



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr P Sheridan

**Respondent:** London Underground Ltd

**Heard at:** London Central                      **On:** 28 and 29 March 2019

**Before:** Employment Judge Wisby  
Ms Boyce  
Ms Stennett

## **Representation**

**Claimant:** Miss A Hart (Counsel)  
**Respondent:** Ms V Brown (Counsel)

# JUDGMENT

The tribunal declares that the respondent failed to permit the claimant to take time off contrary to Regulation 4(2) of the Safety Representatives and Safety Committees Regulations 1977.

## Reasons

### **Evidence before the Tribunal**

1. The tribunal was presented with:
  - 1.1. An agreed bundle;
  - 1.2. For the respondent, a witness statement from Mr C Taggart; and
  - 1.3. For the claimant, witness statements from Mr T O'Neill, Mr A Libberton-Rowe and the claimant.

### **The Issue**

2. The complaint is that contrary to Regulation 4(2) of the Safety Representatives and Safety Committees Regulations 1977 ("1977 Regulations"), the claimant was denied paid time off work to perform the functions set out in Regulations 4(1)(d) and 4(1)(h). The claimant's

representative clarified during closing submissions that the claimant's complaint was not that he had been denied time off to perform the functions set out in Regulation 4(1)(c), as per the further particulars of claim.

3. The parties agree that:
  - 3.1. the claimant was at the relevant time a safety representative for the purposes of the 1977 Regulations;
  - 3.2. operational matters (such as the number of train operators available on a shift) are not relevant to whether paid leave is 'necessary' under Regulation 4(2)(a); and
  - 3.3. it is for the tribunal to decide objectively if the paid time off was necessary.

## **The Law**

4. Regulation 4 of the 1977 Regulations provides:

### **4. Functions of safety representatives**

(1) In addition to his function under section 2(4) of the 1974 Act to represent the employees in consultations with the employer under section 2(6) of the 1974 Act (which requires every employer to consult safety representatives with a view to the making and maintenance of arrangements which will enable him and his employees to cooperate effectively in promoting and developing measures to ensure the health and safety at work of the employees and in checking the effectiveness of such measures), each safety representative shall have the following functions—

- <sup>[[1]]</sup><sub>SEP</sub>(a) to investigate potential hazards and dangerous occurrences at the workplace (whether or not they are drawn to his attention by the employees he represents) and to examine the causes of accidents at the workplace;
- <sup>[[1]]</sup><sub>SEP</sub>(b) to investigate complaints by any employee he represents relating to that employee's health, safety or welfare at work;
- <sup>[[1]]</sup><sub>SEP</sub>(c) to make representations to the employer on matters arising out of sub-paragraphs (a) and (b) above;
- <sup>[[1]]</sup><sub>SEP</sub>(d) to make representations to the employer on general matters affecting the health, safety or welfare at work of the employees at the workplace;
- <sup>[[1]]</sup><sub>SEP</sub>(e) to carry out inspections in accordance with Regulations 5, 6 and 7 below;
- <sup>[[1]]</sup><sub>SEP</sub>(f) to represent the employees he was appointed to represent in consultations at the workplace with inspectors of the Health and Safety Executive [the Office of Nuclear Regulation] and of any other enforcing authority;
- <sup>[[1]]</sup><sub>SEP</sub>(g) to receive information—
  - <sup>[[1]]</sup><sub>SEP</sub>(i) in relation to premises which are, or are on, a relevant nuclear site, from inspectors under paragraph 23 of Schedule 8 to the Energy Act 2013;
  - <sup>[[1]]</sup><sub>SEP</sub>(ii) otherwise, from inspectors in accordance with section 28(8) of the 1974 Act;

~~SEP~~(h) to attend meetings of safety committees where he attends in his capacity as a safety representative in connection with any of the above functions;

but, without prejudice to sections 7 and 8 of the 1974 Act [or section 102 or 103 of the Energy Act 2013], no function given to a safety representative by this paragraph shall be construed as imposing any duty on him.

(2) An employer shall permit a safety representative to take such time off with pay during the employee's working hours as shall be necessary for the purposes of—

~~SEP~~(a) performing his functions under section 2(4) of the 1974 Act and paragraph (1)(a) to (h) above;

~~SEP~~(b) undergoing such training in aspects of those functions as may be reasonable in all the circumstances having regard to any relevant provisions of a code of practice relating to time off for training approved for the time being by [the Health and Safety Executive] under section 16 of the 1974 Act.

