



EMPLOYMENT TRIBUNALS

Claimant: Mr J Phillis

Respondent: Tesco Stores Limited

Heard at: Cardiff **On:** 15th and 16th July 2024

Before: Employment Judge G Duncan

Representation

Claimant: Mr Probert, Counsel

Respondent: Mr Uduje, Counsel

REASONS

Introduction

1. The Claimant is Mr Jason Phillis. The Respondent is Tesco Stores Limited. The Claimant was employed as a warehouse operative. He commenced his employment on or around the 21st November 1994. His employment was terminated on 30th September 2023.
2. The Claimant, by way of ET1, received on 24th January 2024, states that he was unfairly dismissed following an incident that took place on 2nd May 2023 when approximately 100 of the Respondent's operatives refused to return to work. The ET1 advanced claims for Automatic Unfair Dismissal pursuant to Section 152 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA 1992") and for Unfair Dismissal pursuant to Sections 94 and 98 of the Employment Rights Act 1996 ("ERA 1996").
3. The Respondent, by way of ET3 and Grounds of Resistance, dated 15th April 2024, states that the Claimant was fairly dismissed due to gross misconduct relating to his role in the events of 2nd May 2023. It is denied that the Claimant was dismissed as a result of his membership of an independent trade union or his participation in activities or services of the trade union.
4. A Notice of Claim and Case Management Order was sent to the parties on 25th March 2024 listing the matter for a two-day hearing.

5. In consideration of the claims, I have had regard to the contents of the trial bundle running to 626 pages. In addition, I have considered the CCTV footage entitled “Bay One (25minutes)”, “Bay One with Audio (7 minutes)” and “AL Aisle”. I have read the statements from each of the witnesses.
6. I heard oral evidence from the following:
 - a) Gemma Theaker – Area Manager;
 - b) Nick Allen – Distribution Director;
 - c) Andrew Woolfenden – UK Distribution and Fulfilment Director;
 - d) The Claimant.
7. The oral evidence concluded on Day 2. I am grateful to both advocates for drafting written submissions. I have had the benefit of oral submissions expanding upon those documents. On the afternoon of Day 2, the Tribunal adjourned for the purpose of drafting written reasons, it being acknowledged at the outset of Day 1 that given the issues and number of witnesses, it was highly unlikely that the Tribunal would be in a position to give a decision within the allocated two days.
8. During the Claimant’s oral submissions, it was confirmed that the claim for Automatic Unfair Dismissal was no longer being pursued.

Findings of Fact

9. As briefly outlined above, the precipitating events take place on 2nd May 2024, however, it is necessary to briefly address the surrounding circumstances that led to the incident.
10. As of 2nd May 2024, the Claimant was a warehouse operative. As part of the role, he was involved in picking stock to order, loading trailers, unloading stock and checking it into the warehouse. The Claimant was also a trade union representative. He describes his role as representing colleagues, accompanying them to grievance/disciplinary meetings and defending their interests. Whilst the Claimant did not accept that he was an “experienced” representative, he acknowledged that he had been a representative for “a number of years”. As part of the disciplinary meeting, he informed Gemma Theaker that, “I take my job seriously, and if someone has voted for me, I will take it seriously” [415].
11. Whilst undertaking his responsibilities as union representative, the Claimant played a role in submitting a collective grievance on 21st April 2023 to highlight concerns in relation to the Respondent’s intention to implement a new picking system known as “Simpler Picking”. The Claimant’s name, as a union rep, appears alongside another representative, Kevin Berry, at the top of the grievance form. In oral evidence, the Claimant was keen to stress that he was not the “lead name” but that eight other union representatives and he, alongside Keven Berry, were the named representatives at they were “nominated as the reps that would attend the grievance meeting”. The Claimant was keen to stress

that 255 names were on the grievance and that each of the named individuals were “part of the grievance”. The grievance raises issues with timings, a lack of evidence or dialogue around the change, concerns around colleagues’ mental health and makes a request for sight of a risk assessment. The grievance requests that the introduction of Simpler Picking “be paused” whilst the formal grievance is considered.

