of the photographs in D1/3/9 in helping the reader understand the words stating the steps required to be taken) about the procedure to be followed in doing a craned battery change.

Part 7 of the EVJD for Mr Pratt: "metrics"

732 Without in any way intending to cast doubt on what we say in paragraphs 329-330 and 543-547 above, we refer here again to the issue of what the respondent called "key facts and metrics", but this time in relation to section 7 of the EVJD for Mr Pratt.

733 We have already (in paragraph 61 of our judgment of 12 July 2023) stated our conclusion on the admissibility and reliability of the various statistics relied on by the respondent. We saw that a number of statistics were advanced in section 7 of the EVJD for Mr Pratt. The claimants opposed reliance by the respondent on those statistics on the basis that they were not reliable. We doubted the relevance, or at least the evidential value, of the statistics asserted by the respondent, assuming, that is, that they were accurate.

734 While the claimants told us at the hearing of 20 July 2023 that they were opposed to the respondent being subsequently permitted to put proper evidence before us in relation to the statistics, and we accepted at the time that we would not be making provision for that possibility, when deliberating, by time of writing this document, we were of the view that if the IEs asked under rule 6(3) of the EV Rules for us to determine one or more questions relating to the statistical evidence then we would reconsider that question. In the meantime, however, we record that we doubted that

at least some of the figures given in section 7 of the EVJD for Mr Pratt were relevant, or accurate. For example we doubted that the statistic in paragraph 7.9 of the EVJD for Mr Pratt was accurate if read as applying to what Mr Pratt personally did. Paragraph 7.9 was in these terms.

> "The total weight lifted and carried by the job holder during a single full Assembly night shift was, on average, 5.3 tonnes increasing to a maximum of 7.5 tonnes."

735 If that figure of 5.3-7.5 tonnes referred to the weight carried by the MHE used by Mr Pratt, then it was meaningless.

The work of Mr Todd for the purposes of section 65(6) of the EqA 2010

Introduction; the proportions of the time spent on the various tasks done by Mr Todd

736 Mr Todd's work was summarised in section 3 of the EVJD for him. While the summaries of the tasks were of no value to us, since it was the tasks themselves that mattered so that a summary of that task did not help us or the IEs (being, in fact, a commentary on the evidential assertions about the tasks), it was helpful that there was in section 3 a statement of the proportions of time spent by Mr Todd on the tasks which he undertook during the relevant period. The proportions were, however, disputed, but ultimately so far as we could see agreed sufficiently for present purposes, in the following manner.

736.1 In paragraph 3.10 of the EVJD for Mr Todd, it was first said by the respondent that Mr Todd spent 24% of his time during the relevant period doing what the respondent called "Tipping", which was in reality the unloading of goods received. The claimants asserted that the proper figure was 18%, although the amount varied during that period, and by the time of closing submissions, the respondent had accepted that figure of 18%. We could not see on what that acceptance was based, but it was said by the respondent to have resulted from a revised analysis by it of its Denver system data. The respondent (in our view correctly) pointed out in its submissions in relation to paragraph 3.10 of the EVJD for Mr Todd that that system "was not originally designed for the purpose to which it is now being put". In any event, the claimants submitted that while the respondent now accepted the figure of 18%, "this fails to recognise material changes in the breakdown of the job holder's work for which information is available from October 2014 onwards." The respondent's answer to that assertion was in general terms, part of which we describe above in this paragraph. The answer started with this passage. "It is denied that the statistics are misleading or meaningless. As addressed in the introductory submissions on Deployment above, the Respondent has sought to assist the Tribunal and the Claimants by providing as accurate an analysis as it can of the data in its Denver system."

736.2 In paragraph 3.13 of the EVJD, it was first said by the respondent that Mr Todd spent "14% of his overall working time" on "Checking" goods received. The claimants said that that figure should be 13% but that the amount done varied throughout the relevant period. By the time of closing submissions, the respondent had accepted the figure of 13%. That, like all of the other acceptances by the respondent of the claimants' proposed figures in this paragraph (731), was based on the revised analysis of the Denver data to which we refer in the preceding subparagraph above. Again, the claimants submitted that the respondent was failing to "recognise material changes in the breakdown of the job holder's work for which information is available from October 2014 onwards".

736.3 In paragraph 3.15 of the EVJD, the respondent originally said that Mr Todd spent 18% of his overall working time on breaking down pallets. The claimants said that it was about 13% and that it varied over the relevant period. Again, the respondent accepted the claimants' proposed figure (here 13%) by the time of closing submissions. Again, the claimants objected that the respondent was failing to "recognise material changes in the breakdown of the job holder's work for which information is available from October 2014 onwards".

736.4 In paragraph 3.18 of the EVJD, the respondent at first said that Mr Todd spent 15% of his overall working time on "topping", which was removing the top layer of an over-height pallet, but that he also did topping as part of his work of tipping, so that it formed part of the 24% of the time spent on tipping. The claimants said that Mr Todd spent about 12% of his overall working time on topping but that the figure varied during the relevant period. Again, the respondent accepted the claimants' proposed figure ("12% of his overall working time") by the time of closing submissions. Again, the claimants objected that the respondent was failing to "recognise material changes in the breakdown of the job holder's work for which information is available from October 2014 onwards".

736.5 In paragraph 3.25 of the EVJD, the respondent first said that Mr Todd spent 28% of his overall working time doing what the respondent called "grid walking", which was said to be recording and reporting differences between the stock that was stated in the respondent's computer systems to be in the DC and that which was in fact there, and correcting any errors in that regard. The claimants said that the figure was instead about 42%, but that the figure varied throughout the relevant period and set out some figures for the period. By the time of closing submissions the respondent had accepted the figure of 42%.

736.6 In paragraph 3.26 of the EVJD the respondent said that Mr Todd on eight occasions during the relevant period did the task of "inside pallets", spending

on average less than an hour on each occasion. The claimants agreed with the figure of eight but said that the average time was just over 35 minutes. The respondent's position on that number was not expressly stated.

736.7 In paragraph 3.27 of the EVJD, the respondent said that Mr Todd from 2016 onwards "was deployed 3 to 4 times per year and for approximately 2 hours on each occasion to assist with the preparation of empty Cages for all Assembly Aisles within the +1 Chamber." That was agreed.

736.8 Battery changing was dealt with by way of summary in paragraph 3.28 of the EVJD. Battery changes were there said to occur "at least once per shift but usually once or twice". Since (as could be seen from the documents to which we refer in paragraphs 96 and 99 above) the task varied according to the battery being changed, that was not very informative. The claimants submitted that battery changes "could be required as frequently as once per shift or, subject to battery condition, up to once a week". However, the parties agreed that the time spent on changing batteries was included in the time recorded for Mr Todd doing "Goods In" work. We noted that nowhere in the respondent's description of the work of Mr Todd in paragraph 3 of the EVJD for him was reference made to him doing "Goods In" work as such. The claimants proposed, however, that we concluded that several of the elements of the work of Mr Todd referred to in paragraph 3 of the EVJD for him were parts of the "Goods In" function. We saw that the part of the EVJD for Mr Todd to which we turn in the next paragraph below was headed (at D3/1.1/50) "Part 3 Goods In Tipping (Unloading Trailers)", showing that the claimants were probably right to say that. The relevance of the assertion was, however, not clear to us. We were ourselves doubtful that Mr Todd would need to change the battery on his MHE more than once per shift at the most. That was because of the evidence of Mr Young to which we refer in paragraph 928 below.

Goods in; tipping (unloading trailers); paragraphs 6.66-6.193 of the EVJD for Mr Todd

<u>Paragraph 6.95 of the EVJD for Mr Todd; ratchet straps and goods in; tipping</u>

737 The first material factual disagreement that we found in the rest of the EVJD for Mr Todd was in paragraph 6.95. As proposed by the respondent, that paragraph was as follows.

> "At least once a day a Ratchet Strap became folded within the ratchet mechanism and the job holder applied the necessary level of physical effort (equivalent to lifting a full width Bulkhead Panel) in order to pull open the spring-loaded ratchet and pull out the twisted strap at the same time."

738 The claimants said that the paragraph should be in these terms.

> "About once a day the job holder would have to deal with a Ratchet Strap that had folded on itself within the ratchet mechanism. He would then apply a bit more force to pull the strap through the mechanism, the amount of force needed varying according to how badly the strap was folded."

739 The words "a bit more" were imprecise. But so was the reference to the effort of lifting a full-width bulkhead panel. However, the latter task was more easily envisaged than using a bit more force. Accordingly, we accepted the words proposed by the respondent.

Paragraph 6.97 of the EVJD for Mr Todd

740 Similarly, we thought that if it were true, then it was likely to be relevant that Mr Todd, as claimed in paragraph 6.97 of the EVJD for him, at least once a week "suffered minor finger and hand injuries (e.g., bruising or similar injuries, although not sufficient to report formally) as a result of the ratchet handle springing back and hitting him on his (gloved) hand/fingers". However, we accepted that, rather than being injured, he got (as recorded by the claimants in their closing submissions, taking the quotation from page 24 of the transcript of day 25) "a shooting pain up [his] arm".

Paragraphs 6.128-6.129 of the EVJD for Mr Todd: unloading MUs in tight rows of four

741 We agreed with the claimants that paragraph 6.128 of the EVJD for Mr Todd contained some unnecessary and unhelpful words (namely "required a particular technique"). However, we found it hard to see what was meant by what was said in that paragraph, read with the next one, i.e. paragraph 6.129, as it had to be. In addition, the claimants' proposed words to describe the factual situation did not make sense. The situation was in our view better described as follows, on the assumption that the original text of the two paragraphs was accurate.

> "When MUs were positioned tightly in rows of 4 across the Trailer, the job holder inserted the forks under an MU at the side of the trailer at a slight angle in order to compress the 3 other MUs. This allowed him to withdraw the forks and have the space to re-insert them fully so that he was able properly to align the forks underneath the MUs and safely remove them from the Trailer."

742 The problem we had with those words was that it was not clear under which MU Mr Todd would then insert the forks of his truck. Presumably it was the one which he had first put the forks under. So, he would insert the forks under the MU next to a side of the trailer (presumably the side to which he was closest), push the other three MUs out of the way slightly, reverse, and then insert the forks again, now more centrally under the MU under which he had first put the forks. After that, he would be able to take that MU out, and then go back into the trailer and insert the forks under the next MU, i.e. the one which now had a gap to its side. He would then be able to push that MU slightly towards that gap, so that he could then reverse and re-insert the forks,

now under the centre of that MU. He could then take that MU out, and do the same to the other two MUs.

Paragraph 6.137 of the EVJD for Mr Todd: alleged instability of MUs

743 We agreed with at least the thrust of what the claimants said about paragraph 6.137 of the EVJD for Mr Todd. That was that there was nothing before us to show that the MUs which Mr Todd moved were so unstable that they were liable to topple over. The photograph at D9/0.2/42 did not show unstable MUs.

Paragraphs 6.138 and 6.139 of the EVJD for Mr Todd; what his colleagues did to MUs

744 Similarly, we agreed with the claimants' assertion, made in response to paragraph 6.138 of the EVJD for Mr Todd (which was in these terms only: "*During the Relevant Period, around once a week the Job Holder's colleagues would cause an MU to topple and spill its contents, either inside the Trailer or when being moved across the Dock Leveller.*"), that what Mr Todd's colleagues did to MUs was irrelevant. However, if as a result of such toppling and spilling, Mr Todd was required to do something, then that was relevant. But, as claimed by the claimants, there was no witness statement evidence to support the proposition that Mr Todd cleared up the resulting mess as claimed in paragraph 6.139 of the EVJD for him. That appeared to have been accepted by the respondent by the time of closing submissions, since it had struck through the text of that paragraph in its closing submissions and by that text, in the next box of the table, put this:

> "JH confirms he never had an MU topple over. Delete."

745 As for paragraph 6.138 of the EVJD for Mr Todd, it was Mr White's evidence in paragraph 86 of his first witness statement, that "[t]he figure [in paragraph 6.138 of the EVJD for Mr Todd] of one a week would be correct only as an average across all of the Warehouse Operatives moving MUs." By the time of closing submissions, it was clear that what was said in paragraph 6.138 of the EVJD for Mr Todd in the form it took by the time of those submissions was said in support of the proposition that Mr Todd was especially skilful. Given what we say in paragraph 64 of our second reserved judgment (at pages 23-24 above), any particular skill that Mr Todd had did not affect the value of his work, so it was simply irrelevant for present purposes.

Paragraphs 6.145 and 6.146 of the EVJD for Mr Todd; the greater difficulty of moving Danish trolleys (referred to by the respondent as "Danish Trollies")

746 The parties disagreed about the reference in paragraph 6.145 of the EVJD for Mr Todd to Danish trollies being harder to move if the steerable wheels were at the rear of the trolley. The photograph at D9/0.2/26 was helpful, and the content of paragraphs 6.145 and 6.146 of that EVJD as proposed by the respondent made sense to us. We therefore accepted the respondent's factual assertions in those paragraphs, which in our judgment included the final sentence of paragraph 6.145 of

that EVJD. That was because we concluded that that sentence was more than an evaluative or analytical comment. Rather, it stated a material factor.

Paragraphs 6.147-6.150 of the EVJD for Mr Todd; more on moving those trolleys

747 We agreed with what the claimants said about the content of paragraph 6.147 of the EVJD for Mr Todd: it had to be read as replaced by what Mr Todd said in paragraph 100 of his witness statement. However, paragraph 6.148 of that EVJD was more than just an evaluative comment; it was, we concluded in the light of paragraph 101 of the witness statement of Mr Todd, an accurate and helpful statement about the comparative difficulty of moving Danish trollies.

748 However, we concluded that paragraphs 6.149 and 6.150 of the EVJD needed to be read as stating only that because of the size and shape of Danish trollies, which was shown by the photograph at D9/0.2/26, it was more difficult to move them using MHE than for example a full-size cage.

Paragraph 6.164 of the EVJD for Mr Todd: closing the bay door

749 We agreed with the claimants' submission that the original words used by the respondent for paragraph 6.164 of the EVJD for Mr Todd were apt and sufficient. It appeared from the respondent's closing submissions that the respondent thought that the claimants agreed with the respondent's proposed words for paragraph 6.164 of that EVJD, which were as follows.

> "On all Trailers, the job holder pressed the "close door" button on the Bay Door Control Panel, so that the air bag deflated. Once completely deflated, the internal green light changed back to a red, simultaneously showing as green externally to indicate to the driver that it was safe for him to drive the Trailer away from the Bay. The job holder then scanned the Bay door using his AMC to confirm the offloading as completed."

750 However, the situation of closing a bay door was sufficiently described in D9/385, as we say in paragraph 356 above. The only additional thing referred to in paragraph 6.164 of the EVJD for Mr Todd, even in its proposed expanded form, was the pressing of a button on the AMC when the loader had finished the task of closing the bay door, which was plainly a part of the work of anyone unloading a trailer using an AMC. If documentary support for that obvious proposition was required, it could be seen for example at page 6 of both D9/314 and D9/354 (to which we refer in paragraphs 148 and 149 above) and the following paragraph on page 4 of D9/355 (to which we refer in paragraph 152 above).

> "Once the delivery is complete return the dock leveller to its storage position, deflate the airbags, lower the bay door using the bay door control panel and scan the door barcode with your arm computer to complete the unloading task."

751 Paragraph 6.164 of the EVJD for Mr Todd, even in its proposed expanded form, therefore added nothing to what was in the training materials before us.

Paragraph 6.184 of the EVJD for Mr Todd; decisions made by other persons

752 For the avoidance of doubt, the content of paragraph 6.184 of the EVJD concerned what the respondent's managers did by way of the rejection of a full pallet of damaged goods. That was not something which Mr Todd did so it was irrelevant. The claimed fact that such rejection might be "[b]ased on alerts raised by" Mr Todd was also of no value here as it did not add anything material.

Paragraph 6.192 of the EVJD for Mr Todd; the force used to tighten ratchet straps in trailers

753 We do not in paragraphs 513-515 above address the proposition, which was not agreed by the Leigh Day claimants, that the effort involved in tightening a ratchet strap in a trailer was equivalent to lifting 10kg in weight. We did not do so because we did not see a need to do so. The Harcus claimants, however, proposed in relation to paragraph 6.192 of the EVJD for Mr Todd that we should apply that proposed description by the respondent of the force required to pull the ratchet strap.