In this paragraph 'with pay' means with pay in accordance with [Schedule 2] to these Regulations.

## 5. Regulation 11(1) of the 1977 Regulations provides:

### **11 Provisions as to [employment tribunals]**

(1) A safety representative may, in accordance with the jurisdiction conferred on [employment tribunals] by paragraph 16(2) of Schedule 1 to the Trade Union and Labour Relations Act 1974, present a complaint to an [employment tribunal] that--

(a) the employer has failed to permit him to take time off in accordance with Regulation 4(2) of these Regulations; or

(b) the employer has failed to pay him in accordance with Regulation 4(2) of and the Schedule to these Regulations.

## 6. Regulation 11(3) of the 1977 Regulations provides:

(3) Where an industrial tribunal finds a complaint under paragraph (1)(a) above well-founded the tribunal shall make a declaration to that effect and may make an award of compensation to be paid by the employer to the employee which shall be of such amount as the tribunal considers just and equitable in all the circumstances having regard to the employer's default in failing to permit time off to be taken by the employee and to any loss sustained by the employee which is attributable to the matters complained of.

## 7. Reference to 'the 1974 Act' is to the Health and Safety at Work etc Act of 1974.

### 7.1. Section 2(4) of the 1974 Act provides:

Regulations made by the Secretary of State may provide for the appointment in prescribed cases by recognised trade unions (within the meaning of the regulations) of safety representatives from amongst the employees, and those representatives shall represent the employees in consultations with the employers under subsection (6) below and shall have such other functions as may be prescribed.

7.2. Section 2(6) of the 1974 Act provides:

It shall be the duty of every employer to consult any such representatives with a view to the making and maintenance of arrangements which will enable him and his employees to co-operate effectively in promoting and developing measures to ensure the health and safety at work of the employees, and in checking the effectiveness of such measures.

7.3. Section 2(7) of the 1974 Act provides:

In such cases as may be prescribed it shall be the duty of every employer, if requested to do so by the safety representatives mentioned in [subsection (4)] above, to establish, in accordance with regulations made by the Secretary of State, a safety committee having the function of keeping under review the measures taken to ensure the health and safety at work of his employees and such other functions as may be prescribed.

7.4. The non statutory HSE Code of Practice on the 1977 Regulations provides at 11:

Section 2(6) of the Act requires employers to consult with safety representatives with a view to the making and maintenance of arrangements which will enable them and their employees to co-operate effectively in promoting and developing measures to ensure the health and safety at work of the employees, and in checking the effectiveness of such measures. Under section 2(4) safety representatives are required to represent the employees in those consultations.

7.5. The relevant HSE Guidance at 15 provides:

When appointing health and safety representatives, the trade union should inform the employer of the group or groups of employees represented. For example, they may say a health and safety representative will represent:

- (a) only their own members;
- (b) all the employees in a particular category; or
- (c) employees who are not members of a trade union recognised by the employer, but are part of a group of employees for which a union is recognised.

## 8. Findings of Fact

9. The claimant is a train operator for the respondent and has been since 1996. He is also an appointed health and safety representative for the National Union of Rail, Maritime and Transport Workers (RMT), which is a trade union recognised by the respondent. The Associated Society of Locomotive Engineers and Fireman (ASLEF) is also a trade union recognised by the respondent.

10. The tribunal finds that the respondent does as a matter of routine allow relevant trade union representatives, including safety representatives, time off on a paid basis for union and health and safety activities. Planning for such absence is easier when meetings are known about in advance. The respondent has to try to balance managing absence (for many reasons such as holiday, sickness etc. as well as for trade union activities) with providing a reliable service to its customers. When there is not sufficient staffing cover the result can be train cancellations.

11. The claimant had a long-standing involvement in matters concerning the

platform train interface (PTI). The PTI is where the train meets the platform and is considered a high-risk area. This is where the respondent's customers transfer from the platform to the train. Risks in this area include (but are not limited to) individuals being caught by train doors and being dragged along the platform.