12. It is agreed that, notwithstanding the grievance, Simpler Picking was implemented on or around 25th April 2023. The Respondent acknowledged the grievance by way of letter dated 27th April 2023 to state that a suitable date will be offered for a grievance hearing. The letter invites the Claimant and/or Kevin Berry to contact the “People Team” if they have any questions or concerns relating to the proposal to arrange a meeting. It is agreed that the representatives did not contact the aforementioned team.
13. On 1st May 2023, a post was made on the website Reddit under the title, “Protest in distribution centre”. The post refers to protests about the new way of picking and poses the questions, “Is there anything Tesco can do? Could they do a mass sacking? Any thoughts”. It states, “The protest is peaceful come in and refuse to work on shop floor from what I hear”. The post appears to trigger replies from several other users. The parties agree that there is no evidence to suggest that the Claimant was involved with the making of the Reddit post. As the Claimant states in oral evidence, “let me be clear, I do not even know what Reddit is, I have never seen it or anything”.
14. At approximately 6am on 2nd May 2023, approximately 100 operatives refused to return to work unless the Simpler Picking was switched off. The Claimant was in the canteen as the events were unfolding on the warehouse floor. He was not scheduled to work that day and was only on the premises for the purpose of attending training in relation to forklift truck driving. In his statement, he asserts that he was originally scheduled to attend the training in the afternoon, but the trainer had asked him to rearrange to the morning. He asserts that he had no prior knowledge or involvement in the stoppage whatsoever and would not have been at the warehouse if not to attend the training.
15. The most senior manager on site at the time was Paul Evans. During an interview with Paul Evans on 10th May 2023 [151/152], he states that Ian Woodward “received a message from our Assembly Coordinator – Fiona Waite, that there were a number of colleagues that weren’t starting their daily duties and there was a clear group gathering of our colleagues...close to bay one”. The interview discusses the position of the gathering and approximate numbers before at page 155 recording that Paul Evans “asked Ian for a union rep to come and see me as soon as one can be located”. Tony Evans, union representative, is located and leaves to find the Claimant. As Gemma Theaker accepted in her oral evidence, no concerns were expressed by Paul Evans that Tony Evans was intending to locate the Claimant. Further, Gemma Theaker accepted that the reason he has asked to get the reps was to try and help resolve the situation, the specific help requested was to report back what the issues were and that there was no request that the Claimant specifically tell the workers that they must go back to work. Of note, Paul Evans, the most senior

manager on site at the time, opted against attending the warehouse floor and relied upon the union representatives to establish the issues. Gemma Theaker acknowledged that this was a potential management failure and Nick Allen stated that he felt that Paul Evans, "should have engaged [the colleagues] however I understand why he contacted the union".

16. Following the request made by Paul Evans to engage union representatives, Tony Evans locates the Claimant at approximately 6:20am, whilst in the canteen, and told him that management had instructed him to speak to the warehouse employees and resolve the issue. As a result, the Claimant and Tony Evans attended the warehouse floor. At this time, it is conceded by Gemma Theaker that the Claimant was acting as a middleman or mediator. As described by Paul Evans, both the Claimant and Tony Evans returned approximately 25 minutes later and, "informed me that the actions of their members were due to the implementation of optimal stop and refusing to go back to work until it had been switched off...I asked them for how we thought we were best to fix the situation at that moment. The reply from Jason Phillis [was] that despite engaging the members he believed they were not going to return to work" [159]. As a result of the discussion, Paul Evans contacted Jason Watts, Distribution Site Manager.
17. Jason Watts attends the warehouse floor at approximately 7:05am. The exchange between Jason Watts, the Claimant and various other colleagues is captured on the CCTV marked "Bay One with Audio (7 minutes)". It was accepted by Gemma Theaker that the first thing that the Claimant did when Jason Watts arrived was to step into the role of explaining the nature of the colleagues' concerns. She acknowledged that the initial exchanges were consistent with the Claimant trying to be a mediator. During these early exchanges, Jason Watts can be seen and heard explaining to the gathering that their concerns were being taken seriously and addressed with technical support. At approximately 7:08am, the interjections become more abrupt, and the exchange becomes tense in nature. Gemma Theaker acknowledged that several rude and disrespectful remarks were made towards Jason Watts but that these were not made by the Claimant. Jason Watts requests that the colleagues return to work on a number of occasions. Gemma Theaker states that at 7:09am, the CCTV demonstrates that the Claimant states, "we are going to need a guarantee first" in the context of Jason Watts requesting that the colleagues return to work. Further, she states that the Claimant's body language is of relevance and that she had a reasonable belief that the Claimant became a spokesperson, elevated himself several times and encouraged the colleagues not to return to work. Jason Watts ended the conversation at 7:12am with a view to updating the Claimant and others once he had spoken to senior management. A short time later, the Jason Watts obtained authority to turn off Simpler Picking. This information was passed onto the Claimant and Tony Evans, and they subsequently updated the colleagues of the position. The workforce dispersed and returned to work.
18. Following the events of the 2nd May 2024, the Claimant was suspended by way of letter, dated 16th May 2024 [206]. The letter is general in nature and refers to the suspension "pending the outcome of an investigation into allegations of:

your role and involvement in the unofficial stoppage that occurred on 2nd May 2023, between 6:00 and approximately 7:35 hours, in which it is alleged that you were involved in organising that action and encouraging fellow colleagues to stop working". The suspension letter is from Paul Evans, Warehouse Service Shift Manager. At the time of suspension, the initial investigation consisted of meetings undertaken with Paul Evans [144-182], Ian Woodward [183-190] and Jason Watts [191-200].