754 We doubted that it was possible to make an accurate assessment of the force used to pull a trailer's ratchet strap, and we thought that the description at D9/393/5-6 was probably as far as such an assessment could reliably go. However, given the Harcus claimants' acceptance of the assertion that the force was equivalent to lifting 10kg in weight, we decided that that could be taken into account as a material fact by the IEs.

Paragraph 6.193 of the EVJD for Mr Todd: much change to the original version, and no apparent reason for its original approval by Mr Todd

755 We had much difficulty understanding how Mr Todd could have approved the original version of paragraph 6.193 of the EVJD for him which was put before us. That version was in these terms.

> "For every 6 loads of Stock the job holder had to reload as result of it being rejected, one would require him to attach Ratchet Straps to secure the UODs within that load; the remaining 5 were secured using Retention Bars."

756 By the time Mr Todd gave evidence to us, it was proposed that that paragraph was in these terms.

> "There were two other situations in which the job holder fitted Ratchet Straps and/or Retention Bars:

(a) From 2017, when securing loads for FareShare (see paragraph 6.298 below), the job holder attached Ratchet Straps to secure the UODs within that load; and

(b) where a delivery was being half tipped in one Chamber before being moved to the other (which happened about once a shift)."

757 Mr Todd was cross-examined on this closely, as recorded at pages 33-37 and 39-41 of the transcript of day 25. He could not explain satisfactorily how he came to approve the first version of paragraph 6.193.

758 There was a photograph of a retention bar at D9/0.2/58, which was informative. However, looking at paragraph 6.298 of the EVJD served only to confuse us. That was because that paragraph, the terms of which were agreed, was this.

> "Also from 2017, if the job holder confirmed a single Product as an 'Over', the AMC gave him 2 options; FareShare or "Return to Supplier". If the number of (over) Units was less than 10, as was the case in the large majority of circumstances, the job holder would select FareShare which would prompt an instruction to the Assembly operative to place those Units into a FareShare Cage."

759 If the number of units over was less than 10, then it was difficult to understand why the retention bar would be required to be put in place.

760 In the circumstances, we concluded that the respondent's evidence on paragraph 6.193 of the EVJD for Mr Todd was so lacking in cogency that we had to reject the factual assertion made in that paragraph. We did, however, doubt whether that was going to make any difference to the evaluation of the work of Mr Todd for the purposes of section 65(6) of the EqA 2010.

Goods in: checking; paragraphs 6.194-6.238 of the EVJD for Mr Todd

761 The job of checking goods received as described in D9/298 was straightforward. That referred (on page 4) to counting the "number of cases for the product" that the checker was scanning. That is a task which needed no explanation. Despite that fact, the respondent included this statement in paragraph 6.200 of the EVJD for Mr Todd.

> "Where a count was necessary arising from the above, if the job holder believed the Units were uniformly stacked, he used mental arithmetic to determine the total by multiplying the number of layers on the Pallet by the number of Units on each of those layers. Where necessary, with more uncommon and complicated sums, the job holder would use a pen and paper to undertake the multiplication."

762 We rather doubted that a checker would use pen and paper to do a calculation. That is because that would be less reliable than a calculator function on a mobile

telephone or a simple hand-held calculator. If the respondent failed to provide a checker with a calculator, then that was in our view incapable of adding to the demands of the work of a checker. That is because in our judgment, it would mean it was open to an employer to argue that work was more demanding than it would have been if the employer had provided what a reasonably efficient business would have provided.

763 In fact, we saw that in paragraph 6.6 of the EVJD for Mr Todd (as it stood at the start of the hearing before us, namely at D3/1.1/38) this was said.

> "Whilst the job holder could keep his mobile phone in a pocket during his shift, he was not allowed to use it on the warehouse floor (except in exceptional circumstances and with prior agreement from his Manager). Breaching this procedure would result in disciplinary action, depending on the circumstances."

764 In paragraph 3.4 of the same document, at D3/1.1/14, this was said.

> "At the same time [i.e. around 2008], Rechecking and Grid Walking, which had been a discrete element of the Checker role the job holder had previously done, was identified as a separate and standalone activity for the job holder. Throughout the whole of the Relevant Period the job holder was one of only a small number of Warehouse Operatives entrusted to undertake this specialist activity."

765 In those circumstances, it was in our judgment an inescapable conclusion that Mr Todd must, or at least should, have been permitted to use the calculator function on his mobile telephone if he had any doubt about the accuracy of his mental arithmetic.

<u>Paragraphs 6.204, 6.209, 6.218 and 6.221 of the EVJD for Mr Todd; dispute (in paragraph 6.204) over the precise kind of MHE used when moving a pallet to one side when a count resulted in a discrepancy; references to the use of discretion (paragraphs 6.209 and 6.218), and (in paragraph 6.221) a statement that care and attention was required</u>

766 While we thought that the resolution of the dispute maintained in regard to paragraph 6.204 of the EVJD for Mr Todd could not conceivably affect the IEs' assessment of the demands of the element of the work of Mr Todd referred to in that paragraph (that being because it would make no difference in that regard whether or not Mr Todd used a manual pump truck or a Pedestrian PPT, since on the facts asserted in paragraph 6.204 he would have a choice as to the MHE that he used), we thought that the words to which the claimants objected in paragraph 6.209 might have been helpful. They would have been helpful if there had been a need in practice to exercise discretion. They were to the effect that Mr Todd had to decide whether to top an over-height pallet then and there, or leave it to be done later. However, as the evidence given in cross-examination by Mr Todd to which the claimants pointed in their closing submissions (it was at pages 49-50 of the transcript of day 25) showed, he did not in practice make a decision on that issue as such. Rather, if there was a

Layermaster or VOPT available, then he would use that available MHE to do the topping himself. If no such MHE was available, then he would leave that task to be done by someone else later.

767 So, even the words proposed by the claimants ("*If the Pallet was over-height, the job holder decided whether the Pallet should be Topped immediately or could wait and be Topped later*.") were wrong. The relevant factual situation is as stated by us in the last two sentences of the preceding paragraph above.

768 Similarly, it added nothing to say, as it was in the respondent's proposed words for paragraph 6.218 of the EVJD for Mr Todd, that he "had discretion to decide the number of empty Pallets to use for Breakdown". We agreed with what the claimants submitted in this regard, but on the basis not that Mr Todd did in practice use the minimum number he could, but on the basis that it was obviously part of the work of a comparator breaking down pallets to do that.

769 Equally, paragraph 6.221 of the EVJD for Mr Todd added nothing material to the factual situation: if, as it was said in paragraph 6.220 of that EVJD, the checker had "checked the description on the packaging of each Product, its OCC Code and/or its TPN Number", then the fact that the packaging for products which had different OCC codes was nearly same (which was the foundation of the factual assertion in paragraph 6.221 of the EVJD) was irrelevant. Having said that, we accepted that there was a need (as claimed by paragraph 6.221) for "care and attention", but that was obvious.

<u>Paragraphs 6.222 and 6.223 of the EVJD for Mr Todd; the potential number of different products on a single pallet</u>

770 As an assertion of fact, paragraph 6.222 of the EVJD for Mr Todd was unobjectionable. It was in these terms.

> "Multi-Product Pallets could contain up to 100 different Products from a single supplier stacked randomly onto a Pallet by the Supplier although the average received into the DC during the Relevant Period was between 10 and 15 i.e., a Pallet may have included multiple different Product types randomly stacked across the top, middle and/or bottom layers of the Pallet."

771 That, however, was at best of only dubious relevance. The claimants proposed instead that it be found by us as a fact that (and here only that) "Multi-Product Pallets contained an average of 10 to 15 different Products." But, we inferred, the reason for paragraph 6.222 of the EVJD for Mr Todd was to illustrate the need to pay attention when breaking down a multi-product pallet, which those words would do less well than those proposed by the respondent. However, that need was (we repeat) obvious. In addition, what was said in paragraph 6.222 was in reality another way of saying what was in paragraph 6.221. Paragraph 6.223 was also in part a further additional way of asserting that there was a need for care. That was because of its

first sentence. Its second sentence was, however, material, if, that is, the IEs concluded that going to the goods in desk "to request the correct OCC Code for scanning" added to the demands of the work. The whole of that paragraph was as follows.

> "This added to the complexity of distinguishing between different Products/Product types, as did factors such as packaging/labels being written in a foreign language and/or the OCC Code not being recognised by the AMC when scanned. At least once each day, the job holder was then required to attend the Goods In Desk to request the correct OCC Code for scanning."

<u>Product type codes and moving stock by hand; paragraphs 6.224-6.231 of the EVJD for Mr Todd</u>

772 Similarly, paragraphs 6.224-6.226 and 6.228-6.230 of the EVJD for Mr Todd (paragraphs 6.227 and 6.231 were agreed and were material) added at best little that was material as far as we could see. They were objected to by the claimants on the basis that they were

772.1 "Exaggeration / misleading / unclear" (that was the first three of them),

772.2 "Exaggeration" (paragraph 6.228),

772.3 "Analysis / evaluation / comment" (that was said about paragraph 6.229 which was in these terms only:

> "The movement of these Units by hand during Breakdown was physically demanding on the job holder."), and

772.4 Analysis / evaluation / comment. Exaggeration." That was said about paragraph 6.230, which was in these terms.

> "It was for the job holder to decide whether to count the number of Units of each different Product during Breakdown or whether he waited until he had completed the Breakdown of the Products and then used mental arithmetic to calculate those numbers, having stacked the Units on the Pallet in such a way as to enable them to do that."

773 The claimants proposed the deletion of paragraph 6.224 and the replacement of paragraphs 6.225 and 6.226 of the EVJD. The claimants' proposed words for paragraphs 6.225 and 6.226 were about the more substantial parts of paragraphs 6.224-6.226 of the EVJD for Mr Todd as proposed by the respondent. The claimants' proposed replacement words were as follows.

> '6.225 Product type codes were used to identify Products that were not allowed to be Broken Down on to the same (new) Pallet. If the job holder

attempted to do that, the AMC (recognising the SSCC Codes and OCC Codes for those "do not mix" Product types) would not allow Units of more than one Product type to be scanned on to the new Pallet (at the relevant grid location).

6.226 The job holder was able to recognise many products which were not allowed to be broken down together and tried to avoid putting them onto the same pallet during Breakdown.'

774 We doubted that the IEs would need to know about the things which were the subject of the original versions of paragraphs 6.224-6.226 of the EVJD for Mr Todd, but if they did then the claimants' proposed words were in our view a slightly better description of the factual situation than those proposed by the respondent.

775 We agreed with the claimants' proposed correction of the factual assertion in paragraph 6.228 of the EVJD for Mr Todd. That was because he would not be continuously "reaching, bending, crouching and carrying Products between Pallets": he would be doing that repeatedly. However, the content of paragraph 6.228 of the EVJD described something which was obvious in that it was a necessary consequence of doing the job of moving stock from one pallet to another.

776 Paragraph 6.229 was plainly meaningless here. That is because what was in issue was what was the work of the comparator, i.e. what did the respondent require him to do, and what were the demands placed on him by that work. Stating in general terms that something is "physically demanding" was in our view of no assistance here. That was because (1) the extent to which something is physically demanding varies according to the individual, and (2) the demands of the work can be inferred by the IEs from the description of the task in paragraph 6.227, which was in our view apt and was in fact agreed.

777 In place of the respondent's words for paragraph 6.230 of the EVJD for Mr Todd, the claimants proposed these words.

"The job holder could count the number of Units of each Product as he moved them during the Breakdown process or once that process was complete."

778 Even those words seemed to us to be unnecessary. That was because all that the IEs and we needed to know was that a person doing the job of breaking down a pallet had to count the number of units of each broken down product and that (as seemed to be highly likely, if not a certainty) the task would be prompted by the AMC.

Goods in: topping; paragraphs 6.239-6.273 of the EVJD for Mr Todd

779 None of the disputed factual assertions which were left after allowing for what the claimants proposed as an alternative statement of the relevant facts in those parts of paragraphs 6.239-6.273 of the EVJD for Mr Todd which were at least in part

disputed, was in our judgment material. That is to say, taking into account what the claimants proposed as statements of fact for the disputed parts of those paragraphs, showing with what the claimants agreed, there were assertions of fact made by the respondent with which the claimants disagreed and those assertions were about things which were not capable of affecting the assessment by the IEs of the demands of the work described in those paragraphs.

780 For the avoidance of doubt, while the claimants proposed the deletion of paragraph 6.258 of the EVJD for Mr Todd, which was about the need for Mr Todd to reach across the top layer of trays or packages when using the VOPT, the claimants' submissions on that paragraph included a statement of fact, and we thought that that statement was apt. That was as follows.

> "The job holder did not reach repeatedly across the width of the pallet – at most he reached half way across the pallet to the nearest edge of the furthest tray to slide it across to the VOPT."

Re-checking and grid walking; paragraphs 6.274-6.343 of the EVJD for Mr Todd

Introduction and overview

781 We refer in paragraph 188 above to the policy and procedure document for "Grid Walking" at D9/569, dated "December 2012", and the updated version (dated "2018-07") at D9/634. Those documents provided little by way of illumination for the uninformed observer of the tasks described in paragraphs 6.274-6.343 of the EVJD for Mr Todd. Thus, those paragraphs were informative and their content was relevant at least for the most part (although there was some repetition and unnecessary text, for example the summary in paragraph 6.292 which, however, was agreed). Whether the IEs needed to know the precise details of the work, as stated in those paragraphs, was not so clear. Overall, the purpose of the work was as described in paragraph 6.276, which in our view said (if nothing else by implication) all that needed to be said about the work itself. That paragraph was in these terms (which were agreed).

> 'The purpose of the rechecking and Grid Walking functions was to review and investigate various different "mismatches" between the data held in the DC's Stock control system and the volumes and location of all items of Stock actually being processed from Goods In readiness for Assembly."

Rechecking: paragraphs 6.274-6.324 of the EVJD for Mr Todd

782 In the next paragraph, namely paragraph 6.277 of the EVJD for Mr Todd (the text of which was also agreed), reference was made to the "Stock reconciliation errors identified on his AMC". However, it appeared from paragraph 6.280 of that EVJD that before 2017, those errors were identified on "system-generated (paper) Exception Reports (called OR50 reports), which the system produced automatically as soon as

each delivery had been Checked by the relevant Goods In operative". In either case, the errors were identified before Mr Todd's relevant work started, and that work was to investigate the errors. Plainly, that required sustained concentration and attention to detail. We wondered whether the rest of the rechecking work (i.e. as recorded up to and including paragraph 6.324 of the EVJD for Mr Pratt) was obvious in that it could be inferred from what we say above in this paragraph and at the end of the preceding paragraph. That which was obvious included even what was said in paragraph 6.305 of the EVJD for Mr Pratt about moving an "over" from one pallet to one where there was a corresponding "short". That was because doing that was an obvious consequence of being required to correct errors as far as possible.

783 In any event, the IEs can take into account all of the agreed parts of paragraphs 6.274-6.324 of the EVJD for Mr Todd when evaluating that work. Most of those paragraphs were agreed. As for the disputed parts of that passage, we agreed with what the claimants said (including their proposed replacement words) except that we thought that what was said in paragraph 6.287 of the EVJD was helpful by way of background, and (assuming that it was relevant) a better place for its content than paragraph 3.23 of the EVJD. In addition, we thought that the claimants' closing submissions (in the far right column of the spreadsheet in which the closing submissions were made) in response to that paragraph referred to factual matters which the IEs and we both could and should take into account. Those factual matters were as follows:

783.1 "the job holder did not review system information for every grid location on a shift, so the inclusion of the total number of locations is irrelevant and potentially misleading", and

783.2 "there is no adequate evidence that the number of Grid locations was 931 during the Evaluation Period. 540 was the figure given in the first 4 versions of the JD which must be presumed to have had an evidential basis. Tony White accepted in evidence that he himself did not count them, and that there must be a record of the number on the system which would not be difficult to print out but which has not been disclosed."

784 We did wonder how the varying frequency with which Mr Todd did the work of grid walking and rechecking (as recorded in paragraph 6.317, which was agreed) could be taken into account by the IEs, but we noted that in paragraph 6.317 the frequency was averaged out as "2 to 3 times per week".