12. The respondent's stations have cameras in various locations along the platform, the footage from which is shown in the train operative's cab. This footage allows the train operative to view the platform and the PTI as they enter and leave the station. Where a platform is curved the number of cameras can be increased to assist the view.
13. The respondent accepts that it often consults with health and safety representatives when it considers platform cameras need upgrading or the location of the cameras on the platform needs changing.
14. It had been identified as part of the Getting Active about Platform Safety project ('GAPS project'), undertaken by the respondent, that the cameras on certain platforms, including Bank station platforms five and six, needed to be upgraded to allow train operators a better view of the PTI.
15. Mr Taggart (Head of Line Operations for the Central Line and Waterloo and City Line) accepted in evidence that injuries to customers can have health and safety implications for employees, for example, as a result of stress caused by witnessing serious dragging incidents and having to deal with such incidents. Mr Taggart also accepted in evidence it was theoretically possible that employees may be a victim of an incident at the platform train interface.
16. The tribunal finds the types of accidents the project was aimed at mitigating do have an impact, even if indirectly on employee's health, safety and welfare. The tribunal finds that a serious dragging incident can, for example, adversely affect the health of a train operator.
17. The respondent accepts that it was agreed by the respondent that health and safety representatives from both the RMT and ASLEF, would be involved in the commissioning of the new OPO (one person operation) CCTV cameras the footage from which is viewed in the train operators' cab. Mr Taggart explained that train operators had a relevant opinion to offer since they use the footage produced by the system. The tribunal accepts that train operators have relevant experience of customer behaviour on platforms, for example where people congregate on particular platforms and where customers may try to run onto trains. Train operators therefore understand the key areas of the platform that will be looked at when the train enters a station.
18. In summary the stages involved in commissioning the new OPO CCTV cameras were:
  - 18.1. platforms with the biggest safety risk were identified and prioritised;
  - 18.2. the concept and detailed design stage. During this stage contractors produced drawings of the design proposals (the number of cameras, camera angle etc.). The designs and drawings were then discussed with the project team health and safety representatives. The contractors then amended the proposals based on the feedback. Detailed designs were then presented and agreed, the expectation

- being that the detailed CAD proposals and design photographs would be the same views as when the cameras were installed and switched on;
- 18.3. the 48-hour review stage. The new OPO CCTV cameras were installed. The existing system however remained in place and live. Footage of the platform from each system was recorded for review by the GAPS project team, including the health and safety representatives. The review was to compare the two sets of footage, typically looking at different times of day. This is the first time the actual camera views (as opposed to CAD images) from the new OPO CCTV cameras are seen. These are reviewed to ensure they are as planned and whether, the angles etc. are optimal when viewed with actual passengers and daily activity on the platform. The review stage should ensure the obscured views in the existing system that had been identified are reduced. Adjustments to the camera angles, zoom and minor adjustments to the cameras themselves (within the constraints of their bracketed positions) can take place to optimise the view the train operator will have of the PTI.
  - 18.4. After adjustments at the review stage the new OPO cameras were commissioned (switched on) (meaning the live footage from the new OPO CCTV cameras was viewed by the train operators in their cabs); and
  - 18.5. the old equipment was removed.
19. The meeting at the heart of this case is the stage three review meeting, at which the footage from the old and new systems was reviewed and adjustments to the OPO CCTV views were considered.
  20. Mr Adrian Libberton-Rowe, an Instructor Operator (previously having been a Train Operator)), and an elected health and safety representative for the RMT was due to attend the stage three review meeting. He was informed on 8 February 2018 by Mr Jim Redmond (the respondent's Operational Task Manager and Head of the GAPS Project), that the respondent intended to hold the stage 3 CCTV footage review meeting for the new CCTV equipment at Bank station, on 13 February 2018. Footage from the new cameras was due to go live on 16 February 2018. An ASLEF health and safety representative was also asked to attend that review meeting.
  21. It is accepted that the respondent provided short notice of the 13 February review meeting; the meeting had been rescheduled by Mr Redmond as the contractors were running late at the design review stage.
  22. Mr Libberton-Rowe was unavailable for the review meeting due to pre-booked holiday. On 8 February 2018 he therefore asked the claimant, who had attended such meetings in Mr Libberton-Rowe's absence on previous occasions, to attend the review meeting on 13 February 2018 instead of him. The claimant responded to say that he was working but if Mr Libberton-Rowe emailed his manager he was sure his manager would accommodate it.
  23. Mr Libberton-Rowe sent a text message the same day to Mr Edward Payne (the claimant's line manager) asking that the claimant be released from his duties to attend the meeting in his absence.