19. The Claimant attended an investigation meeting on 30th May 2023. The interview was undertaken by Stephen Grimsdale, Operations Manager [214-230]. The interview consisted of interviews with ten members of staff taking place between 31st May 2023 and 14th June 2023. The interviews were conducted by either Stephen Grimsdale or Ross Jones, Shift Manager, and can be found in the bundle between pages 231 and 322. I have considered each of the interviews undertaken. Given how the investigation and appeal developed over a number of weeks and months, it is important to briefly outline some of the salient features of those interviews:

- a) Mike Rogers [231-232] confirmed that he had asked the Claimant to come in early for training on the 2nd May 2023. He states that he was in the canteen and that he was, "pretty sure that Jason was on a table and can recall another union rep coming in and asking if he can speak with Jason".
- b) Jason Watts [233 to 239] provides detail around the Simper Picking process [234]. He confirms that attempts were being made over a number of months to try and implement the process. He describes the Claimant as the main challenge and provides information around the extent to the Claimant's opposition [235-236]. Jason Watts states that the dialogue from the Claimant was inflaming the situation and asserts that, "we have been lied to". He opines that the reps were not there to diffuse the situation and states that the Claimant was adding information to get a reaction from colleagues [238]. Jason Watts states that other colleagues were swearing at him and that the reps, "appeared to have primed the colleagues with information and fuelled their frustrations – especially Jason" [238].
- c) Paul Evans [240-256] confirms that he asked Tony Evans, union representative, to speak to him. He describes that Tony Evans was "suspiciously surprised" and replied to ask where the Claimant was [246]. Paul Evans states that he wanted to engage the reps and he was "not sure what to do" [247]. He progresses to state that the Claimant explained that the colleagues had stopped due to Simpler Picking [248] and that the Claimant, "believed they were within their rights to stop working as there was a grievance that hadn't been heard" [249]. He states that the Claimant informed him that it was "his belief they were not going to return to work until it was switched off". Of note, Paul Evans confirms that it was agreed that the Claimant should address the members first and then handover to Paul Evans [250]. He provides an account of attempting to get the members to return to work on three occasions [251], describes other members as confrontational [252] and swearing [253]. Paul Evans states that there must have been an element of planning [254]. He states that, "I have noticed a

pattern where the reps are not directly involved, have a knack for being in a different place” [255].

- d) Nick Gambetta [257-265] confirms that Simpler Picking had issues [259] and that there was a lot of emotion from colleagues [260]. He describes addressing some of the issues with the Claimant and states that he had a “good relationship” with Tony Evans and that his relationship with the Claimant was a “bit more professional” [261].
- e) Kieran White [266-268] describes the colleagues as being highly resistant to change and outlines a number of the genuine issues with Simpler Picking and examples of inefficiency and trucks driving sideways. He did not accept that there was any genuine health and safety issues.
- f) Ian Woodward [269-274] describes that Tony Evans was “a bit taken back” when he was informed that the “boys have stopped work” [271]. He moves on to state that Paul Evans told Tony Evans that the members needed to return to work.
- g) Jason Watts [275-294] describes the strength of the Claimant’s views in relation to Simpler Picking [282] and a meeting in April 2023 when the Claimant, “got very angry...we don’t like it and will fight you all the way” [283]. He describes that everything was a “battle” with the union [288]. Jason Watts describes addressing the members and experiencing hostility from a number of them [289]. He states that he, “felt very let down by the union, the Claimant was saying been lied to was not helpful, felt very disappointed and let down, worked with those people a long time and have been supportive to them. To have 100+ people against 1 person was very hostile” [290]. Jason Watts states that, “I did say to both reps I really need their help to get them back to work but that didn’t happen” [291]. He states that the Claimant would have known about the unofficial action and that “looking back on that week, they were in all week with less than three hours productivity. They spend time talking to people and interacting. When Paul asked Tony to go and see the colleagues, he went to see Jason who went to the colleagues and spend 60 seconds there. If they didn’t know what was going on, it would have taken longer” [293].
- h) Tony Carpenter [295-303 and 312-315] provides an overview of the incident and Simpler Picking issues. Of note, he describes the Claimant moving from the canteen to speak to colleagues and that “Jason asked them what’s the purpose of this, they said it is Simpler Pick, it’s not safe and not happy. Jason said what are you hoping to get from it – was along those lines. The crowd said [we] want to speak to someone in charge [and] highlight we are not happy, at that point one of them said [we] need to get the shift manager” [297]. Tony Carpenter was asked in the second interview on 14th June 2023 when he first became aware of the “peaceful protest”. He responds to state that, “I did not hear about the peaceful protest, first I heard was when Tony came into the canteen and said everyone is on Bay 1. No one approached me about having a protest on Bay 1, it was feedback [of] how people were

feeling, had no prior knowledge when Tony came in me, Jason and Stephen were surprised” [313].