<u>Grid-walking (or lane sweep); paragraphs 6.325-6.343 of the EVJD for Mr Todd</u>

785 As with paragraphs 6.274-6.324 of the EVJD for Mr Todd, most of paragraphs 6.325-6.343 of that EVJD were agreed. If and to the extent that a paragraph was the subject of a dispute, we agreed with what the claimants submitted about the disputed matter (ignoring for this purpose the typographical errors in the proposed text for paragraphs 6.338 and 6.341).

Craned battery changes and other things relating to batteries; paragraphs 6.344-6.379 of the EVJD for Mr Todd

Craned battery changes; paragraphs 6.344-6.363 of the EVJD for Mr Todd

786 We refer above to the evidence relating to the use by Mr Todd of a crane to change MHE batteries. We do so in paragraphs 297-298, 717 and 730-731 above. We also refer there to the training materials relating to changing batteries using a crane. In particular (but not only) in the light of what we say in those paragraphs above, we thought that paragraph 6.345 of the EVJD for Mr Todd was accurate, although it was for present purposes unnecessary given what we say in paragraphs 297-298, 717 and 730-731 above. In addition, we thought that the words of paragraphs 6.353 and 6.357-6.359 of the EVJD for Mr Todd could be taken into account by the IEs if and to the extent that the IEs found them to be a helpful addition to the content of D1/3/9. We ourselves doubted the need for there to have been more said here than that the content of D1/3/9 stated the work sufficiently, and that the frequency with which the work had to be done was stated in paragraph 6.344 of the EVJD.

787 As for that frequency, we agreed with the claimants' analysis of the evidence and therefore their proposed words for paragraph 6.344. We also preferred the words proposed by the claimants for paragraph 6.348, which made more sense than those proposed by the respondent and also (and critically) were consistent with what was said in columns 1 and 3 of D1/3/9. Similarly, we agreed with the words proposed by the claimants for paragraph 6.350, which were consistent with what was said at the bottom of column 1 on D1/3/9. We also agreed with the claimants that paragraphs 6.354 and 6.355 of that EVJD were about irrelevancies (in the form of the presence of operatives working in, waiting in, or passing through the battery bay).

Changing the battery on a layermaster truck: paragraphs 6.364-6.373A of the EVJD for Mr Todd

788 Contrary to the claimants' submissions on the content of paragraphs 6.365-6.368 and 6.372 of the EVJD for Mr Todd, which described what he did when changing the battery of a layermaster truck, we thought that parts of what was said in those paragraphs might be helpful to the IEs and us in understanding the difficulties of driving a layermaster truck across the DC and then changing its battery. The truck itself was shown in the picture at D9/0.2/39, where there was a photograph of it in its fully extended position, that is to say with the four-way clamp at the highest point it would go upwards. However, the truck was shown more informatively in the photographs at D9/492/1, D9/492/3 and D9/492/5. It was certainly larger than some other pieces of MHE. It was not said expressly in the EVJD for Mr Todd whether or not a layermaster truck was more difficult to drive safely around a DC than any other large piece of MHE such as a LLOP, but that was implied. In addition, what Mr White said in paragraph 121 of his first witness statement suggested that the battery of a layermaster truck was (even) bigger than the batteries of some of the other larger

pieces of MHE. The photograph of the battery compartment at D9/492/4 showed a bigger battery than the ones which appeared to be for LLOPs at D9/487/2, but a smaller battery than the forklift truck batteries shown at for example D9/0.1/16.

789 As a result, we accepted that what was said in paragraphs 6.365-6.368 and 6.372 of the EVJD for Mr Todd might assist the IEs and us, although we thought that there had some over-egging of the pudding in those paragraphs. For example, the claimants' submissions about the content of paragraph 6.366 of that EVJD were cogent, pointing out as they did that when travelling from the goods in area to the battery bay, the driver of the layermaster truck would not go down any aisles so there would be no danger of the truck bumping into overhead signs. In addition, the training document at D9/491 relating to moving a layermaster truck was in substance the same as the training document at D9/484 relating to moving a LLOP, which showed that there was no fundamental difference between moving a layermaster truck and moving a LLOP.

The work which the respondent called "Inside Pallets"; paragraphs 6.380-6.393 of the EVJD for Mr Todd

790 There was similar over-egging of the pudding in paragraphs 6.380-6.382 of the EVJD for Mr Todd, and we accepted the claimants' submissions about the facts asserted in those paragraphs. So, what the claimants proposed as factual statements instead of what the respondent proposed in those paragraphs was in our judgment accurate. The work included using a pallet stacker, to which we refer in paragraphs 34-36 above, and had to be seen in the light of the documents to which we refer in paragraphs 91 and 183 above. We have already dealt (in paragraph 701 above) with the proposed additional words of paragraph 6.385 of the EVJD for Mr Todd concerning the impact of rainwater on a pallet.

The rest of the EVJD for Mr Todd

791 We believed that the other disputes maintained in regard to the contents of Mr Todd's EVJD did not need to be determined. That was because of one or more of the things said in paragraphs 9-78 of our second reserved judgment (at pages 5-28 above).

<u>The work of Mr Pustula in so far as the disputes in relation to it are not determined above, whether directly or indirectly</u>

Introduction; an overview of the work done by Mr Pustula and our determination of the proportion of time spent by him on the various tasks which he did in fact do

792 The work of Mr Pustula was summarised in the EVJD for him as it stood by the time of the hearing (G/313.3) as consisting principally of

792.1 assembly, during which time Mr Pustula spent (according to paragraph 3.9 of the EVJD at G/313.3; any reference below to the EVJD for Mr Pustula is to

that version of it) approximately 60% of his working time in the +1 chamber at Hinckley; and

792.2 the management of merchandising units (abbreviated by the parties to, and referred to by us in what follows below as, “MUs”).

793 The work of assembly required no further explanation here. The work done by Mr Pustula in relation to the management of MUs, however, did. It was summarised in paragraphs 3.16 to 3.23 of the EVJD for Mr Pustula. That summary was unnecessary, because it was the demands of the work that were in issue here, and they were not revealed by a summary. One part of the summary (paragraph 3.17) was, however, a pure repetition, and for convenience we consider it here. In addition, what was said in paragraph 3.20 was relevant in helping us to understand what it was that the respondent asserted about the role of Mr Pustula in regard to the management of MUs.

794 In paragraph 3.20 of the EVJD for Mr Pustula, the respondent described him as being “responsible for:

(a) maintaining the required standards in the Aisles within the +12 Chamber and ensuring MUs he prepared for delivery during the course of his night shift, could commence without unnecessary delays;

(b) managing the space available for MU (and other UOD) storage across the +12 Chamber, to ensure all operatives (including himself) were able to locate and retrieve any UODs he/they needed during the night shift as quickly, safely and easily as possible; and

(c) responding to enquiries from Loaders seeking to locate MUs unavailable in the Aisle location identified on their AMC.”

795 The claimants responded to that paragraph by submitting that that was an exaggeration and proposing the following alternative words.

“The job holder kept the locations where he was collecting MUs tidy, made sure when delivering MUs to Aisle / Grid locations that he left them tidy, and sometimes had to answer queries from colleagues who could not find a particular MU in the Aisle location where their AMC said it would be.”

796 We agreed with that submission and those proposed words.

797 It was said in paragraph 3.17 of the EVJD for Mr Pustula (and that paragraph was repeated, almost word for word, in paragraph 6.200 of that EVJD; the only the word “management” in paragraph 3.17 was replaced by “collection and allocation”, but the heading to paragraph 6.200 was “Management of MUs”) that

797.1 when he was "deployed to the management of MUs, [he] worked independently of close supervision and without reference to an AMC", and

797.2 "On 90% of his night shifts, the job holder was the only Warehouse Operative responsible for the management of MUs."

798 The claimants responded to the content of both of those paragraphs of the EVJD by saying that it was "Exaggeration / misleading / evaluative", and that a more accurate description of the situation was this.

> "When deployed to the management of MUs, the job holder worked from a strip of UOD labels provided to him rather than by reference to an AMC. On 90% of his night shifts, the job holder was the only Warehouse Operative dealing with MUs."

799 We thought that the latter words did not reflect the reality, which was that Mr Pustula was not the only warehouse operative "dealing with MUs", as others were, necessarily, doing something in relation to them, which might be called dealing with them. So, the word "responsible" was apt. The relevant issue was what were the demands which arose from being so responsible. That was a matter of detail, to which the respondent referred later on in the EVJD for Mr Pustula (in paragraphs 6.201-6.263), and to which we return in paragraph 819 onwards below. As for paragraphs 3.17 and 6.200 of the EVJD for him, if Mr Pustula worked from "a strip of UOD labels provided to him" instead of using an AMC, then it was equivalent to using an AMC and it was misleading to imply that there was any relevant difference.

800 In paragraphs 3.24-3.25 of the EVJD for Mr Pustula, it was said that he also did some work of "dekitting", meaning (as stated in paragraph 3.24 of that EVJD) collecting "groups of empty Cages and on rare occasions Danish Trollies and Milk Cages (that had been returned from stores) from the rear of Trailers and transport[ing] them to various designated storage locations within the middle of Assembly Aisles using a Loading Truck adapted for this purpose". While the words of paragraph 3.25 of the EVJD for Mr Pustula were slightly ambiguous, we read them (as did the claimants) as meaning that Mr Pustula did that work only "up until 2016", although precisely when in that year he stopped doing it, or whether he had stopped at the end of 2015, was not stated. When doing the task, it was said in paragraph 3.25 of the EVJD, "[Mr Pustula] normally remained on the task for the whole of his night shift, on average 2 - 3 times per month, although [he] could be asked to return to any of his other duties according to business need."

801 The claimants' response to what was said about dekitting in paragraphs 3.24-3.25 of the EVJD for Mr Pustula was that while the description of the work was accepted by them,

801.1 "the only evidence that the job holder did any dekitting in the Evaluation Period appears to be the job holder's confirmation (eg paragraph 18 of his

statement) that he did some dekitting and a single one-word reference in his 2013 annual appraisal (at {D2/8/108}) to him liking 'dekit'", and

801.2 "The Denver system includes a specific code for dekitting, but the data provided by the Respondent in respect of the job holder at {D2/9.1} does not include any entries for dekitting, and the Respondent has provided no explanation as to why it says that he did dekitting but it is not recorded anywhere."

802 Thus, it was submitted by the claimants, there was a "lack of evidence [that Mr Pustula] did this [task of dekitting]", and, as a result, it was said, paragraphs 3.24 and 3.25 of the EVJD should be deleted.

803 It was in our judgment unlikely that in 2022 or 2023 Mr Pustula would have had an accurate recollection of the extent to which he did the work of dekitting between 2012 and 2016, but the fact that it was referred to by him in his 2013 appraisal as being something that he liked doing (it was the third of the three things that he liked doing, the other two being (1) "Picking", and (2) "MU's") meant in our view that the claimants' submission that we should conclude that he did not do it had to be rejected. The description of the work of dekitting was detailed and was in paragraphs 6.264-6.317 of the EVJD for Mr Pustula. We return to those paragraphs below, when stating (in paragraphs 830-851) such conclusions as we concluded needed to be stated in relation to the disputes maintained about the content of those paragraphs.

804 In paragraph 3.26 of the EVJD for Mr Pustula, it was said that he also on six occasions "from 2015 to 2017" did the task called by the respondent "inside pallets", which, according to that paragraph, meant "collect[ing] individual empty Pallets from common workspaces at the end of each of the Aisles across the warehouse, [and] removing them from the Pallet Stacker (in groups of 10) using either a Ride On PPT (Photo G39) or a Pedestrian PPT". The claimants did not dispute that Mr Pustula did that task on six occasions only during the relevant period, but submitted that the precise period was "from May 2015 to November 2017" and that the time spent was "sometimes ... under 30 minutes and on other occasions up to around 2 hours". We doubted that such precision was going to assist us or the IEs. Even on the respondent's evidence, it was done over a period of 3 years, with a frequency which was best characterised (applying H31) as "Rarely", and it was best characterised as taking at least sometimes no more than 5%-20% of the shift, which was the lowest bracket for the "Percentage of time spent undertaking specific activities" stated on that page.

805 In paragraph 3.27 of the EVJD for Mr Pustula, it was said that on 82 occasions during the relevant period, he did the work called by the respondent "set up and standards", which was "assist[ing] with the preparation of empty Cages for all Assembly Aisles within the +1 Chamber". Averaged out over the period of six and a half years or so, that was approximately 12 times per year. At most, applying H31, that was "regularly", the definition of which was "In a week or month".

806 In fact, the claimants asserted that "about 75%" of the work of set up and standards was done during 2014 and 2015. Their submissions in that regard also related to the amount of time spent doing the work, and included the following paragraphs.

> "1. The Denver data provided by the Respondent shows that the vast majority of occasions were in 2014 and 2015, with far fewer in other years.
> 2. It also shows that there were only 4 full shifts and that the average time spent on the task when it wasn't a full shift was about 2.5 hours."

807 The respondent's proposed words for paragraph 3.27 of the EVJD for Mr Pustula by the time of closing submissions were these.

> "Throughout the Relevant Period, the job holder was deployed on 82 occasions to assist with the preparation of empty Cages for all Assembly Aisles within the +1 Chamber. Between the start of the Relevant Period and 9th August 2014, the job holder undertook Set up and Standard [sic] during 1 full shift and 20 part-shifts (when doing part shifts, for a period of 2 hours at a time on average). From 9th August 2014 until end of February 2018, the job holder undertook Set up and Standard during 18 full shifts and 41 part-shifts (when doing part shifts, for a period of 2 hours at a time on average)."

808 Unsurprisingly, Mr Pustula was unable when he was cross-examined on this, as recorded at line 10 on page 25 of the transcript of day 28, to remember precisely whether he ever did a full shift of set up and standards. The respondent's submission in relation to (1) its position set out in the preceding paragraph above and (2) the claimants' challenge to it was this, and only this.

> "This revisions [sic] to this paragraph is [sic] supported by the evidence before the Tribunal and there is no good evidential basis for challenge."

809 In response to it, the claimants relied on the Excel spreadsheet at D2/9.1. That document had 6 tabs, and the "Denver Data" tab, which was the fifth one, had in it 42082 rows, each of which was an entry for time taken on a particular task by Mr Pustula. The second tab was entitled "WeekByWeek". Neither of those tabs was in a form which (without guidance from the parties) was helpful to the task that we were required to carry out as part of the stage 2 hearing which led to this document. Nor were the "Pivot tables" in the sixth tab of any overt assistance here. In row 35 of the fourth tab, entitled "Category", it was said that "Setup & Standard" work (categorised in column C as "Assembly") constituted 1.89% of Mr Pustula's work during the whole of the relevant period. Probably the most helpful part of the document for our purposes was the chart tab, which was the third one, and that showed by a visual chart the work done by Mr Pustula during the relevant period as recorded on the Denver system. The vast majority of it was either assembly or the management of MUs, but with assembly being the large majority of the work of Mr Pustula for the first two and a half years of the relevant period. The charts at tab 3 spoke for themselves,

and we concluded that the IEs should take from those charts whatever they regarded as being relevant and informative. We did not attempt to verify the assertions of the claimants in numbered paragraphs 1 and 2 which we have set out in paragraph 806 above, because

809.1 in order to do so we would have needed assistance from the claimants to interpret the spreadsheet on which they were based,

809.2 the parties agreed that Mr Pustula did the work on 82 occasions during the relevant period,

809.3 the respondent's factual assertions about those 82 occasions were not supported by references to any documentary evidence, and

809.4 given the content of the work of setup and standards (which was dealt with in paragraphs 6.332-6.339 of the EVJD for Mr Pustula, which were in substance agreed; we return to those paragraphs in paragraph 854 below) we were unable to see how a determination of the correctness or otherwise of the assertions could affect the determinations of the IEs about the demands of the work done by Mr Pustula for the purposes of section 65(6) of the EqA 2010.

810 However, if the IEs believe that they need a determination by us of the question whether the claimants' assertions or those of the respondent were correct about the 82 times during the relevant period when Mr Pustula did the work of setup and standards, then we will consider their request to do so, which will have to be made under rule 6(3) of the EV Rules. When writing this document, we could not see how we could come to a reliable determination of that sort without further input from the parties.