24. The claimant explained that it is importance to have a RMT health and safety representative at the meeting as the project group looks at the footage together, using their joint experience to make suggestions, and bounce ideas off each other, for example in relation to camera angles and the options regarding zooming in and out. Mr Libberton-Rowe gave evidence, that was not challenged, that on a previous occasion representations were made at the review stage that more cameras were required to address obscured views of the PTI that continued to be in place, as a result of which the number of cameras changed. Mr Libberton-Rowe explained that if the footage was viewed singularly at a later point it would be too late to discuss or address concerns as the review would have already been signed off. He did accept on further questioning however that it would be odd if having been invited to review the footage at a later stage the respondent ignored concerns raised. The tribunal finds that that gathering the relevant project members together to review the footage at the same time in a meeting allowed for effective representations and discussions about what was and was not possible with angles, views etc. The tribunal also finds that representations would be more effective if they were made prior to the review stage being signed off by the project team. The tribunal finds representations made after other project members had signed the review stage off, very shortly before the footage from the cameras was due to be live would carry less weight.
25. Mr Payne's response to Mr Libberton-Rowe on 9 February 2018 was: "*our coverage is not great so at the moment it's a no. I'm really sorry as I realise the importance of the OPO stuff. It may be worth checking on Monday with Kelly to see if anything changes or people return etc*".
26. Mr Taggart explained in paragraph 30 of his statement that he acknowledged Mr Payne had expressed regret that the claimant could not be released due to the importance of the project but where it looks like a train operator's absence would result in the cancellation of trains, the issue of that operator's release from duties is escalated to him for a decision to be taken.
27. A further request for the claimant's release to attend the review meeting was sent by Mr Libberton-Rowe to Kelly Nottage (Train Manager West Ruislip) on 12 February 2018 by email, copying in the claimant and Mr Redmond.
28. A final decision not to allow the claimant to attend the meeting was taken on 12 February 2018 by Mr Taggart, following a daily conference call, at which issues of staffing and coverage for the network for the following day were considered. It is accepted there were coverage issues, brought on, in part by the half term holidays and more operators than usual being on holiday. Kelly Nottage notified the claimant and Mr Libberton-Rowe of the decision by email, stating that agreeing to the claimant's release would "*definitely lead to train cancellations*". The tribunal finds that was not the case but cancellations were a distinct possibility.
29. On 12 February 2018 Mr Libberton-Rowe suggested to Mr Redmond that the review meeting should be rescheduled owing to the lack of availability of RMT representatives. Due to the cost of delaying the project the review meeting was not rescheduled. Mr Redmond offered that Mr Libberton-Rowe could arrive early on the Friday (16 February) and review the OPO CCTV footage before the cameras went live. Mr Rowe responded that he could not review

an entire day's traffic the morning before a commissioning (the cameras going live). In response, Mr Redmond suggested Mr Libberton-Rowe arrive around 1 am to give him enough time. Mr Libberton-Rowe stated he could not do this as he had meetings the day before and would not be able to do the night turn too.

30. In a follow up email Mr Taggart said he had been exchanging "messages all day" with Mr Redmond, who understood the claimant could not be released. The tribunal finds that Mr Redmond was seeking the claimant's release.
31. The collective agreement in place with the RMT, regarding time off for trade union duties and activities, provides that requests may be refused for operational or safety reasons. Mr Taggart did not agree to the claimant's time off as he genuinely considered it may result in train cancellations if, for example further train operators called in sick. Had there been more train operative's on duty the tribunal finds that Mr Taggart would have agreed to the claimant's release. Mr Taggart explained he did not accept Mr Libberton-Rowe's position that the claimant's attendance at the meeting was worth cancelling a train for.
32. The 13 February 2018 meeting was not rearranged to enable Mr Libberton-Rowe or the claimant to attend and went ahead without a representative of the RMT present. An ASLEF representative (who was a train operative) did attend. Adjustments were made to camera views as a result of the meeting. The meeting record states the meeting objective was to "*assess the new OPO/PTI camera prior to commissioning the new system*". The attendees were listed as: Mr Redmond (Operations Task Manager); Mr Parry (Principal Eng. – Systems Safety; Mr Crook (Telecoms Client Eng.; Mr Hayward (Telecoms Discipline Engineer, Mr Miller (ASLEF H&S Rep); Mr Nield (in part) (Lead Discipline Engineer – Communications).
33. On 13 February 2018 the fact an RMT representative was not present at the review meeting was escalated by a full time RMT union official, Mr John Leach.
34. On 14 February 2018 (after the review meeting had taken place), the respondent's senior employee relations manager emailed Mr Leach, stating that release was subject to reasonableness and business needs and that it was not possible to release the claimant but the respondent could release a different RMT Central Line safety representative, Terry O' Neill, on Friday 16 February 2018 to view the OPO CCTV before it went live.
35. Mr O' Neill refused to carry out the review on the following grounds: PTI is not his field of expertise but Mr Libberton-Rowe and the claimant did specialise in that area; the lack of reasonable notice; the ongoing disagreement regarding the claimant's release and in light of that it would be unreasonable of him to undermine the discussions by attending any review; and, his release was suggested by management but it is for the RMT to decide which trade union representative should attend any meeting, it was not the prerogative of management to decide.
36. On 16 February 2018 footage from the new OPO CCTV cameras went live, replacing the footage from the old cameras.