- i) Richard Williams [304-306] and James Moon [307-311] detail a number of the issues and non-issues around Simpler Picking.
- j) Steven King [316-322] states that the Claimant, “didn’t know anything about it. Tony and Jason [were] in the canteen. [They] didn’t know until we got to Bay 1. He was trying to resolve it”. He describes a number of issues relating to health and safety and the implementation of Simpler Picking. At the end of the interview, he reiterates that the union representatives did not know anything about the unofficial action [322].

20. The Claimant attended a reconvened investigation meeting on 22nd June 2023 [326-349]. By way of letter, dated 27th June 2023, Stephen Grimsdale confirms to the Claimant that there is a disciplinary case to answer and that a disciplinary manager should be appointed. In summary, the letter states that it is reasonable to believe that the Claimant was complicit in the unofficial industrial action, failed to advise colleagues to return to work, condoned their actions and spoke on their behalf. Further, the investigation considered that the Claimant had prior knowledge and were involved in the planning.

21. The allegations are distilled into the Invitation to Disciplinary Hearing letter, dated 3rd July 2023. The letter contains allegation 1) that the Claimant was involved in the planning of the unofficial action and allegation 2) with three sub-allegations, namely, that the Claimant was complicit in carrying out unofficial industrial action in that:

- You did not ask colleagues to return to work when asked to do so by senior manager Paul Evans
- You did not ask colleagues to return to work when asked to do so by senior manager Jason Watts
- You set conditional demands on behalf of the colleagues stating that they would not return to work until the Simpler Pick system was switched off.

22. The Claimant’s disciplinary meeting was held on 22nd September 2023 [405-447]. Prior to this, additional statements were obtained from Kevin Berry, Jason Watts and two other individuals [366-384, 389-392]. The interview was conducted by Gemma Theaker, Store Manager. A subsequent meeting was held on 29th September 2023. By way of letter, dated 1st October 2023, Gemma Theaker concluded that the Claimant should be summarily dismissed on the basis of his role and involvement in the unofficial stoppage, becoming an active part of the leadership of the unofficial strike and that he was complicit in the action alongside 105 colleagues. The letter states that the Claimant failed to ask the colleagues to stop their unlawful behaviour and return to work and that “I believe you encouraged them not to return to work”. The letter states that the

Claimant became a spokesperson which in turn encouraged, reinforced and enabled their unlawful behaviour.

23. By email, dated 12th October 2023, the Claimant appealed the decision. Nick Allen heard the appeal on 31st October 2023 [505-539]. The decision was upheld by letter, dated 13th November 2023 [554-555], stating that the Claimant was asked to support getting colleagues to return to work but failed to do so, that the Claimant was lead spokesperson, colleagues were following the Claimant's lead, he failed to ask them to return to work and encouraged them not to return to work.
24. By email, dated 23rd November 2023, the Claimant lodged a second appeal. The second appeal was allocated to Andrew Woolfenden, UK Distribution and Fulfilment Director. The appeal was heard on 27th December 2023 [559-583]. The decision was upheld by way of letter, dated 5th January 2024 [584-585]. The letter states that the Claimant's conduct and behaviour was unacceptable, that the Claimant was the spokesperson for the mass "downing of tools" and you actively encouraged the colleagues to continue with the unofficial action.

The Law

25. The law that I must apply is settled and I do not propose to rehearse it in great detail. In relation to the unfair dismissal claim, it is for the respondent to prove the reason for dismissal in accordance with section 98 of ERA 1996. Section 98 lists the potentially fair reasons for dismissal. Where the employer does show a potentially fair reason for dismissing the Claimant, or where that is conceded, the question of fairness is determined by section 98(4). The question of whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case.
26. The correct approach to follow in conduct dismissals is based on the principles distilled from **British Homes Stores v Burchell [1980] ICR 303**. The Tribunal should have reference to the ACAS Code of Practice and take account of the whole disciplinary process. Applying **Burchell**, and **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**, the questions for the Tribunal are:
- a) Did the Respondent genuinely believe that the Claimant was guilty of misconduct?
 - b) If so, was that belief based on reasonable grounds?
 - c) Had the employer carried out such investigation into the matter as was reasonable?
 - d) Did the employer follow a reasonably fair procedure?

- e) If all those requirements are met, was it within the band of reasonable responses to dismiss the Claimant rather than impose some other disciplinary sanction?
27. I am referred to various authorities within the written submissions relied upon by both parties. I do not propose to rehearse those authorities at length. It is though correct that I consider the following principles.
28. The degree of investigation required very much depends on the circumstances. In ***Shrestha v Genesis Housing Association Ltd [2015] EWCA Civ 94***, the Court of Appeal made it clear that it is not necessary for an employer to extensively investigate each line of defence advanced by an employee. This would be too narrow an approach and would add an "unwarranted gloss" to the *Burchell* test. What is important is the reasonableness of the investigation as a whole.
29. I am reminded of the case of ***London Ambulance Service NHS Trust v Small [2009] IRLR 563*** and the need to avoid the 'substitution mindset' when answering that question. That means that the tribunal is not to ask itself whether it would have believed the Claimant's guilty based on the material available to the Respondent when it reached its decision but rather whether the Respondent acted reasonably in forming that belief – judged objectively.
30. The importance of the ACAS Code was emphasised by the EAT (Morison J presiding) in ***Lock v Cardiff Railway Co Ltd [1998] IRLR 358***. The Claimant invites me to consider the following extracts:

9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.