811 There was the following separate statement in paragraph 3.28 of the EVJD for Mr Pustula about battery changes.

> "The job holder monitored battery levels on all MHE he used for all duties throughout his night shifts and to undertake battery changes as necessary. Battery changes could be required as frequently as more than once a night shift. The time taken to undertake battery changes was included in his measured time for Assembly."

812 We thought that it was highly unlikely that the respondent would have bought, or countenanced the use of, MHE that had batteries whose charge would not normally last at least the whole of an employee's working day. We were therefore surprised by the proposition that "[b]attery changes could be required as frequently as more than once a night shift". However, the proposition was not challenged by the claimants.

813 The proportion of time spent on assembly was, according to paragraph 3.15 of the EVJD for Mr Pustula, 64% of Mr Pustula's working time. That was disputed by the claimants on the basis that the "Overall working time statistic is not helpful, as this does not adequately describe JH's work over the period." It was the claimants' position (based on the content of the spreadsheet at D2/9.1) that the amount of time spent by Mr Pustula on the tasks of (1) assembly and (2) MUs during the relevant period, was as follows.

"**Time period**	**% Assembly / % MUs**
18/2/12-31/12/12	98.7 / 0.8
1/1/13-31/12/13	96.0 / 3.6
1/1/14-30/6/14	94.0 / 5.2
1/7/14-31/12/14	75.7 / 23.3
1/1/15-30/6/15	67 / 32
1/7/15-31/12/15	58 / 40
1/1/16-30/6/15	50 / 49
1/7/16-31/12/16	47 / 51
1/1/17-30/6/17	42 / 57
1/7/17-31/12/17	31 / 68
1/1/18-31/8/18	38 / 61"

814 The respondent's submission in support of the content of paragraph 3.15 of the EVJD for Mr Pustula was this.

> "Detailed breakdown is provided at {G/94.4/1} and later in the sections that follow.
>
> This is a summary section of the EVJD.
>
> Details follows [sic] in the sections below. This is appropriate and in line with the IE Guidance {G/11/3}."

815 The document at G/94.4 was a single page summary, plainly created by the respondent, entitled "Robert Pustula – Timeline and Deployment Summary". It had three columns. The first was for the "(Approx) Date" and the second was entitled "Detail of Change". In that second column there were cross-references to paragraphs of the EVJD for Mr Pustula. The third column was entitled "Deployment (Time Allocation)". Nothing was stated by way of support for the evidential propositions made in that third column. Thus, the document at G/94.4 was not evidence. It was at best a statement of the result of an analysis by someone, who was not identified, of documentary or (if different) digital evidence which was not identified.

816 Given the charts at tab 3 of the spreadsheet at D2/9.1 to which we refer in paragraph 809 above, we concluded that the claimants' figures set out in paragraph 813 above

were likely to be accurate, or at least sufficiently accurate to be accepted. We therefore accepted them.

The task of assembly as done by Mr Pustula; paragraphs 6.53-6.199 of the EVJD for him

817 The task of assembly as done by Mr Pustula was the same as that which was done by Mr Pratt. The words used by the respondent in the EVJDs for them to describe the task of assembly differed in minor ways only (which we identified by doing a digital comparison of the applicable sections in the EVJDs for both of them). Given that we had already determined such disputes as we concluded needed to be determined in relation to the work of Mr Pratt, which themselves were determined in the light of such determinations as we had already made about the work of assembly in an ambient DC, we saw no need to address the disputes maintained by the parties in relation to the assembly work of Mr Pustula.

818 We add (for the avoidance of doubt) that

818.1 we saw that the content of paragraphs 6-134-6.136 of the EVJD for Mr Pustula (concerning what the respondent there referred to as "Paperpick Assignments" and "Label Pick Assignments") was not mirrored in the equivalent part of the EVJD for Mr Pratt, which was paragraphs 6.404-6.405, to which we refer in paragraphs 678-682 above,

818.2 in paragraph 6.148 of the EVJD for Mr Pustula it was said that it was Mr Pustula's understanding that no allowance would be made in the application of the PI rates to his work for the fact that he had to complete a layerpick assignment, and that that caused him anxiety, whereas in paragraph 6.418 of the EVJD for Mr Pratt, the position in that regard was "not transparent to the job holder", and

818.3 we saw no material difference between a paper assignment and one done using an AMC, and no difference for present purposes between the impact of what was said in paragraph 6.148 of the EVJD for Mr Pustula and what was said in paragraph 6.418 of the EVJD for Mr Pratt.

The management of MUs by Mr Pustula; paragraphs 6.200-6.263 of the EVJD for him

<u>Paragraph 6.201 of the EVJD for Mr Pustula: the irrelevance of the excellence (or otherwise) of his performance</u>

819 For the avoidance of doubt, for the reasons given in paragraph 64 of our second reserved judgment (at pages 23-24 above), the statement in paragraph 6.201 of the EVJD for Mr Pustula was irrelevant for the purposes of a stage 2 hearing. That paragraph was as follows.

> 'In his annual review on 7 September 2013, the job holder's Manager recorded that the job holder was a "great support for the Chill 2 Manager" in relation to his work on MUs.'

Paragraphs 6.202-6.204 of the EVJD for Mr Pustula: the absence of scrutiny

820 What was said in paragraphs 6.202-6.204 of the EVJD for Mr Pustula about the absence of scrutiny of his work in the management of MUs was no different in effect from the "burden of accountability and responsibility" referred to in paragraphs 6.363-6.377 of the EVJD for Mr Hornak to which we refer in paragraph 542 above.

Paragraphs 6.205-6.263 of the EVJD for Mr Pustula; the disputes relating to the details of the task of managing MUs as done by Mr Pustula

821 We agreed with the claimants' submissions about the things which were the subject of dispute in the following paragraphs of the EVJD for Mr Pustula: 6.215, 6.218 (which, for the avoidance of doubt, we thought overstated the position; it was in our view sufficient for the IEs and us to know that Mr Pustula had to listen to tannoy announcements, but since, we assumed, that was part of the work of all comparators, and probably all claimants, we concluded that paragraph 6.218 added nothing material to what was in the two preceding paragraphs above it), 6.221, 6.224, 6.227, and 6.229 (in relation to which it appeared that the claimants' submissions were advanced on the basis that the figures for the average weights of MUs were unreliable, but if the respondent's figures in spreadsheets were to be relied on then the respondent's proposed words were inaccurate and the correct figures were as stated by the claimants).

822 As for the claimants' submissions in regard to paragraph 6.230 of that EVJD, we accepted the proposition that saying that the task was "physically demanding given the weights involved" was evaluative only, but we concluded that if Mr Pustula did in fact push, pull, or otherwise cause about 300 MUs weighing on average 168kg to move then, even though that 168kg would be on wheels, that would require some effort. The impact of that requirement for the purposes of section 65(6) of the EqA 2010 was, however, in our view a matter for the IEs at this stage, and not us.

823 We came to the same conclusion in regard to paragraph 6.238 of the EVJD for Mr Pustula. Assuming (which the claimants said should not be done, and which we did not do) that the figures given by the respondent for the weights of the things moved by the comparators were correct, what was said in paragraph 6.238 about the "overall weight [of MUs with 6 trays stacked on top] being 'pushed through' by" Mr Pustula "far exceed[ing] the weight of the MUs themselves" was meaningless for present purposes.

824 We refer in paragraph 178 above to the documents at D9/554 (dated September 2011) and D9/611 (dated "2017-12") stating the respondent's policy and procedure for checking and putting away merchandising units. We refer in paragraph 17.13

above to D9/553 (dated September 2011) and D9/609 (dated "2017-12") concerning "Picking Merchandising Units". We refer in paragraph 17.18 above to D9/567 (dated November 2012) and D9/605 (dated "2017-12"), concerning "Assembling on Merchandising Units in Stockless Depots". Plainly, the "Team Member" tasks in those documents were relevant here, but those documents were also helpful in that they stated the factual background to the disputed descriptions in paragraphs 6.239, 6.241 and 6.246 of the EVJD for Mr Pustula. So, for example, the following three bullet points in the "Picking merchandising units" box at D9/553/1 and D9/609/1 showed what was required by way of managing the space in which MUs were kept for picking.

> "• Merchandising units are placed neatly within store lane towards the front to help prevent them being moved to the wrong store lane or being misdirected
>
> • Only merchandising units with the earliest delivery date on the labels should be put in the store lanes
>
> • Store lane moves are updated on the Denver system so that the sequence number on the merchandising unit label matches the store lane number".

825 The words of D9/554 for the same thing (this time in the box with the heading "Putting Merchandising Units in the Correct Area") were different, and in fact less informative as far as we were concerned. In any event, we concluded that the words of D9/553/1 and D9/609/1 which we have set out in the preceding paragraph above were the best guide to what was required of Mr Pustula by way of managing the space where MUs were stored and picked at Hinckley.

826 For the avoidance of doubt, we concluded that the reference in paragraph 6.246 of the EVJD for Mr Pustula to keeping "the Aisles and other areas between the storage locations ... tidy and free of any obstructions" was not a separate task but part of the obligation to clean as he went along, as stated in paragraph 6.400 of the EVJD for him.

827 We concluded that the parties' disputes in relation to the references to Danish trollies in paragraphs 6.242 and 6.244 of the EVJD for Mr Pustula did not need to be determined. That was because

827.1 the number of "seasonal periods" that there were at Hinckley was not stated in paragraph 6.242,

827.2 the reference to paying "particular attention to other operatives" to avoid "damage to MHE or other equipment and/or injuries to those operatives", as asserted in paragraph 6.244, was unlikely (even when read with paragraph 6.245, which the claimants objected to for the cogent reasons stated in their submissions in response) to help the IEs or us in deciding whether or not the

work of Mr Pustula when moving Danish trollies differed materially from moving MUs, and

827.3 if and to the extent that there was any difference between moving MUs and moving Danish trollies, it is catered for by what we say in paragraphs 746-748 above.

828 The work of assisting loaders who were having difficulty finding for example an MU, stated in paragraphs 6.253-6.254 of the EVJD for Mr Pustula, was in our judgment an obvious incident of managing MUs. So was giving a loader a label for an MU which Mr Pustula had not had time to collect, as described in paragraph 6.256 of that EVJD. We therefore rejected the claimants' submissions on those paragraphs. The frequency with which Mr Pustula was asked to help find a particular UOD was, we noted, stated in the agreed part of paragraph 6.255 ("2 to 3 times during the course of each night shift".)

Monitoring resource requirements in relation to managing MUs and working with other operatives on that task as and when required; paragraphs 6.257-6.263 of the EVJD for Mr Pustula

829 In contrast, we agreed with almost all of the claimants' submissions in response and in relation to paragraphs 6.257-6.263 of the EVJD for Mr Pustula about what was referred to there as "resource requirements", i.e. about (1) the need for help from other operatives, and (2) the manner in which Mr Pustula would work with other operatives who were assigned to work with him on managing MUs. We had the following two disagreements with what the claimants submitted.

829.1 We did not agree with the proposed replacement words for paragraph 6.258, because they did not cater for the asserted fact that Mr Pustula usually had someone to help him and that it was mostly "towards the end of the shift". However, we found it difficult to see how the fact that Mr Pustula had assistance could in itself be relevant to what was his work for the purposes of section 65(6) of the EqA 2010. Presumably paragraph 6.258 should have been joined with paragraph 6.259, so that the content of paragraph 6.258 was simply a statement of the frequency with which Mr Pustula did what paragraph 6.259 described.

829.2 There was no justification for confining (in paragraph 6.260 of the EVJD) the frequency with which Mr Pustula supervised and/or gave guidance to newly employed operatives to "rarely", although we accepted that there was no evidence before us about the frequency with which that occurred. What was relevant in our view was that Mr Pustula was required, as was Mr Jones for the reasons which we give in paragraph 528 above, to give assistance to newcomers. As we also say in that paragraph, however, we were not sure whether that requirement added to the demands of the job for the purposes

of section 65(6) of the EqA 2010. We point out here in addition that the obligation to help newcomers applied also to the claimants.

The work of "dekitting" as described in paragraphs 6.264-6.317 of the EVJD for Mr Pustula

Did Mr Pustula open the door of a trailer and put down the dock leveller? Paragraphs 6.270-6.285 of the EVJD for him

830 Mr Pustula said in an interview conducted by Mr Bryant on 15 June 2022, as recorded at D2/7/19, internal pages 74-75 (line 18 on page 74 to line 18 on page 75), that when dekitting, (1) he opened neither the bay door nor the trailer door and (2) he did not put in place the dock leveller. That statement was not implemented in paragraphs 6.271-6.284 of the EVJD for Mr Pustula (because those paragraphs were written on the factual assumption, assertion, or basis that he did do those things) and in paragraph 69 of his first witness statement, Mr Pustula attested to the accuracy of those paragraphs. He concluded that paragraph with these words:

> "When I was asked about opening the Trailer doors during my conversation with the Claimants' lawyers, it was unclear to me whether I was asked opening the Trailer doors or handling Dock Levellers. I did not want to say that I did not use a Dock Leveller".

831 He was cross-examined on paragraph 69 of his first witness statement. We did not accept his evidence in support of what was said in paragraphs 6.271-6.284 of his witness statement. That was because of the unequivocal statements made by him on 15 June 2022, when, without prompting or suggestion from any person acting on behalf the respondent, he stated what was in our judgment the truth.

832 If we had concluded that Mr Pustula did indeed open the bay door and the trailer door, and then pressed the relevant buttons to get the dock leveller to move to its proper place, then we would have regarded those tasks as being sufficiently stated in the documents to which we refer in paragraphs 79, 142, 350-351 and 355-356 above.

Trailer lighting: paragraphs 2.686-6.288 of the EVJD for Mr Pustula

833 For the sake of convenience, we note here that we deal with the issue of lighting in trailers in fresh DCs in paragraphs 606-611 above.

The issue of water ingress: paragraphs 6.294-6.295 of the EVJD for Mr Pustula

834 We have in paragraphs 360-389 above set out, and in substance stated our conclusions in relation to, paragraphs 6.294-6.295 of the EVJD for Mr Pustula. We record here that Mr Pustula's oral evidence provided strong support for what we say in paragraphs 360-389 above. That is because in his oral evidence, Mr Pustula emphasised the difficulties caused by water on a trailer. That was as recorded at

lines 5-7 on page 177 of the transcript of day 27, where he said that it was "[s]ometimes ... really scary to get on the trailer." Of course if it was dangerous to get onto the trailer then the respondent would not have required him to get onto it, or, if it did, then, we concluded, it could not have been regarded by us as part of his work to get onto the trailer, because it would have been unlawful for him to get onto the trailer and the respondent to require him to do so.

Releasing strapping and nesting; paragraphs 6.299-6.305 of the EVJD for Mr Pustula

835 The effort required to operate ratchet straps was the subject of a separate analysis in paragraphs 6.299-6.302 of the EVJD for Mr Pustula. That was because the operation of the ratchet straps was considered there in relation to the work of unloading and in the course of doing so releasing strapped cages.

836 On 15 June 2022, in his interview with Mr Bryant asking questions, Mr Pustula said that he had no problems with undoing ratchet straps if he did it slowly. The full exchange was at the top of page 77 of the record of that interview, at D2/7/20, which we now set out.

> "Q. When you are going to remove cages from the trailers, I understand that there are straps, ratchet straps holding them; is that right?
> A. You have to undo them and hang them in the way that don't interfere with if you are taking it out.
>
> Q. Did you have any problems undoing the straps?
> A. Not really, but you had to do everything slowly, don't rush it.
>
> Q. For example, did you ever have to cut a strap because you couldn't undo it?
> A. There were ratchets that were damaged but you would still be able to undo them."

837 By the time of closing submissions, these words were proposed as a factual assertion in paragraphs 6.301-6.302 of the EVJD for Mr Pustula.

> "Where the strap was folded within the ratchet mechanism, the job holder released the strap by pulling open the spring-loaded ratchet and forcing the twisted strap into the correct position at the same time. To do this, the job holder pulled the whole (tightened) strap towards him away from the Cages whilst at the same time pulling the ratchet handle forward with one hand and yanking the twisted strap sideways with the other hand at the same time.
>
> The job holder equated the effort required to be much greater than lifting a 20kg Tray above head height due to the multiple forces required to be used."