37. On 18 April 2018, Mr Nick Dent (Director of Line Operations), in his email to Mr Payne in relation to the issue of how the grievance raised by the claimant should be dealt with stated: *"I do not believe that the legislation gives an absolute right for release of a specific trade union representative regardless of circumstance. There is no dispute that consultation in relation to this issue was necessary, but consultation did take place with safety representatives appointed to act on behalf of all relevant employees"*.
38. The respondent's Health and Safety Machinery, dated 17 April 2000 (the parties to which include the respondent, ASLEF and the RMT amongst others), provides a framework for preventing and resolving health and safety at work issues. The purpose of the Machinery is set out as being to define the respondent's processes for ensuring that health and safety matters that affect or may affect employees can be openly discussed between the respondent and its employee Health and Safety Representatives as required by the 1977 Regulations. At paragraph 4.4 the Machinery sets out "local representatives will represent, for all health and safety issues, all staff regardless of whether they are a trade union member or not for:" - there is then a table which sets out categories of staff, such as, Stations and Revenue Control, Tracks and Signals, Trains etc. In the Train section of the table under 'Operational Staff' it states there will be 1 ASLEF and 1 RMT representative per Train Staff depot. The claimant was a local RMT representative.

### 39. Submissions

40. The tribunal was directed to the following authorities:
- 40.1. Walker v North Tees and Hartlepool NHS Trust EAT/0563/07
  - 40.2. Duthie v Bath and North East Somerset Council [2003] ICR 1405
  - 40.3. Rowe v London Underground Ltd EAT/0125/16
  - 40.4. Coates v Strathclyde Fire Board EATS/0022/09
  - 40.5. Skiggs v South West Trains Ltd [2205] IRLR 459
41. Counsel for each side helpfully provided written submissions.

#### On behalf of the claimant (in summary)

42. The tribunal was directed to the definition of recognised trade union and that under section 5 of the Trade Union and Labour Relations (Consolidation) Act 1992 'independent' means not under the domination or control of an employer and not liable to interference by an employer. It was submitted that for unions to carry out their functions properly they must be truly independent of employers. It was submitted that this means employers do not have the right to choose who attends a meeting on behalf of a particular trade union and should not interfere with a union's affairs.
43. In relation to the application of regulation 4(2) of the 1977 Regulations it was submitted that: the provision provides no discretion ("shall permit"); that the provisions provide a distinction between time off for performing one of the prescribed functions and time off for training; neither the amount of time off for performing a prescribed function nor the purpose is subject to any test of

reasonableness; and, that necessity is a stricter test but it must be applied correctly.