When investigating a disciplinary matter take care to deal with the employee in a fair and reasonable manner. The nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against.

Conclusions

31. I must firstly consider the reason for dismissal. The Respondent has adduced evidence to outline the steps taken during the disciplinary process as outlined above. The entire process is focused upon the actions of the Claimant on 2nd May 2023. The Claimant does not pursue the claim for Automatic Unfair Dismissal on the basis of trade union association. In the circumstances, there was no substantive challenge to the Respondent's evidence in relation to the

reason for dismissal. Indeed, there are an absence of any periphery reasons within the bundle that would suggest that the Claimant may have been dismissed for reasons other than misconduct. Accordingly, I am satisfied that, on the balance of probabilities, the reason for dismissal was misconduct as asserted by the Respondent.

32. When considering the Respondent's actions, I have regard to the fact that the Respondent is a national company with considerable resources. The Respondent has around 3,400 stores and employs around 300,000 people in the UK. The Respondent has the benefit of significant HR resources.

33. As outlined above, I must consider the following questions of the test outlined in **Burchell**.

a) Did the Respondent genuinely believe that the Claimant was guilty of misconduct?

34. At paragraphs 11 and 12 of this decision, I outline briefly the circumstances leading up to the unofficial action on the 2nd May 2023. On any reading, it is clear to the Tribunal and it would seem, to the Respondent, that there was a significant level of discontent around the implementation of Simpler Picking. In relation to the Claimant specifically, his name appears at the top of the grievance form and, in his own words during cross-examination, he accepts that he was "not a fan". It was known to the Respondent that Jason Watts was reporting the Claimant as having got very angry in relation to the subject at a meeting in April 2023. He describes at page 282 a conversation whereby the Claimant is alleged to state that he could not believe that the company was "going to war" in relation to the implementation of Simpler Picking. In my judgment, the information is relevant in the context of considering the Claimant's actions on 2nd May 2023. It was in my judgment, a genuine belief that the Claimant had strongly negative views towards Simpler Picking and it was known that he was playing a significant role in requesting a pause in respect of implementation.

35. The Claimant played a significant role in the events of the 2nd May 2024. Whether he acted as a neutral middleman, mediator, orchestrator or ringleader is irrelevant to the relatively uncontroversial view that whatever role he did play, it was significant in the context of the events that would unfold. It is agreed that he liaised with senior management, gathered the views of the members, relayed those views back to management, introduced management to colleagues, raised himself on the forklift truck, played a significant part in the discussions when Jason Watts attended the warehouse and, eventually, was the individual that passed the news to the members that the Simpler Picking system was going to be turned off.

36. I consider that the Respondent genuinely believed that there must have been a degree of pre-planning so to organise the mass unofficial action. It is a reasonable belief to hold that to ensure that over 100 people stop working at the same time, some degree of preparatory steps is likely to have been required. The Respondent was also aware of the Reddit post that specifically

makes reference to the prospect of a peaceful protest and that this involved a refusal “to work on the shop floor from what I hear”. The fact that the Reddit post took place on the day before the incident and the scale of the unofficial action support the Respondent’s suggestion that there must have been pre-planning.

37. On viewing the CCTV, and considering the video, the Claimant, as above, can be seen and heard playing a significant role in the events. Gemma Theaker was keen to emphasise the Claimant’s body language and the fact that he was addressing the members on a forklift truck. During the course of the CCTV with audio, comments can be heard of an offensive and hostile nature at around the same time that the Claimant is taking a lead role in the discussions with Jason Watts.

38. The aforementioned points are relevant in the context of a reading of the disciplinary letter and appeal outcomes in totality. Further, my assessment of each of the Respondent’s witnesses was that they were approaching their respective roles in a professional manner and had commenced their tasks with an intention to fairly consider the Claimant’s role on 2nd May 2024. During their oral evidence, I was struck by each of the Respondent’s witnesses being steadfast in their views that the Claimant had engaged in gross misconduct. I formed a view of each of the witnesses as expressing a genuine view in the course of their evidence. I consider the assessment of the witnesses alongside the context I outline above, namely, the Claimant’s known hostility towards Simpler Picking, the significant role the Claimant played in the events of 2nd May 2023 and the expressed view that there must have been pre-planning. For the aforementioned reasons, I am satisfied on balance that the Respondent formed a genuine belief that the Claimant was guilty of misconduct, namely, his role and involvement in the unofficial action on 2nd May 2023.

b) If the Respondent did genuinely believe that the Claimant was guilty of misconduct, was that belief based on reasonable grounds?