838 The word "yanking" suggested that some force was required as did the second paragraph's description of the effort that was required. The first meaning of the word

"yank" in the Shorter Oxford English Dictionary is to "Pull or jerk vigorously", and the second one is to "Pull with a jerk". That was inconsistent with what Mr Pustula first said about how to undo a ratchet strap when dekitting. That is because pulling or jerking vigorously, or even just jerking something, is the opposite of "do[ing] everything slowly".

839 Here again we concluded that Mr Pustula's first answer was the correct one. That which we have set out in paragraph 836 above was therefore in our judgment what dekitting required when releasing the ratchet straps securing UODs in a trailer.

Being wary of trapping fingers and toes; paragraph 6.304 of the EVJD for Mr Pustula

840 We were not sure whether or not the claimants opposed the content of paragraph 6.304 of the EVJD for Mr Pustula, because in the second column of the part of the claimants' submissions concerning the work of Mr Pustula dealing with that paragraph, where it was intended that the claimants would state whether or not the content was agreed, this was said: "NoYes". In fact, the words of paragraph 6.304 (which were that "Whenever preparing Cages for removal from the Trailer, the job holder remained wary throughout to avoid trapping his fingers or toes in those Cages.") were consistent with what was said in column 4 in the document at D2/3/14 (to which we refer first in paragraph 69 above), which was that in "push[ing cages in nests] into position in the trailer ready for MHE to be used to collect and move them to designated areas", the dekitter had to be "wary of not trapping fingers or toes".

<u>More on dekitting; paragraphs 6.306-6.317 of the EVJD for Mr Pustula</u>

841 Indeed, that document, at D2/3/14, was a straightforward and seemingly comprehensive statement of the work of a dekitter, including in a fresh DC, to which specific reference was made in the box at the bottom right hand corner of the document. That document was a slightly more informative version than the one which was first put before us at page 110 of the bundle for the respondent's recast case, as we record in paragraph 69 above. The latter document was dated 18/09/13. The document at D2/3/14 was dated 10/04/18.

842 However, in addition, the other documents referred to in paragraph 88 above relating to dekitting showed what the job of dekitting required. It was of some interest that we saw that in a proposed new paragraph of the EVJD for Mr Pustula, paragraph 6.316A, the respondent said that he was "advised to wear ear plugs when Dekitting due to the level of noise crated when transporting empty Cages". Not only did (as we say in paragraph 89 above) the document at D2/3/14 state, but also the earlier document, at page 110 of the bundle accompanying the respondent's recast case, stated, that it was "a mandatory legal requirement for hearing protection to be worn whilst carrying out internal dekit activities". Given that statement, we failed to understand why it was said by the respondent (and agreed by the claimants) that a dekitter was only <u>advised</u> to wear ear plugs in that situation.

843 In fact, more by way of safety protection was required when dekitting. That was shown by what was said at the top of D9/379/5, which was this.

> "What safety precautions should be taken when unloading cages?
>
> Only pull off five cages at a time and make sure gloves, ear protection and safety shoes are worn."

Paragraph 6.307 of the EVJD for Mr Pustula; lining up the forks of the MHE used to remove cages or dollies when dekitting

844 The words of the respondent for paragraph 6.307 of the EVJD for Mr Pustula by the time of closing submissions were in this form.

> "The job holder focussed and moved carefully to ensure to reverse the adapted Loading Truck correctly, so it lined up ideally first time with the Cages and Dollies being Dekitted. He did this to ensure the forks of the relevant MHE were both appropriately placed centrally and at the necessary depth under single and multiple empty Cages and Dollies."

845 The claimants opposed those words on the basis that "focussed" and "carefully" were "evaluative". However, we agreed that it was necessary both to be focussed and to act carefully, but we also concluded that that necessity was implicit and obvious. We therefore concluded that it was for the IEs to give their opinion on, and us to assess, the demands of the work of lining up the forks of the MHE used to remove cages and dollies, envisaging that task using what we will call common sense and practical wisdom.

Paragraphs 6.309 and 6.313 of the EVJD for Mr Pustula; was alertness required?

846 By the time of closing submissions, the respondent maintained only the second of the two factual assertions which had originally been in paragraph 6.309 of the EVJD for Mr Pustula. That was that Mr Pustula "remained alert to the presence and movement of other loading and Assembly operatives, as well as other pedestrians working in the same areas as him." The claimants said that "remained alert" was "evaluative". However, at the top of column 5 of D2/3/14, it was said that the dekitter had to "[remain] vigilant for pedestrians / loaders / assemblers working in areas where dekit activity is taking place". At the bottom of column 4 of the document at page 110 of the bundle attached to the respondent's recast case there were words to the same effect, and the warning was repeated at the top of column 5 of that document, in the form of a warning that the dekitter had to "[remain] vigilant" for "other people in the vicinity" when "[driving] and [dropping] cages into the drop off area". Thus, we rejected the claimants' submission that the requirement to remain alert was "evaluative" and was therefore wrongly proposed as a statement of fact about the work of a dekitter.

847 Paragraph 6.313 of the EVJD for Mr Pustula was unnecessary when read against the background of what we say in the preceding paragraph above.

Paragraph 6.309A of the EVJD for Mr Pustula; did the driver of a LLOP have to twist his body?

848 The proposed new paragraph numbered 6.309A for the EVJD of Mr Pustula was unnecessary given the factor to which we refer in paragraph 220 above, which, as we say there, was applicable to the driving of a LLOP (which was, for the avoidance of doubt, what was referred to also by the respondent as a "Loading Truck"; that was stated so far as relevant at D2/1.1/25, which was page 24 of the updated EVJD for Mr Pustula).

Paragraph 6.314 of the EVJD for Mr Pustula; was it part of the work of a dekitter to know why he was required to position nests of cages herringbone style?

849 The parties agreed what was required by way of the storage of nested cages ("at an angle, herringbone style") but they disagreed about the need for the dekitter to know why the respondent required them to be stored in that way. Just as a customer assistant benefited from knowing why something needed to be done a certain way, it was possible that it was part of the work of a dekitter to know why the cages had to be stored in a herringbone style. If it was not, then, we agreed, it was not a factual matter which had to be included in our factual determinations at this stage of the process (the stage 2 hearing).

850 We could find no statement in any of the documents to which we refer in paragraph 88 above, which stated the requirements of dekitting, of the reason why nests of cages should be stored "at an angle, herringbone style". We therefore agreed with the claimants' submission on the second sentence of paragraph 6.314 of the EVJD for Mr Pustula, namely that it was an irrelevance for present purposes. If, however, it had been relevant, then we could not see how it could have added to the value of the work of a dekitter to know the reason why he was storing nests of cages "at an angle, herringbone style".

Paragraph 6.315 of the EVJD for Mr Pustula; what kinds of damage to UODs did a dekitter need to look out for?

851 In contrast, the submissions of the claimants in response to paragraph 6.315 of the EVJD for Mr Pustula in its original form were shown by what was said at D9/402/3 to be wrong. The respondent had, however, by the time of closing submissions reduced the scope of paragraph 6.315 and it was agreed, with the respondent having accepted that a dekitter only needed to do something about a damaged UOD if he noticed it. We now record, however, that at D9/402/3, this was said, which (1) showed that a dekitter was required (the word used was "should", but that was in our view a statement of a job requirement) to look out of damage to UODs, and (2) was

in our view determinative of what sort of damage to cages a dekitter needed to look out for:

> "As you unload the trailer you should check for any damaged cages. A damaged cage is one which has:
>
> - wobbly/square wheels;
> - missing wheels;
> - broken doors;
> - stray/broken metal."

The work of dealing with "Inside Pallets"; paragraphs 6.318-6.331 of the EVJD for Mr Pustula

852 There was nothing more in paragraphs 6.318-6.331 of the EVJD for Mr Pustula than there was in one or both of the passages in the EVJDs for Mr Pratt and Mr Todd, to which we refer in paragraphs 699-704 and 790 above. There was, however, one difference in the response of the claimants. That related to the proposed new words of paragraph 6.330 of the EVJD for Mr Pustula. Those words were also in paragraph 6.494 of the EVJD for Mr Pratt and we have set them out in paragraph 702 above. For convenience we now repeat them.

> "A further task that the job holder's Manager asked him to do while on Inside Pallets was to fill Trailers with Pallets using a Ride-On PPT. This would usually happen at least once every time the job holder was assigned to Inside Pallets. The job holder had no direct supervision nor did he use his AMC when completing this task."

853 The claimants said that Mr Pustula did not do that work. That was on the basis that Mr Bates accepted in cross-examination (in line 8 on page 87 of the transcript of day 27) that Mr Pustula did not do that work. We saw that that acceptance was for cogent reasons. We therefore concluded that the proposed new words of paragraph 6.330 of the EVJD for Mr Pustula were wrongly included in that paragraph, as they were inaccurate.

Set up and standards; paragraphs 6.332-6.339 of the EVJD for Mr Pustula

854 The only things about which the parties disagreed in relation to the work of Mr Pustula called by the respondent "set up and standards" were the statements of reasons for the things described as being done by Mr Pustula in paragraphs 6.338 and 6.339 of the EVJD for him. We agreed with the claimants here. The words stating those reasons added nothing material. That was because the tasks themselves in the words proposed by the claimants for those paragraphs said all that was required to be known by the IEs and us.

<u>The work of Mr Young</u>

Introduction and overview

855 The work which Mr Young did (at Didcot DC, which was a fresh DC) consisted of

855.1 using a forklift truck to do (1) "pallet clearance and loading" and (2) "other forklift truck duties", and

855.2 assembly.

856 The work of assembly was done (the parties agreed by reference to paragraph 3.16 of the EVJD for Mr Young) by Mr Young as (we inferred; the words which were agreed were "1 or 2 out of every 5 shifts") a full shift once or twice a week. On other days, he (as he said as recorded on page 208 of the transcript of day 31) "might start off on assembly and then be taken off" to do "forklift truck pallets work".

857 In paragraphs 3.27 and 3.28 of the EVJD for Mr Young, it was said respectively that

857.1 "During the Relevant Period, approximately 76% of the job holder's work time was spent carrying out various FLT driver activities, including Pallet clearance, Pallet loading and other FLT duties."

857.2 "During the Relevant Period, the job holder was deployed on Assembly for approximately 23% of his overall working time."

858 The claimants proposed instead the following words as recording the factual position accurately.

> "The job holder's two main activities over the Relevant Period were Assembly and FLT work. The proportion of his time spent on these varied materially over the Relevant Period as follows:
>
> | Time period | % Assembly / % FLT |
> |---|---|
> | 18/2/12-31/12/12 | 21 / 78 |
> | 1/1/13-31/12/13 | 37 / 61 |
> | 1/1/14-31/12/14 | 24 / 73 |
> | 1/1/15-31/12/15 | 17 / 82 |
> | 1/1/16-31/12/16 | 10 / 90 |
> | 1/1/17-31/12/17 | 23 / 76 |
> | 1/1/18-31/8/18 | 24 / 75". |

859 Those figures were based on the spreadsheet at D4/9.1. That was in the same format as the spreadsheet relating to Mr Pustula at D2/9.1 to which we refer in paragraphs 809, 813 and 816 above. As with the work of Mr Pustula, the charts at tab 3 of D4/9.1 were the most obviously helpful part of the spreadsheet for present purposes.

860 In fact, we found what Mr Young said in cross-examination was also helpful. As recorded on pages 209-210 of the transcript of day 31, Mr Young said that it "sound[ed] about right" that on average, during the whole of the relevant period, (1) in 75% of shifts, he did no assembly work, (2) in 17% of his shifts, he did only assembly work, and (3) only in 8% of his shifts did he do both assembly work and "pallets", i.e. forklift truck work dealing with pallets.

861 There was a slight complication of the situation in that some of the work which it was said was done by Mr Young as a forklift truck driver was done by him using an "Adapted Loading Truck", which was not defined in the EVJD for him. However, it appeared from the content of paragraphs 6.15 and 6.18 of that EVJD that it was "a Loading Truck with rear facing forks". That appeared to us to be what we understood to be a LLOP. We saw that in cross-examination, Mr Young himself called the truck which he used which was not a reach or counterbalance forklift truck as his "LLOP". That was in lines 1-2 of page 41 of the transcript of day 32. Mr Bumpass also said that Mr Young "would use a LLOP to load a truck". That was recorded in line 22 on page 42 of the transcript of day 31. There was a photograph of a "Loading Truck – Rear Facing Forks (Hinckley Fresh)" at D9/0.2/41. There was a photograph of an "Assembly Truck (Ambient)" at D9/0.2/4. They were either the same, or at least very similar. Both had rear-facing forks.

862 Despite the relatively confined nature of the work done by Mr Young, the EVJD for him ran to 165 pages plus appendices. However, as with all of the other EVJDs before us, there was in the EVJD for Mr Young much repetition of the content of other EVJDs before us. By way of example, there was a section on "Accessing the Trailer" which included sections on "Opening Bay Doors", "Operating the Dock Leveller" and "Opening Trailer Doors". That was in paragraphs 6.99 - 6.105 of the EVJD. Many parts of the EVJD for Mr Young (which consisted of a series of statements about what he did) were agreed and, for the reasons stated in paragraphs 52.2 and 53-54 of our second reserved judgment (at page 21 above), we refer below only to the disputes which were maintained in relation to the EVJD the resolution of which in our view might affect the judgment by the IEs of the demands of the work.

The tasks done by Mr Young using a forklift truck, including an adapted loading truck

Introduction; the relevant training materials

863 The work of a forklift truck driver was the subject of the training materials referred to in paragraphs 123-141 above.

864 We record here that at D9/288/11-12 there was a statement of the pre-use checks required to be carried out on a reach forklift truck. That section was repeated, almost verbatim (it would have been verbatim if the bullet point symbols had not been stripped out, somehow) but without attribution, as the content of paragraph 4.19 of

the EVJD for Mr Young, at pages G313.7/26-30. That was an illustration of the respondent doing something which the claimants also did (for example in paragraphs 366-380 of the EVJD for Mrs Worthington, at C6/1/69-74) which we found to be unhelpful. That was to put into a so-called job description the content of one or more training documents of the respondent, without attribution. That practice was in our view contrary to the interests of justice and should not be repeated. Here, the situation was exacerbated by the fact that the pre-use checks required to be carried out on a reach forklift truck were stated in some (but not all) respects in more helpful detail at D9/273/15-18, which would (or at least should) have been stated to the persons receiving the training evidenced in the passage set out in paragraph 4.19 of the EVJD for Mr Young, and that additional detail was not included in the EVJD for Mr Young. In addition, no reference was made in the submissions or oral evidence to any of the informative documents to which we refer in paragraph 133 above, which were (1) D9/273, (2) D9/289, and (3) D9/291. (D9/467 was just a simple checklist.)

Paragraph 6.32 of the EVJD for Mr Young; pallet clearance

865 While the content of the (short) paragraph 6.32 of the EVJD for Mr Young was agreed, we thought that it would have been better if it had been acknowledged that the task referred to in it of "Pallet clearance and loading inside ... the warehouse" was the job which was elsewhere called by the respondent "Inside Pallets", and which was therefore done by several of the other comparators.

Paragraph 6.46 of the EVJD for Mr Young; pre-use checks of his "adapted Loading Truck", i.e. the LLOP which he used

866 The parties disputed what were the checks referred to in paragraph 6.46 of the EVJD for Mr Young as "the required Pre-Operational Safety Checks on his adapted Loading Truck". The claimants asserted that these would be set out on a hard copy checklist. The substance of the respondent's final approach, as advanced in closing submissions, was to agree with that assertion, if only because that is what was said by Mr Young in cross-examination in the passage (pages 40-41 of the transcript of day 32) to part of which we refer in paragraph 861 above

867 So, the checks will have been the same as for an assembler using a LLOP, but Mr Young did not record the checks in the same way as would an assembler (which would include him when he was doing the work of assembly, of course). That was a factual dispute which we could have ignored, as we could not see how its resolution could affect the demands and therefore the value of the work done by Mr Young. We refer to it here as it was the factual background to what we say in paragraphs 869-870 below.

868 In any event, if Mr Young (or any other comparator) was using an AMC when using a LLOP or any other kind of MHE except (1) a pump truck, (2) a reach forklift truck, or (3) a counterbalance forklift truck, then the pre-use checks were on the AMC and had to be completed before the comparator could start to use the MHE. That was clear

from the documents to which we refer in paragraph 103 above, namely D9/463, D9/561 and D9/594. Indeed, there was more information in those documents that was relevant than was recorded in paragraphs 6.46-6.49A of the EVJD for Mr Young.