39. In assessing whether the Respondent’s belief was based on reasonable grounds, I consider that I am somewhat hampered by the lack of precision in respect of the allegations against the Claimant and the fact that it is far from clear what the Respondent’s witnesses actually found the Claimant to have engaged in. In general, it is my view that the allegations and subsequently the findings against the Claimant appear to change as the Respondent progresses from the disciplinary stage through to the first and then second appeals. In my judgment, the changing nature of the allegations, and the uncertain nature of the actual findings that the Respondent has made, are indicative of a reaction to the changing face of the evidential landscape as the disciplinary process progresses.

40. I am helpfully guided through the uncertainty by the Claimant’s Counsel in the written submissions from paragraph 5 to 12. I agree with the submission that the allegations set out at page 360 are not properly addressed by the dismissal letter at page 501 nor at either appeal at page 554 or 584. It is entirely proper that the Claimant emphasises that both Gemma Theaker and Andrew

Woolfenden accept that allegation 1) that the Claimant was involved in the planning of the unofficial action, was not upheld. Despite this, the speculation around pre-planning forms part of the disciplinary letter at page 501 before seemingly falling away in the appeal letters at pages 554 and 584.

41. The position is less certain in relation to allegation 2a) that the Claimant did not ask colleagues to return to work when asked to do so by senior manager Paul Evans. Again, both Gemma Theaker and Andrew Woolfenden accepted in cross-examination that the allegation was not upheld. Yet, in relation to Gemma Theaker, there is reference within the disciplinary letter that, "Paul instructed you to request the colleagues to cease their unlawful action and return to work. You declined to do so". It is not clear why this forms part of the disciplinary letter and it is certainly not clear as to why it appears within the appeal outcome letter of Nick Allen at page 584 when it is stated that, "You were requested by Paul Evans in your role as elected union official to ask the colleagues to return to work, but you declined to do so". It is not clear how this forms part of either letter as there appears to be no evidence to suggest that Paul Evans made a specific request that the Claimant should ask the colleagues to return to work. I accept the submission made on behalf of the Claimant that Gemma Theaker's oral evidence is inconsistent with her outcome letter and the appeal letter of Nick Allen. The inconsistency and uncertainty may explain why Nick Woolfenden, as part of the second appeal, appears to focus upon being a "spokesperson" as referred to in the outcome letter, or a "orchestrator and ringleader" as stated in his witness statement. I agree with the submission that the Claimant was ultimately found guilty of something that was not an initial allegation against him.
42. In respect of the allegations relating to not returning to work when asked to by Jason Watts and the allegation that conditional demands were set, it is important, in my judgment, to consider the evidence that was available to the decision maker. Again, the surrounding context is important and the allegations should not be viewed in an evidential vacuum.
43. I have read each of the interviews in full. In particular, I have revisited those interviews with Paul Evans. I have regard to the submission that the Claimant was simply setting out to Paul Evans the demands of the workers – he does so precisely and clearly. The Claimant expresses his beliefs in respect of the issues, even if he expresses his view that the action may be "founded", but he does not speak on behalf of the members at this stage and cannot be said to make demands. I struggle with the Respondent's interpretation of these initial exchanges and, given the fact that the Respondent's witnesses acknowledge that the Claimant was acting as a middleman for long periods, it is likely that they struggle to justify a number of the assertions found within the earlier documentation.
44. The Respondent places little or no weight upon the fact that there was no evidence to suggest that the Claimant was involved in the pre-planning. Likewise, there appears to have been little regard to the fact that the Claimant was in the canteen at the time of the incident and was only in the warehouse that morning at the request of another member of staff asking to rearrange the

training. It would seem that there was never any evidence to suggest that the Claimant was involved in the planning. Any suggestion that he was appears to be speculation or suspicion.

45. The Respondent appears to be blind to the fact that the Claimant's presence in the warehouse was triggered by the request by Paul Evans that the union representatives are contacted following him being notified of the incident. It is correct that Tony Evans thereafter involved the Claimant, but on any reading, it was the decision of Paul Evans not to address the workers that led to the involvement of the union officials and the request that the union reps be called. Two of Respondent's witnesses considered that this could amount to a management failure. Regardless, it was a decision that commenced the Claimant's involvement in the incident.
46. Having been notified of the incident, Gemma Theaker acknowledged that Paul Evans wanted help from the union representatives so that they could report back with what the issues were. It was accepted that Paul Evans was content with the Claimant's involvement. It was also accepted by Gemma Theaker that the Claimant was the middleman at this stage.
47. At no stage does the Respondent appear to acknowledge the difficult position that the Claimant was placed in at the time of the incident. At page 416, during the disciplinary meeting on 22nd September 2023, the Claimant states that "the pack makes me out to be a monster and I am not...When we are highlighting issues its difficult as we are between the ops and the managers". This was the position that the Respondent placed the Claimant and Tony Evans in when Paul Evans decided that he would utilise their help. On any assessment, it would appear to be a difficult position trying to appease the managers and colleagues.
48. During the same meeting, the Claimant emphasises that he does not have any authority over the members engaged in the unofficial strike. At page 432, the Claimant is asked, "Why did you tell them Paul can't turn it off but you didn't relay what Jason said about the grievance being in so carry on?". In response, he states "I'm a work level 1, I don't have the authority to get those guys and girls back to work, they will tell me to F.off".
49. It is also important to note that this was involvement that the management were comfortable with at the time. Paul Evans at pages 165 and 166 describes entering the warehouse to address the colleagues and being introduced to members by the Claimant. There is no evidence to suggest that the Claimant's conduct was a concern at the time.
50. I rehearse the surrounding circumstances and lead up to the crux of the incident as in my judgment this was relevant information that was known to the Respondent at the time of dismissal. This information was known at the time that the allegations were drafted at page 360 and decisions reached in respect of the disciplinary letter at page 501 and appeal letter at 554. It follows that it is difficult to understand how the allegations 1) 2a) and 2b) form any part of the documentation at this stage given that there appears to be no evidence to support them. In this context, I remind myself of the factors I address at

paragraphs 34 to 38 above and the suspicion that arose from them – suspicion that simply does not sit with the available evidence at the time and hampered by the absence of precise allegations and findings throughout the disciplinary process.

51. Ultimately, the focus of Andrew Woolfenden was that the Claimant was the “spokesperson” for the unofficial action and that the Claimant “actively encouraged”. In the second appeal outcome letter, dated 5th January 2024, it is stated that the audio demonstrates that the Claimant set “demands to Jason Watts as the DCM that you needed a guarantee that the system would be turned off before the colleagues would return to work”. As above, Andrew Woolfenden describes the Claimant as the “orchestrator” and that the main focus was on the CCTV and audio footage. I struggle to identify any evidence to support the notion that the Claimant was actively encouraging the members not to turn to work. Indeed, having read the statement of Steven King, there is evidence to demonstrate that the Claimant was indeed *not* encouraging. The Respondent invites the Tribunal to consider that the Claimant’s role changed when he uses the words, “we are going to need a guarantee”. In my judgment, these words form the only piece of evidence to support the notion that the Claimant was acting in a way that could be interpreted as contrary to the interests of the Respondent; however, in considering the relevance of the comments, I remind myself of the context above and one piece of evidence given in cross-examination by Andrew Woolfenden. In response to a question asking when the Claimant is alleged to “cross the line”, he stated, “I say very clearly in the investigation about the words that he used, we have been lied to, we need guarantee, I think that his answer was a slip of the tongue, I think true colours came through”. In my judgment, the answer reflects more appropriately the suspicion with which the Respondent’s witnesses have approached the actions of the Claimant.
52. In my view, the Respondent has embarked upon a lengthy and extensive investigation that has uncovered almost nothing by way of evidence against the Claimant. It appears that they have attached disproportionate weight to the body language of the Claimant, an alleged failure to ask the members to cease their unofficial action notwithstanding that he was never specifically asked to request that they do so, and a handful of comments on the CCTV that could possibly be interpreted as supporting the actions of the members. The Respondent has, in my judgment, leapt upon these comments as if they were the “smoking gun” and, in doing so, only served to support the Claimant’s concern that the Respondent’s disciplinary investigation was predetermined and unfair.
53. In my judgment, each of the Respondent’s witnesses have attempted to embark upon a fair process but they have encountered various difficulties that have prevented them from completing their roles fairly. In summary, it is the Tribunal’s view that the Respondent has:
 - a) Allowed the investigation to be impacted by suspicion based upon the Claimant’s known views towards Simpler Picking;

- b) Having determined that the unofficial action must have been preplanned, have embarked upon an investigation with a form of confirmation bias that various individuals appear to have held notwithstanding the absence of evidence to support the initial assumption;
- c) Conflated the Claimant's significant role in the events with acting as a ringleader or orchestrator;
- d) Made allegations or findings against the Claimant that have seemingly been erroneously upheld and/or not clarified by virtue of the lack of precision and certainty around those allegations. Findings that were apparently not upheld have been carried into later appeal letters without the issues being properly addressed. The focus of the investigation and finding changes significantly between initial allegation and second appeal;
- e) Allegations were seemingly pursued without any evidence to underpin them. One example being the lack of evidence to suggest that Paul Evans requested the Claimant to tell the members to return to work;
- f) Failing to have regard to the fact that the Claimant became involved in the incident by virtue of a request by Paul Evans that the union representatives are engaged. As above, the Respondent has had no regard to the difficult position that the Claimant was placed in having to liaise between members and management;
- g) For a substantial period of the incident, management were entirely content with the Claimant's involvement;
- h) The Respondent has placed a completely disproportionate amount of weight upon one or two comments that the Claimant allegedly made during the CCTV audio. The comments have been latched upon notwithstanding the fact that there is little else that the Claimant has allegedly done to encourage the unofficial action. In my judgment, the approach taken only serves to demonstrate the extent of the suspicion around the Claimant's conduct notwithstanding the fact that this was not supported by evidence. It is not a surprise that a union representative, having been requested to provide help to another union rep (himself having been asked to assist by a manager), who steps into a role that management were content with, playing the role of middleman and relaying information, refers to the members as "we" in circumstances where he quite plainly does not support the implementation of Simpler Picking. A similar disproportionate approach was taken to the Claimant's body language during the course of the exchange and Gemma Theaker attaching significant weight to body language as part of her decision making.
- i) The Respondent has failed to attach any weight to the evidence in support the Claimant's case. In particular, the statement of Stephen King stating that the Claimant did not support or encourage the action.