869 In addition, as can be seen from what we say in paragraph 291 above, paragraph 6.47 of the EVJD for Mr Young was not a reliable statement of what was required of a person using a LLOP. That is for the following reasons. In paragraph 6.47 it was said that

> "[i]f the battery level charge indicator showed 2 or less bars of charge on the Loading Truck, the job holder [and here we use the original words, which were better than the revised ones] was required to replace the battery before starting his shift to minimise the risk of a flat battery subsequently disrupting his shift".

870 However, as shown by what was said on page 2 of the document to which we refer in paragraphs 286, 287, 288 and 291 above, namely D9/475, the user of a LLOP was required by the respondent to check before the start of the shift to see whether the battery charge indicator showed three bars or less, and not two, and that was done to ensure that the user's LLOP did not run out of battery power (the word "should" in that document being quite clearly an instruction and not an exhortation): the risk of running out of battery power was not intended by the respondent merely to be minimised.

Paragraphs 6.122-6.124 of the EVJD for Mr Young; did Mr Young have to load empty pallets onto a trailer using a manual pump truck?

871 There was a photograph of a manual pump truck at D9/0.2/51. It looked like those which were used in stores (as shown at the top of page C7/0.1/26). It was said in paragraphs 6.122-6.124 of the EVJD for Mr Young that if he "experienced damp underfoot conditions in and around Bay door areas when loading empty Pallets when the inflatable air seals had not inflated tightly enough during periods of rain" then it would not be "safe to load Pallets with a Loading Truck" and that he would then use a manual pump truck to load the pallets.

872 As with the situation which we discuss in paragraphs 361-389 above, we thought that if it was unsafe to load empty pallets with a powered truck then it would be unsafe to load them with a manual pump truck. That was because both were wheeled pieces of MHE, and because the fact that the use of a powered truck was unsafe would result from the fact that the floor was slippery. For the reasons we give in paragraphs 361-389 above, if the floor was slippery then it would in our view be unsafe to load, using either form of MHE. While we do not say it in those paragraphs specifically, we now point out that in no place in the training materials or other documentary evidence before us (i.e. documentary evidence which did not consist of one or more factual assertions made or collated for the purposes of these claims) was there any statement or indication that the respondent required any of its employees to load, or unload, a trailer if its floor was wet. Rather, if the floor was wet then the respondent

required the employee in question to deal with it by (it was in our judgment an inescapable conclusion, which we would characterise as an obvious one) drying it, or if it were not possible to do that or it was unreasonable to expect the employee to do that, by the relevant team (which was referred to by the respondent as a "hygiene" team) drying it.

873 We saw, incidentally, that the original words of paragraph 6.123 of the EVJD (at D4/1/67) for Mr Young referred to him using "a PPT or Manual Pump Truck to transfer up to 26 stacks of empty Pallets (each stack weighing up to 234kg) and position them within the rear of the Trailer." We were not sure what was meant by "a PPT" there. It was probably a "Pedestrian PPT" of the sort of which there was a photograph at D9/0.2/48. That was rather different from a manual pump truck of which there was a photograph at D9/0.2/51. That factor rather suggested that the evidence in paragraph 6.123 of the EVJD for Mr Young at D4/1/67 did not originate from Mr Young. That was because it was likely that if he had indeed loaded pallets into a wet trailer then he would have known what MHE he used to do so.

874 The respondent's submissions on this point were confused. Its final position stated in paragraph 6.123 of the EVJD for Mr Young at D4/1.1/67 was that he used "a Manual Pump Truck to transfer up to 26 stacks of empty Pallets (each stack weighing up to 234kg) and position them within the rear of the Trailer." The claimants objected to that wording, proposing instead that it be concluded that Mr Young "used a Manual Pump Truck or, from [date] a PPT or to transfer up to 26 stacks of empty Pallets and position them within the rear of the Trailer". The respondent's submission in response was that "there was no date of change. The JH was using the PPT for assembly during all the Relevant Period, but occasionally also used a Manual Pump truck."

875 In the circumstances, we concluded that the respondent did not require Mr Young to do what was described in paragraph 6.123 of his EVJD, and that it was therefore not part of his work for the purposes of section 65(6) of the EqA 2010.

<u>Paragraph 6.136 of the EVJD for Mr Young; working in the yard</u>

876 We saw that what the claimants asserted in the words they proposed for paragraph 6.136 of the EVJD for Mr Young reflected what Mr Young said in oral evidence as recorded on pages 220-222 of the transcript of day 31 and on pages 87-88 of day 32. What the claimants proposed for paragraph 6.136 of the EVJD for Mr Young was this.

> "About twice a year, the job holder spent about 3 hours undertaking work in the Yard such as loading flatbed Trailers and using the Outside Pallet Storage area. If the job holder determined that the internal Pallet storage locations were full, he alerted the Manager to the fact that he was going to start using the Pallet storage areas outside the warehouse, in the Yard."

877 By the time of closing submissions, the respondent's proposed words for paragraph 6.136 of the EVJD for Mr Young described him spending

> "an average of 3 hours each week undertaking work in the Yard on tasks such as:
> - loading flatbed Trailers
> - taking the LPG Gas canister deliveries and (around twice a year)
> - using the Outside Pallet Storage area".

878 In paragraph 3.23 of the EVJD for Mr Young as it stood by the time of closing submissions it was said that he received deliveries of LPG gas canisters once a fortnight, although it was not said there how long that task took. The task of "Dealing with LPG Canister Deliveries" was dealt with in detail in paragraphs 6.411-6.421 of the EVJD for him, but there was also no statement in them of the amount of time that the task would typically take. The part of Mr Young's first witness statement which was meant to give evidential effect to the contents of paragraphs 6.411-6.421 of the EVJD (paragraphs 160-166) did not say how much time those tasks took, although, as we record in paragraph 953 below, he did say in oral evidence that he received gas canister deliveries once a fortnight. In addition, in paragraph 85 of his first witness statement he said that he "would spend an average of three hours a week in the Yard on tasks such as loading flatbed Trailers, taking the LPG Gas canister deliveries and using the Outside Pallet Storage area." Furthermore, the following sections of the EVJD for Mr Young (paragraphs 6.138-6.158) suggested that he spent a fair amount of time in the yard.

879 In those circumstances, we accepted that the respondent's proposed words for paragraph 6.136 of the EVJD for Mr Young were an accurate statement of the factual situation.

880 We saw, however, that the tasks which were referred to in paragraphs 6.138-6.159 of that EVJD were stated only sketchily, so that it was possible that the fact that they collectively took up about 3 hours per week of Mr Young's time would be of little assistance here. That is a matter which we leave it to the IEs to assess.

<u>Forklift truck work as described in paragraphs 6.164-6.187 of the EVJD for Mr Young</u>

881 Paragraphs 6.183-6.187 of the EVJD for Mr Young described what he did by way of the recovery and transportation of a fallen Pedestrian PPT battery. That description was in our view less informative than the content of D9/502, which was entitled "Know Your Stuff for Mechanical Handling Equipment – Uprighting a MHE Battery". That document was helpful also for making it clear (by what was said on page 4) that if a forklift truck were to be used to "retrieve faulty Ride on and Pedestrian PPTs which had been abandoned at any location within the Aisles or elsewhere around the warehouse, as a result of its battery running flat or some other mechanical failure, which meant that they could not be moved" as asserted in paragraph 6.175 of the EVJD for Mr Young, then it would be a counterbalance truck. That was not stated in

the section of the EVJD for Mr Young dealing with the moving of a faulty ride-on or pedestrian PPT, namely paragraphs 6.175-6.182 of the EVJD for Mr Young. Indeed, we saw no reference to that task in the training materials.

882 That did not mean that we concluded that it was not part of Mr Young's work to do the work described in paragraphs 6.175-6.182 of the EVJD for him. There was nothing to suggest that it was not part of his work, and common sense suggested that it would be part of the work of a specialist forklift truck driver. Indeed, we thought that it was plainly one of the most difficult aspects of the work of a forklift truck driver. As a result, we concluded that the respondent's proposed words in paragraphs 6.175-6.182 of the EVJD for Mr Young to which the claimants objected were in part apt. We say "in part" because we concluded that there was here, as elsewhere in the EVJDs of the comparators, some over-egging of the pudding, and we concluded that we should leave it to the IEs to assess the demands by looking at the description of the work in paragraphs 6.175-6.182 of the EVJD for Mr Young, taking with a metaphorical pinch of salt such words as "particular skill, judgment and care" as used in paragraph 6.178.

The work of assembly as done by Mr Young; paragraphs 6.188-6.352 of the EVJD for Mr Young

883 The work of assembly as done by Mr Young was of precisely the same sort as the work of assembly as done by the other fresh DC comparators. As a result, we say nothing more here about the work of Mr Young done as an assembler unless there was a material difference between the section of the EVJD for him concerning assembly from the equivalent sections of the EVJDs for the other fresh DC comparators.

<u>Paragraph 6.236 of the EVJD for Mr Young; moving between the chambers pulling a Pedestrian PPT</u>

884 There was one such difference in paragraph 6.236 of the EVJD for Mr Young (i.e. in the version at D4/1.1/85, which was given a date internally only of "2023" but was given the date of 14 April 2023 in the index to the bundle). There, this was said.

> "When travelling between the Chambers whilst deployed on Assembly (which he had to do an average of ten times during each shift), the job holder guided his Pedestrian PPT through a pedestrian walkway rather than through the Fast Action Roller Shutter Door used by ride on MHE."

885 In contrast, in paragraph 6.345 of the EVJD for Mr Pratt as it stood by the time of closing submissions, at D1/1.1/93 this was said (it was the final sentence of the paragraph and it was agreed by the time of closing submissions).

> "When travelling between the Chambers whilst deployed on Assembly, the job holder guided his Pedestrian PPT through the Fast Action Roller Shutter Door."

886 However, paragraph 6.345 of the EVJD for Mr Pratt originally had this as its final sentence (at D1/1/94).

> "When travelling between the Chambers whilst deployed on Assembly (which he had to do multiple times during each shift), the job holder guided his Pedestrian PPT through a pedestrian walkway rather than through the Fast Action Roller Shutter Door used by ride on MHE."

887 So, in both the EVJD for Mr Pratt and the EVJD for Mr Young there were originally assertions that an assembler using a Pedestrian PPT, i.e. a pedestrian powered pallet truck, was able to use and did in fact use the pedestrian walkway rather than the roller shutter door. That proposition was then resiled from in relation to Mr Pratt, but not Mr Young. For the reasons given in paragraph 664 above, we agreed with that change of position.

888 It did not help the credibility of the respondent's assertions in the comparators' EVJDs that the obviously false assertion in paragraph 6.345 of the EVJD for Mr Pratt and paragraph 6.236 of the EVJD for Mr Young had been made in the first place, and then agreed to by both Mr Pratt and Mr Young. In addition, Mr Bumpass, in paragraph 88 of his witness statement (which was dated 29 January 2023), said this.

> "Paragraph 6.236 of Les' EVJD is correct as drafted. It is accurate to say that Les had to travel multiple times a day between the Chambers. I believe Les could travel between the Chambers an average of ten times per Assembly shift."

889 So, Mr Bumpass approved a paragraph of the EVJD for Mr Young which mirrored the original text of paragraph 6.345 of the EVJD for Mr Pratt, which the respondent had accepted was wrong. That undermined Mr Bumpass's credibility.

<u>Paragraph 6.237 of the EVJD for Mr Young; moving between the chambers as a pedestrian</u>

890 Paragraph 6.237 of the EVJD for Mr Young was as follows.

> "The walkways between the temperature-controlled Chambers were separated by a row of large heavy plastic sheets suspended from height, which the job holder pushed back by hand to pass through. Those plastic sheets could fall back towards his face and, on one occasion in 2010, the job holder suffered a black eye and minor cuts to his face when a similar curtain hit him in the face whilst entering the main Pallet storage area by Bay 11."

891 Whether or not a plastic curtain fell on Mr Young's face in 2010 was not obviously relevant. It was even less obviously relevant that the sheet had been "by Bay 11" when paragraph 6.237 of the EVJD for him related to the use of the passenger door between the chambers. But perhaps most importantly, there was a picture of the door

between the chambers in the document to which we refer in paragraph 664 above, namely D1/3/12, and it was an ordinary door, with no plastic sheets in sight. There was (as far as we could see) no picture before us of a doorway between two fresh DC chambers with "large heavy plastic sheets suspended from height, which the job holder pushed back by hand to pass through". It would have been odd if there had been such a picture given that a doorway with a conventional door in it was going to be a far better sealed pedestrian access point between fresh DC chambers than a doorway with "large heavy plastic sheets suspended from height, which the job holder pushed back by hand to pass through". In addition, if there was no need for a pedestrian route to be through heavy curtains which might hit anyone using the route, then it would be odd for such curtains to be used.

892 We saw that in paragraph 89 of his witness statement, Mr Bumpass said this.

> "Paragraph 6.237 of Les' EVJD is correct. Plastic sheets between the Chambers could fall back towards Les' face. In 2010 Les suffered a black eye and minor cuts to his face when a similar curtain hit him in the face whilst entering the main Pallet storage area by Bay 11. I am also aware that this has happened to other people too, albeit they were not given a black eye."

893 If the respondent knew of employees being hit by heavy plastic sheets when moving between chambers and did nothing about it then the respondent was probably breaching its duties under the Health and Safety at Work etc Act 1974. Curiously, the claimants proposed these words for paragraph 6.237 of the EVJD for Mr Young.

> "The walkways between the temperature-controlled Chambers were separated by a row of large heavy plastic sheets suspended from height, which the job holder had to push back by hand to pass through. There was a possibility of those plastic sheets making contact with the job holder. However, that never happened during the Relevant Period."

894 In those circumstances, if they had been opposed then we would have rejected the factual assertions made in paragraph 6.237 of the EVJD for Mr Young in their entirety. We were, however, in our view able to conclude, and did conclude, that in any event if there was no need for an employee to walk through a doorway with heavy plastic sheets instead of a conventional door, then it could not properly be found by us to be part of the work for the purposes of section 65(6) of the EqA 2010 of that employee to use that doorway. Only if the plastic sheets were replaced with a conventional door could it be part of the work of the employee for those purposes to use that doorway. Accordingly, we concluded that paragraph 6.237 of the EVJD for Mr Young did not describe anything to do with his work for the purposes of section 65(6) of the EqA 2010.

<u>Paragraph 6.238 of the EVJD for Mr Young; "manoeuvring the Pedestrian PPT forks carefully under the Pallet"</u>

895 The claimants opposed the use of the word "carefully" in paragraph 6.238 of the EVJD for Mr Young on the basis that that was an "evaluative" term. We thought that it was descriptive rather than evaluative, and that in the context of the rest of that paragraph, it was (unless it was an obvious part of the work described in that paragraph) helpful. That is because we agreed that it would be necessary to be careful when inserting the forks of a Pedestrian PPT into the space below the "floor" (our word) of a pallet. Having said that, we thought that it was obvious that care would be required in doing that task.

Paragraph 6.258 of the EVJD for Mr Young, concerning the manual breaking down of pallets

896 We agreed with the claimants' submissions on paragraph 6.258 of the EVJD for Mr Young relating to the detail of the paragraph. That detail was incorrect, given what was said in the preceding five paragraphs of the EVJD for Mr Young, with which that detail was markedly inconsistent. We therefore accepted the claimants' proposed words for paragraph 6.258 of the EVJD for Mr Young describing the work of manually breaking down a pallet when "the whole volume of Stock on the Pallet was for a single store" such as "at Christmas when for example Pallets could contain 400 to 500 tins of Celebrations or Quality Street chocolates".

Paragraphs 6.260-6.264 of the EVJD for Mr Young; the need to pay attention when checking the content of a multi-product pallet

897 Paragraph 6.261 of the EVJD for Mr Young was disputed because of its final sentence, which concerned in effect the need to pay attention when counting products on a pallet, but also stated the reasons for that need. In our view, the need was obvious, as were the reasons for it.

898 While it could be said that even what we have just said was itself the obvious resolution of the dispute to which it related, in order to understand the background to the dispute, we had to read the whole of the passage of which it formed a part, i.e. paragraphs 6.260-6.264 of the EVJD for Mr Young. Having done that, we decided that it was necessary to say something about the content of those paragraphs, despite the fact that they were otherwise in substance, if not actually, agreed. That something was that we concluded that the only accurate way to describe the work of an assembler in the circumstances described in paragraphs 6.260-6.264 of the EVJD for Mr Young was either in conjunction with the content of the AMC guide for picking by line and any other relevant training materials, or simply by referring to the relevant parts of those documents.

899 We saw that there was a helpful summary of the process which was described in paragraphs 6.260-6.264 of the EVJD for Mr Young in rows 23-25 on page 4 of D9/154, to which we first refer in paragraph 17.12 above. We saw too that on page 4 of D9/251, to which we refer first in paragraph 17.11 above, it was said that warehouse manager approval was required for abandoning a pallet if there was "a

problem with the pallet for example, an unexpected product on the pallet or a problem with the integrity of the pallet itself." As far as we could see, the relevant part of the AMC guide for picking by line was pages 3-12 to 3-22 and 3-36 of that guide.

900 Those passages of the respondent's own documents were in our view rather more informative than the description of the aspect of the work of an assembler which was the subject of paragraphs 6.260-6.264 of the EVJD for Mr Young. Those passages were also necessarily more authoritative than that description. This situation was therefore a very good illustration of the difficulties caused by a failure to describe the work of the comparators which required the use of AMCs at least primarily by reference to the manuals showing how those AMCs had to be used and any training materials which were helpful in that they showed in addition what was the context in which that work was done.

901 We add that a failure to use those manuals and (where necessary) training materials as the primary way to show what process was required to be followed on the AMC meant that many words were used to described steps that were much better stated in part pictorially through illustrations of the contents of the AMC screens which would be shown as each step was taken in the process. Whether knowingly or not, that meant that there was a risk that aspects of the work of the comparators were stated less clearly than they were stated in the manuals and training materials. Moreover, stating the tasks in words rather than simply by reference to the contents of the manuals or training materials meant that there was a risk that the task would appear to be more complicated than it in fact was. In any event, there was no scope for deviation from the process stated in those manuals and training materials, since the process was computer-driven.

Cage-stacking: paragraphs 6.275-6.286 of the EVJD for Mr Young

902 The same observations applied to the failure by the respondent to describe (for example in paragraphs 6.275-6.286 of the EVJD for Mr Young) the work of stacking cages by reference at least primarily to the documents referred to in paragraphs 58-66 above.

"Paper Pick Assignments": paragraphs 6.291-6.293 of the EVJD for Mr Young

903 As we say in paragraph 818.3 above, we could not see why there was a need to take into account paper picking, since we saw no material difference between a paper picking assignment and a picking assignment done using an AMC. The work was in substance the same, as far as we could see. If the IEs disagree with us in this respect, then they must let us know, under rule 6(3) of the EV Rules.

"Assembling Trays": paragraphs 6.295-6.300A of the EVJD for Mr Young

904 The tasks of (1) putting products which had been taken from pallets and put onto trays on dollies and (2) adding trays to MUs, were the subject of paragraphs 6.295-

6.300A of the EVJD for Mr Young. Those paragraphs referred to "page 32 of the AMC Guide" by saying at the end of two paragraphs: "See page 32 of the AMC Guide". That had to be taken to be a reference to D4/2/32, which did not appear to us to be relevant to the subject-matter of putting trays on dollies or MUs.

905 We concluded that the description of the tasks in paragraphs 6.295-6.300 of the EVJD for Mr Young was accurate so far as it went, and that to the extent that the AMC guide to picking by line added anything, then it was material. However, given what we say in the preceding paragraph above it can be seen that we did not have any steer about the relevant part of the guide. As usual, the claimants simply said that the guide was irrelevant as it did not describe what the job-holder did. For the reasons given in paragraphs 16 and 77 of our second reserved judgment (at pages 7-8 and 27-28 respectively above), we disagreed with that proposition. However, we searched the AMC guide to picking by line and we could find nothing in it which was material to this part of the work of a fresh DC assembler.

906 Paragraph 6.300A of the EVJD for Mr Young was (as with all of the paragraphs of all of the EVJDs which claimed that it was part of the work of the job-holder in question to "ensure that [the task in question was done in such a way as to] avoid the hazards associated with it and the risks arising from those hazards") mistaken in so far as it purported to be a statement of part of the work of the job-holder. That was because, for the reasons stated in paragraph 68 of our second reserved judgment (at page 25 above), paragraph 6.300A added nothing material in itself. The only material issue was what was the task and how it needed to be done. In determining how it needed to be done, we and the IEs had to take into account the obvious risks as well as those which were visible only to the trained eye, but those risks were relevant only in so far as they informed the manner in which the task had to be carried out. Here, the document at D8/9, which was the SSOW headed "Area: Warehouse"; "Activity: Stacking Trays Above Shoulder Height Onto Dollies" to which we refer in paragraphs 17.23 and 67 above, showed precisely what had to be done by an assembler who was taking trays from pallets and putting them onto dollies.

<u>"Assembling from Multi-Product Pallets": paragraph 6.301 of the EVJD for Mr Young</u>

907 The work of assembling from multi-product pallets was described in paragraph 6.301 of the EVJD for Mr Young as being with exceptions "the same as for single-Product Pallets". There was in the paragraph a cross-reference to "page 38 of the AMC Guide", which was D4/2/38 (which in turn was page 3-36 of the guide to using an AMC when picking by line). We record here that we found the description of the work which was referred to on page D9/251/10 as "assembling pallets that have multiple products on them", which set out on that page and the next one, i.e. D9/251/11, to be more informative than the content of paragraph 6.301 of the EVJD for Mr Young. No party referred us to D9/251 (or its duplicate, which was at D9/252) in closing submissions, so (as we say in paragraph 55 of our second reserved judgment, at pages 21-22 above) if a party believes that we are wrong in thinking that D9/251/10-11 was an apt description of the subject-matter of paragraph 6.301 of that EVJD then

they can ask for a reconsideration of this aspect of the matter, stating in precise terms why they are doing so.

Paragraph 6.307 of the EVJD for Mr Young: using the "Closing Drop-Off Pallet" option on the AMC

908 The cross-reference in paragraph 6.307 of the EVJD for Mr Young to "page 50 of the AMC Guide, i.e. we inferred, page D4/2/50, was accurate, and it did in fact help to show what was involved in the task described in that paragraph. Precisely how much it added to the assessment of the demands of the work of an assembler was not entirely clear to us, however. Those demands included following the instructions on the AMC, and that aspect of the work required the assembler to pay careful attention to the small screen on the AMC and to do what it instructed the assembler to do. If that was in itself sufficient to describe that aspect of the work of any of the comparators who used an AMC then, we concluded (at this point, that is to say having nearly finished going through the detail of almost all of the factual disputes maintained by the parties), it did not need to be said by us that a step was the result of an instruction on an AMC. Rather, what needed to be stated was the times when work was not done as instructed by an AMC, such as when using a printed list of instructions instead, or when simply doing a task which was not dealt with by AMCs. We say that not least because of the existence of the AMC guides (i.e. the complete guides, as sent to us on 2 May 2024) and the many photographs of what a comparator would see on an AMC's screens in the training materials. By way of illustration, we refer here to D9/251, which, as we say in paragraph 17.11 above, was dated "01/12" and entitled "Know Your Stuff For Fresh Assembly – Paperless Assembly in Stockless Depots".

Restacking cages: paragraphs 6.308-6.316 of the EVJD for Mr Young

909 As we say above (for example in paragraph 271), the work of restacking of cages was amply described and best seen in the documents to which we refer in paragraphs 58-66 above.

910 Thus, paragraph 6.310 of the EVJD for Mr Young was relevant only if the fact that Mr Young (unusually) "referred the issue [of the need to restack a cage] to a Manager" was material. We doubted that it was, since it was not the norm, and the documents to which we refer in paragraphs 58-66 above showed what was required of an assembler where restacking was required. They also showed that (as can be seen from what we say in paragraph 65 above):

> "Allowances are built into picking time to spend for time re-arranging the cage stack where required [which] can often be needed as the types of products we pick are so diverse in size and shape."

911 Thus, references to the impact on the PI rate of the assembler in paragraphs 6.310 and 6.312 of the EVJD for Mr Young were inapt here on any view, i.e. they would

have been inapt if the impact of PI rates on assemblers had (contrary to our conclusion on this issue stated in paragraphs 684-685 above) been relevant.

"Unit Integrity / Damage": paragraphs 6.317-6.322 of the EVJD for Mr Young

912 We were bemused by the fact that the respondent asserted in paragraphs 6.317-6.322 of the EVJD for Mr Young that an assembler had to be "alert for any visible damage to a Product or its packaging and/or potential contamination to the Products themselves" but (see for example paragraph 83.10 of Appendix 1 above at page 55 above, relating to the work of Mrs Worthington) opposed the proposition that the claimants had to have the respondent's "WIBI" or "Would I Buy It?" policy in mind and apply it at all times.

913 We concluded at this point that it was obvious that it was part of the work of an assembler as well as that of a customer assistant to be alert to the possibility of damage to the respondent's products, especially (but not only) food products.

914 We could see nothing in the rest of the disputed content of paragraphs 6.317-6.322 of the EVJD for Mr Young which illuminated in any way the work described in the preceding paragraph above. That was because the relevant parts of that passage consisted of a description of some of the consequences of a failure by an assembler to do what is stated in the preceding paragraph above, and those consequences were neither part of the work of the assembler nor otherwise material at this stage.

"Closing Cages and Opening new UODs": paragraphs 6.323-6.338A of the EVJD for Mr Young

915 Paragraph 6.324 of the EVJD for Mr Young (with the original words, which were better than the slightly amended version since they referred to what was required rather than what Mr Young himself did) stated something which was obvious and was also just a statement of one result of a failure to take reasonable care. It was in these terms.

> "The job holder had to ensure that Cage doors were securely closed and strapped in order to avoid the risk of Stock falling out and being damaged during subsequent transit and/or injury to colleagues both within the warehouse and at stores."

916 In fact, the work in question consisted of closing the cage doors and engaging and tightening the strap around a cage, which was dealt with in the three lines of text of row 43 on page 6 of D9/154, which (as we say in paragraph 17.12 above) was dated "November 2015", and stated the respondent's policy and procedure for "Paperless Assembly in [a] Stockless Distribution Centre". Those words (with original emphasis by the use of bold font) were as follows.

> "Close the door if a four-sided cage and securely attach the cage straps

Note: Make sure to hold the side of the cage when doing the straps up on a two-sided cage."

917 In addition, the second and third pages of the 3-page document to which we refer in paragraph 17.22 above stated (in words and photographs) definitively and rather more clearly than paragraph 6.325 of the EVJD for Mr Young what was required by the respondent of an assembler when strapping a roll cage. The document was at D9/539, and was entitled "Safe Strapping of Roll Cages".

918 Further, given the content of D9/255/20-32, entitled "Know Your Stuff for Fresh Assembly – Opening and Closing Units of Delivery", to which we refer in paragraphs 15 and 16 above and which must be taken into account by the IEs in determining what were the demands of the tasks of an assembler described in that document, we could see only one thing which arose from what was said in paragraphs 6.323-6.338A of the EVJD for Mr Young which might need to be taken into account by the IEs and us. It arose from paragraph 6.336, which referred to the potential difficulties arising from moving dollies and MUs by 90 degrees. There was a document referred to in a number of places in the training materials relating to the comparators as "Know Your Stuff for Everyone – Bronze 3 – Manual Handling", and that was likely to have been of assistance in describing how an assembler should move dollies and MUs. Unfortunately, that document was not in the bundle before us (or at least, if it was, we were unable to locate it). If we had been able to see what was in that document then we might have been able to conclude that it was a more informative and definitive description of what was involved in the work of moving dollies and MUs by 90 degrees. It was possible that that document was omitted because it stated the obvious, but we doubted that. However, the possibility of the wheels of a dolly or an MU initially being in such a position that a certain amount of force was required to get the dolly or the MU to start moving, was probably obvious to the IEs at least.

919 For the avoidance of doubt, we record here that while it was said in paragraph 6.338 of the EVJD for Mr Young that "*The process of closing and opening Cages or Dollies described above was required 30-35 times per Assembly shift, and was necessary to maximise use of space in the store Aisles location and avoid any obstructions in the Assembly and Marshalling Lanes.*", the underlined words in that sentence appeared to us to add nothing material for present purposes. If, however, the IEs find them helpful, then they can take them into account.

"New Assignment": paragraph 6.346 of the EVJD for Mr Young

920 It was remarkable that the respondent thought it necessary to state (as it did in paragraph 6.346 of the EVJD for Mr Young, under the heading "New Assignment") that "The job holder then pressed enter on his AMC to generate his next Assembly Assignment. See page 19 of the AMC Guide." The effort required to do that was probably minimal, and it was obviously part of the work of an assembler, but in fact it was stated much more clearly and informatively on pages 2, 3 and 14 of D9/251. (We refer to D9/251 so far as relevant in paragraphs 17.11, 27, 627 and 908 above.)

Paragraphs 6.350-6.352 of the EVJD for Mr Young

921 Paragraphs 6.350 and 6.351 of the EVJD for Mr Young had to be read together to make sense as a statement of a material fact, assuming, that is, that what was stated there needed to be stated. Paragraph 6.351 was not agreed because at the end of it there was a reference to "page 68 of the AMC Guide". We could therefore, given what we say in paragraph 77 of our second reserved judgment (at pages 27-28 above), simply have ignored the dispute. We mention it here, however, in order to guide the parties (subject to any observations that they or the IEs might make) on the kind of detail which might in the future be included in any document complying with the requirements of rule 4(1)(d) of the EV Rules.

922 At D4/2/68 there was a scanned copy of page 4-1 of the guide to the use of an AMC in picking by line. The following passage on that page described what happened at the end of an assembler's shift, and it showed that paragraphs 6.350 and 6.351 of the EVJD for Mr Young were a paraphrase of, or at least drawn from, the passage. It consisted of the only words in the second half of the page, with a picture showing what the screen would say in between the two parts.

> "If the assembler has not completed all of the picks in his current assignment, the assembler will still be notified of his end of shift, but will be told to either take his pallet to the goods-in area or to leave the pallet in the assembly layout at the store lane where they completed their last pick. The decisions on where to leave the pallet will be decided by the host and the decision will be relayed to the AMT.
>
> [End of Shift; picture showing the message on the screen.]
>
> The assembler will be requested to scan the location where he is leaving the pallet."

923 It seemed to us that all that the IEs and we might have needed to know was that an assembler was not required to finish an assignment by the end of his shift and had to deposit the pallet on which he was working at that time in such place as he was directed to by his AMC. However, even that was probably unnecessary detail.

"Changing Batteries on MHE" etc; "Changing LPG Canisters in the Gas-Powered Forklift Truck"; and "Dealing with LPG Canister Deliveries": paragraphs 6.355-6.421 of the EVJD for Mr Young

Changing the battery on a Pedestrian Powered Pallet Truck; paragraphs 6.355-6.365 of the EVJD for Mr Young

924 We refer in paragraph 97 above to the document showing definitively what was involved in changing the battery on a Pedestrian Powered Pallet Truck: D1/3/13. We

ourselves saw an operative changing such a battery when we visited the Hinckley DC on 13 April 2023.

925 The content of paragraph 6.355 of the EVJD for Mr Young (with the original words, which were better than the slightly amended version since they referred to what was required rather than what Mr Young himself did) was as follows.

> "The job holder had to continuously monitor the battery levels on his Pedestrian PPT throughout Assembly shifts, undertaking battery changes whenever the battery level indicator dropped to one bar. This was required between once and twice per Assembly shift subject to the condition of the batteries."

926 The claimants proposed this instead.

> "The job holder monitored the battery levels on his Pedestrian PPT throughout Assembly shifts, undertaking battery changes whenever the battery level indicator dropped to one bar. This was usually required only once per Assembly shift subject to the condition of the batteries."

927 However, they submitted this in support of that position.

> "The job holder confirmed in evidence that a battery would usually last to the end of his shift."