54. For the reasons outlined above, I find, on balance, that the genuine belief that the Respondent held was not based upon reasonable grounds. The interpretation of the Claimant's actions was unreasonable in the context of the evidence available to the Respondent.

c) Had the employer carried out such investigation into the matter as was reasonable?

55. In the event that I am wrong in respect of the Respondent's belief and whether this was outside the reasonable range of responses, I will progress to consider the extent of the Respondent's investigation.

56. The Respondent interviewed multiple individuals in relation to the investigation. I have outlined an overview of the witness evidence in the paragraphs above. In my judgment, whilst the investigation was comprehensive, it was misdirected by the initial uncertainty in relation to the allegations to be pursued and the subsequent lack of clarity in respect of the findings made. The uncertainty continued throughout the appeal process. Of note, the Claimant criticises the Respondent by virtue of the absence of statements from the individuals directly involved in the unofficial action. In my judgment, this absence is unusual given the lengths that the Respondent went to in order to obtain evidence. I struggle to understand why there were multiple statements from the senior management but little attempt to obtain evidence from individuals that would have been able to clarify the extent to which the Claimant was involved in any planning, encouragement, enabling or simply the discussions that were taking place away from the conversations with management. Instead, the trajectory of the investigation was eventually narrowed until Andrew Woolfenden was placing the majority of his focus upon the audio and CCTV. The failure to obtain statements is compounded by the fact that a statement was obtained from Stephen King to indicate that the Claimant was not involved in the encouragement of members or in the planning of any unofficial activities. The Respondent had a clear indication that there was potentially relevant information that could have been obtained from additional witnesses but opted against interviewing any of those individuals notwithstanding the attempts made to obtain evidence from the management. In the circumstances, given the issues that were apparent to the Respondent, the investigation became fundamentally flawed by such an omission and the matters that I refer to as part of my earlier section relating to whether there were reasonable grounds to believe that the Claimant was engaged in misconduct. Accordingly, I find that, on the balance of probabilities, the investigation was outside the range of reasonable responses.

d) Did the employer follow a reasonably fair procedure?

57. I have already made various findings and observations in relation to the unclear allegations and findings throughout the disciplinary and appeal process. The process allowed well intentioned individuals to continue down a path of uncertainty without having the opportunity to rectify the issues that would have become apparent. I agree with Counsel for the Defendant when it is submitted that the Claimant was aware of the general nature of the allegations and had a

chance to respond, but I consider that the failure to be clear in relation to the specific allegations and findings prevented the Claimant from properly understanding the case against him and, perhaps more importantly, from insisting that various individuals were spoken to in an attempt to support him defend the allegations. The Claimant was unable to properly understand the allegations and whether they were proved or unproven. I also find that the approach taken by Nick Allen on focusing on the grounds of appeal and the outcome letter first, rather than the original allegations, prevented him from properly understanding the nature of the case being put to the Claimant. Whilst I acknowledge that Nick Allen stated in evidence that he would read the allegations and evidence as part of the appeal, his approach potentially prevented the uncertainty around the allegations being corrected at an early stage of the process. Ultimately, I consider that the extent of the uncertainty around the allegations meant that the procedure was fundamentally flawed notwithstanding the fact that the Claimant was presented with an opportunity to engage with two appeals. I find, on balance, that the Respondent's procedures were outside the range of reasonable responses in the circumstances.

58. Given my findings in relation to the above, I do not progress to consider whether it was within the band of reasonable responses to dismiss the Claimant rather than impose some other sanction. Having reached the decisions above, and having made a number of observations relating to the lack of evidence to suggest that the Claimant engaged in misconduct, I do not consider that this is a case that the Claimant caused or contributed to his dismissal. Further, for the reasons I outline above, this is not the type of case in which there should be a reduction in compensation if the dismissal had not been procedurally unfair.
59. Accordingly, I find that the Claimant, on the balance of probabilities, was unfairly dismissed. These reasons are accompanied by a separate case management order making provision for a remedy hearing, if required.

Employment Judge **G Duncan**

Date 29th August 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 3 September 2024

FOR EMPLOYMENT TRIBUNALS Mr N Roche