928 That was inconsistent with their proposed words for paragraph 6.355 of the EVJD for Mr Young, but it was consistent with (1) what, for the reason stated in the first sentence of paragraph 812 above, we would have expected, and (2) Mr Young's oral evidence since he said (as recorded in lines 5-6 on page 226 of the transcript of day 31) that "usually they'd [i.e. the battery on a Pedestrian Powered Pallet Truck would] last a full day".

929 So, if there was a need to change the battery on a Pedestrian PPT, then it had to be done in accordance with the process stated and described definitively in the documents referred to in paragraph 97 above, namely D1/3/13 and D9/470/4-6 (which was the second half of the document entitled "Know Your Stuff for Mechanical Handling Equipment – Battery Changing (Manual Roll On/Roll Off)"). In the light of those documents we saw no need to determine the dispute about the content of paragraph 6.359 of the EVJD for Mr Young, which was in fact only about the use by the respondent in that paragraph of the words "carefully" and "difficult", which were opposed on the basis that they were "evaluative". We came to the same conclusion (albeit that the opposed words were different) in relation to the content of paragraph 6.364 of the EVJD for Mr Young, i.e. the content of the documents at D1/3/13 and D9/470 was a sufficient statement of the task of changing the battery of a Pedestrian Powered Pallet Truck.

930 We record here that the following words on D9/470/1 were informative in showing that the respondent did not rely on the comparators to guess when the battery on their MHE might run out.

> "Each piece of MHE used in our distribution centres has a battery gauge which indicates the remaining power for that battery. Generally when this gauge reaches 1/8th of its total, the battery will need changing."

931 Also, we saw that at the top of the next page, D9/470/2, this was said.

> "You will find that your truck needs its battery changing when it is no longer able to raise or lower loads. Although it cannot raise or lower loads, the battery will have sufficient charge for the truck to be taken to the battery changing area in your distribution centre. Take your truck to a battery changing station or pod as soon as you suspect the battery is running down."

<u>Changing the battery on a "Loading Truck", i.e. a LLOP; paragraphs 6.366-6.381 of the EVJD for Mr Young</u>

932 Much of the content of paragraphs 6.366-6.381 of the EVJD for Mr Young was agreed. The only material dispute was about the first of those paragraphs, and we agreed with the claimants that their proposed words were apt, whereas those of the respondent were not. That was because we agreed with the claimants that the evidence given in cross-examination by Mr Young as recorded on pages 224-225 of the transcript of day 31 showed that he "changed the battery on his Loading Truck at most once during a shift" when he was deployed on pallet clearance and loading "but often he would not need to change it at all during a shift."

933 There was only one other dispute on the content of paragraphs 6.366-6.381 of the EVJD for Mr Young which we saw a need to mention here. It was a dispute in the same vein as those to which we refer in paragraph 929 above. In this case it was about the respondent's proposed use of the words "particular care" and "to avoid risk of", in paragraph 6.380. In paragraph 95 above we refer to the document which showed definitively how the task of changing a battery using a battery car was to be done. That was the SSOW at D4/3/10, with the title "Area: Battery Change"; "Activity: Battery Change (Battery Car)". We saw that in column 5 the process which was the subject of paragraph 6.380 was described, and that it was so far as relevant to "[place] the charged battery ... into the truck using the magnetic arm".

934 When considering the parties' positions in regard to this aspect of the work of Mr Young, we observed that paragraphs 6.369-6.381 of the EVJD for him described in great detail the process which was described succinctly in D4/3/10, and that paragraph 6.369 of the EVJD, read with the photograph to which it referred as "Photo G4" (which we were eventually able to locate at D9/0.2/5) and the document at D9/500 to which we refer further in detail in paragraphs 941-942 below, would probably have been sufficient for the purposes of the IEs. However, if it was not then

it was open to the IEs to take into account the agreed detailed description in the words used in paragraphs 6-369-6.381 to the extent that it went beyond what was in those documents, especially at D9/500/6-8.

935 What was clear to us was that

935.1 the use of a battery car to change a battery involved the use of a "magnetic arm",

935.2 the person changing the battery was required to operate some mechanical equipment, and

935.3 being able to do that obviously required training and then the application of some skill and, we thought, necessarily some care.

936 We now return to the dispute maintained in relation to the words of paragraph 6.380 of the EVJD for Mr Young. Those which were proposed by the claimants retained some key information, putting it in a single sentence, which was at the end of the claimants' proposed words and was this.

> "The tolerance on either side of the Battery Housing unit was around 10mm."

937 That factor showed in our judgment the need for care, and the degree of the care required, when aligning a battery with the housing unit into which it was to be placed. However, we thought that the picture and explanation at the bottom of page 6 of D9/500 was a rather better illustration of the degree of care required.

<u>Changing forklift truck batteries; paragraphs 6.382-6.393 of the EVJD for Mr Young</u>

938 There was at least one material dispute in paragraphs 6.382-6.393 of the EVJD for Mr Young, which concerned changing forklift truck batteries, and that was in the first of those paragraphs, which concerned the frequency with which the need to carry out the task arose. However, the words used by the parties were not very far apart, and possibly the difference between the words was not material. For the avoidance of doubt, however, we agreed with the claimants that the words "Usually once, possibly twice every full FLT shift" described accurately the oral evidence of Mr Young (as recorded on pages 222-224 of the transcript of day 31) about the frequency with which a forklift truck battery had to be changed (as opposed to "At least once, possibly twice on every shift").

939 We saw that the SSOW at D4/3/10 referred to forklift truck batteries, indicating therefore that the battery car was used to change the batteries of forklift trucks as well as those of a LLOP.

940 Given that counterbalance forklift trucks were powered by gas, the forklift trucks to which paragraphs 6.382-6.393 of the EVJD for Mr Young referred must have been reach forklift trucks.

941 In fact, we saw that the document at D9/500, entitled "Know Your Stuff for Mechanical Handling Equipment – Automated Battery Change Cart Operation" showed (on page 2) that battery change carts differed from DC to DC. That was because of this passage at the top of page 2 of that document.

> "There are different types of battery change cart within the Distribution centres, these are single level and multi tier systems. Some sites have more than one battery change cart and there are also two different models of cart, the power logic cart and the BHS cart. Both manufacturers produce single Tier and double Tier systems. The control panel is different on both carts and the functionality of the carts are also different. The big difference in operation of the two carts is that the battery rollers are powered on the BHS cart and they are not powered on the Powerlogic cart."

942 There were helpful photographs throughout that document. Incidentally, those on page 4 confirmed that the kind of forklift truck which had batteries was a reach truck. They also confirmed that the process of changing a battery on a reach truck was the same as for a LLOP or a "Rider Powered Pallet Truck".

943 Why was there, therefore, we asked ourselves, a separate section in the EVJD for Mr Young on the changing of the battery of a reach truck? We found that answer in the photographs at D9/0.1/16, D9/0.1/17 and D9/0.1/39, which, when compared with the pictures of LLOP batteries (of which there were, we thought, photographs at D9/0.2/5-14, for example) showed that the battery of a forklift truck was rather bigger than that of a LLOP and therefore required different handling. Having said that, the process of changing the battery was, for the reasons stated in the preceding paragraph and paragraph 939 above, the same as using a battery car to change the battery of a LLOP.

944 The parties did not dispute the respondent's proposed words for the description in paragraphs 6.384-6.390 of the process of changing a battery on a reach forklift truck except that the claimants opposed the use of the word "carefully" in paragraphs 6.386 and 6.387. We thought that the exercise of some skill and care would obviously be required to do the things described in those paragraphs.

<u>What Mr Young had to do in relation to battery acid spillage; paragraphs 6.394-6.396 of the EVJD for him</u>

945 The parties disputed the content of paragraph 6.394 of the EVJD for Mr Young which concerned being aware of the process to follow if there was battery acid spillage because, as it was said by the claimants, he "never did this", i.e. follow that process, because he never needed to do so because he himself did not, in the course of his

work, come across a battery acid spillage which had not already been reported by someone else in relation to a toppled battery so that he had gone with a forklift truck to pick up the battery.

946 That was in our view mistaken. Here, the respondent was right in principle in saying, as it did in paragraph 6.394, this:

> "The job holder was also required to be aware of and, where necessary, follow a specific procedure in the event of any acid spillage during a battery change, whether that was caused by damage to or leakage from the metal frame of the battery or where a battery tilted or fell during the change process."

947 Neither party referred us to D9/208, to which we refer in paragraph 98 above. Nor did they refer us to D9/504, to which we refer in paragraph 101 above. The respondent did, however, refer us in closing submissions to the SSOW at D9/641 (with the title "Area: Warehouse/Yard"; "Activity: Battery Spillage"), to which we refer in paragraph 100 above. That SSOW stated what steps needed to be taken, and how they were to be taken, in the event of a fallen battery.

948 We concluded that all that needed to be known by Mr Young and any other comparator about the risks arising from the possible spillage of battery acid were stated so well at D9/208/3, D9/641 and D9/504 that there was no need to do more here than refer to those pages in that regard.

949 If and to the extent that it was necessary to take into account the frequency with which Mr Young himself actually informed a manager of spilled battery acid, which was the subject of paragraph 6.395 of the EVJD for Mr Young, where it was said that he did that "roughly 2 to 3 times a year during the Relevant Period", we saw that Mr Young's evidence given in cross-examination, as recorded on pages 73-75 of the transcript of day 32, did not support the proposition that he himself came across battery acid spillage except when he was called to use a forklift truck to pick up a battery which had fallen over in the process of a battery change.

950 We therefore concluded that the claimants' submission that the evidence before us showed that Mr Young never did what was described in paragraph 6.395 of the EVJD for him, was correct. On that (apparently sound) basis, this was another instance of the approval by one of the respondent's witnesses of a part of a document in which an incorrect (that is to say, unfounded) factual assertion was made.

<u>Paragraphs 6.398-6.410 of the EVJD for Mr Young: "Changing LPG Canisters in the Gas-Powered Forklift Truck"</u>

951 There was in paragraph 6.398 of the EVJD for Mr Young another apparently unfounded factual assertion, which was also revealed by what he said in cross-examination. That was that he changed the gas canister on the counterbalance forklift truck in the yard about once a week. In cross-examination, as recorded on

pages 227-228 of the transcript of day 31, Mr Young said that he changed the canister no more than twice a year in the yard. We, through EJ Hyams, put that issue to Mr Young after that cross-examination to check what we understood to be the situation from that cross-examination, and at pages 1-5 of the transcript of day 32 there was a record of what was said. Mr Young then unambiguously confirmed that he changed the canister on the counterbalance forklift truck no more than twice a year. We wondered whether even that evidence was correct, given what we say in paragraphs 876-880 above.

952 Most of the content of the material parts of paragraphs 6.399-6.410 of the EVJD for Mr Young was agreed. The disputed content was in paragraphs 6.400 and 6.408, and the disputes related to the risks arising from leakage of gas. Those risks were to our minds obvious, but in fact they were stated in columns 2 and 6 of the SSOW at D4/3/9, from which, we thought, paragraphs 6.399-6.410 must have been drawn. (We say "must have been drawn" because neither party referred in closing submissions to that document in connection with paragraphs 6.399-6.410, although, we saw, the respondent did refer to that document in its submissions in support of the content of paragraph 10.33 of the EVJD for Mr Young, which was in substance a repeat of the content of the proposed amended paragraph 6.399 of that EVJD.) That document, i.e. D4/3/9, said, and showed by way of very helpful pictures, all that was required for the purpose of understanding the demands of the work of changing a gas canister on a forklift truck. This was therefore a good example of a situation in which a party had put into words the content of a document which contained rather more information than the words used by the party, and then failed to acknowledge (1) that the words were drawn from that document and (2) that the document itself was rather more informative than the words.

<u>"Dealing with LPG Canister Deliveries": paragraphs 6.411-6.421 of the EVJD for Mr Young</u>

953 It was clear from Mr Young's evidence, as recorded at pages 187-191 of the transcript of day 31, which we accepted, that he received deliveries of gas canisters for the counterbalance forklift truck(s) of the DC at which he worked (Didcot) once a fortnight. The claimants objected to the content of paragraph 6.411 of the EVJD for Mr Young on the basis that saying that he "undertook the task on behalf of the DC" of (and these next words were agreed) "receiving and storing deliveries of full LPG Gas canisters and the collection of those that were empty" was "Analysis / evaluation / comment. Exaggeration."

954 We suspected that neither we nor the IEs were likely in any way to be influenced by the inclusion of the opposed words, which in our judgment were descriptive rather than evaluative, and factually accurate if only Mr Young tended to do the work of receiving deliveries of full gas canisters and returning the empty ones. (We saw that he said in cross-examination, at line 6 of page 191, that it was "usually" 12 of each: "12 full ones in, 12 empty ones out", and that that was not opposed.) In any event, whether or not he was the only person who tended to do that work, he did it, and that was the only relevant factor at this stage.

955 We saw that the final sentence of paragraph 6.412 of the EVJD for Mr Young was opposed on the basis that it was "Analysis / evaluation / comment. Exaggeration." In that sentence it was said that Mr Young "ensured that he remained alert" to "announcements" on the "DC tannoy system when the LPG delivery arrived". Even if he was not the only person who dealt with the delivery and return of counterbalance forklift truck gas canisters, given that he was one of the persons who did that, we concluded that (1) it was part of his job to listen out for such announcements, and (2) the substance of the final sentence of paragraph 6.412 was apt.

956 The disputes maintained about paragraphs 6.418-6.421 of the EVJD for Mr Young were all about words which described or were about peripheral matters. Respectively, they were about the following words in quotation marks:

956.1 the fact that "each filled canister cost approximately £25",

956.2 signing of the copy of the delivery/receipt provided by the driver and taking it to the Goods In Office was done "to enable the relevant records to be updated";

956.3 recording the number of filled canisters which Mr Young had counted in the cage in the yard was done "so that Tesco's finance team could order sufficient canisters to ensure ample reserves were available at all times", and

956.4 "The job holder exercised focus and concentration when handling both empty and filled LPG canisters and in particular, whilst transferring them to and from the security Cage to the tail lift of the delivery (and collection) vehicle and when ensuring that filled canisters were stored neatly in order to remain separated from future emptied canisters".

957 The latter words, i.e. in paragraph 956.4 above, were in our view indubitably unnecessary in that they added nothing to the description of the work in paragraphs 6.414-6.416 of the EVJD for Mr Young and the description by him of that work as recorded on pages 187-191 of the transcript of day 31 (to which we refer in paragraph 953 above).

958 As for the three other sets of words set out in paragraph 956 above, our conclusions were, respectively:

958.1 the cost of a full canister did not seem to us to be material here, but if the IEs disagree then of course they can take it into account in assessing the value of the work within the meaning of section 65(6) of the EqA 2010; and

958.2 the words opposed by the claimants in paragraphs 6.419 and 6.420 of the EVJD for Mr Young, which we have set out in paragraphs 956.2 and 956.3 above,

958.2.1 added nothing material in that they were saying no more than what was either obvious or implicit in the words preceding them, but

958.2.2 were inoffensive and potentially helpful, with the result that there was no good reason for the IEs and us ignoring them.

Section 7 of the EVJD for Mr Young: "Metrics"

959 We have stated above (principally in paragraphs 329 and 733) our view that the "metrics" on which the respondent placed much reliance were for the most part at least of dubious relevance. It was in our judgment disproportionate to go through the disputed content of part 7 of the EVJD for Mr Young and determine those disputes, not least because we did not know at this stage to what extent the IEs would think that the disputed factual assertions were material to their task of assessing the value of the work of Mr Young. Thus, in the same way that we say it above in relation to other parts of the EVJDs before us and the IEs, and in paragraph 55 of our second reserved judgment (at pages 21-22 above), we state here that if the IEs believe any dispute in relation to part 7 of the EVJD for Mr Young to be about something material, then they can ask us under rule 6(3) of the EV Rules to determine that dispute.

Part 8 of the EVJD for Mr Young, concerning "Performance and Accountability", part 9, concerning "Physical Conditions Inside the Warehouse" and part 10, concerning "Risks and Hazards"

960 For the avoidance of doubt, we say no more here about the final three sections of the EVJD for Mr Young on the similar basis that what we say above or in our judgment of 12 July 2023 meant that it was disproportionate to address any of the many disputes in sections 8-10 of the EVJD for Mr Young unless the IEs see in them something which the IEs regard as being relevant to their task in these proceedings.