44. The tribunal was directed to paragraph 8 of the EAT decision in Rowe, which sets out that accepting the claimant had requested time off to perform one of the prescribed functions, the ET had identified that the question for the respondent had not been whether the investigation in question was necessary but whether paid time off was.
45. It was accepted on behalf of the claimant that where there is an alternative time off may not be necessary. In this case therefore had the meeting been rearranged, time off on 13 February would not have been necessary. Likewise it was accepted that had there been another RMT health and safety representative available to attend the review meeting time, off for the claimant would not have been necessary.
46. In relation to the issue of necessity it was submitted that:
  - 46.1. at the time the decision was taken not to release the claimant for the review meeting, no suggestion of an alternative had been raised;
  - 46.2. none of the alternatives suggested involved attendance at the meeting on 13 February but involved instead reviewing CCTV footage alone at a later date;
  - 46.3. there is a significant difference between viewing CCTV footage as part of the panel and viewing it alone;
  - 46.4. if the meeting made no difference to the quality of comments then why have a meeting; and
  - 46.5. evidence was given that the review meeting: enabled attendees to be bounce ideas off each other; provided another set of eyes; enabled constant communication between reviewers (suggesting a collaborative and dynamic process); and, enabled a collective decision to be made about what is viewed.
47. In relation to the issue of an ASLEF representative attending the meeting, it was submitted that:
  - 47.1. It would drive a coach and horses through the provisions on trade union rights to suggest that it is not necessary to provide time off to carry out a prescribed health and safety function where there is a representative from another recognised union present.
  - 47.2. The respondent's Health and Safety Machinery clearly provides for separate places for each union rather than generic places and does not suggest one union can cover for another.
  - 47.3. Safety representatives are appointed under statute by the union to represent their members and be accountable to those members.
  - 47.4. If meetings could be held without permitting safety representatives from all the recognised unions to be present employers could select a preferred union to attend such meetings, undermining union independence, which is fundamental to good industrial relations and enshrined in statute.
48. According it was submitted that the facts of this case are different from those set out in Coats v Strathclyde Fire Board (2009) where the issue was whether it was necessary for a second representative from the same union to be present, since accountability did not arise and there was no risk of one union being played off against another.

On behalf of the respondent (in summary)

49. It was submitted in respect of the issue of necessity that:
- 49.1. Where duties could have been under taken at another time it was not necessary to provide the time off requested.
  - 49.2. A matter can be undoubtedly be of use to a safety representative whilst not being necessary to perform his functions.
  - 49.3. The claimant's attendance at the meeting of 13 February 2018 was not performing a function for the purpose of the 1977 Regulations, since the meeting was in respect of the health and safety of customers not employees and that the risk to drivers' welfare was too remote,
  - 49.4. The risk to health safety or welfare of platform staff is irrelevant as the claimant was a safety representative for train operators and platform staff are a different function within the Health and Safety Machinery.
  - 49.5. Safety representatives' involvement in the GAPS project was useful due to their practical experience but not obliged under the 1977 Regulations.
  - 49.6. At the GAPS meetings RMT health and safety representatives attended they did not raise any employee health and safety issues.
50. In the alternative it was put that the claimant's attendance was not necessary at the meeting because:
- 50.1. Relevant functions were performed by the earlier design stage meetings and the review stage was only a matter of fine tuning.
  - 50.2. A safety representative was permitted time off - namely the ASLEF representative, who did attend and performed their function. In relation to this it was submitted that Regulation 4(1) of the 1977 Regulations refers to each safety representative and that Regulation 4(2) refers to a safety representative and therefore it is not the case that each representative must be permitted time off for any one occasion.
  - 50.3. That the Machinery Agreement provides that local representatives will represent, for all health and safety issues, all staff regardless of whether they are trade union members or not.
  - 50.4. The claimant's evidence was the two unions would have worked jointly and co-operated with each other and that the claimant did not describe a possible difference in perspective.
  - 50.5. The respondent suggested the CCTV footage be reviewed on later occasions by other RMT representatives and that since the purpose of the meeting was simply to review CCTV footage there was no necessity for all parties to do it simultaneously, even if it would be useful.
  - 50.6. Mr Libberton-Rowe ultimately accepted in cross examination it would not make sense for the respondent to invite him to review the CCTV footage unless it would take his views into account.
  - 50.7. Refusal by Mr Libberton-Rowe and Mr O'Neill to take up the respondent's offer to review the footage at a later time does not invalidate the respondent's compliance with its legal obligations.

**51. Discussion and Conclusions**

52. There is no dispute that the claimant was at the relevant time a health and safety representative for the purposes of the 1977 Regulations appointed by the RMT. The question is was it necessary for the claimant to have paid time

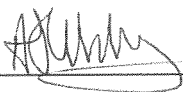
off to perform the health and safety functions set out in Regulation 4(1)(d) – namely to make representations to the employer on general matters affecting the health, safety or welfare at work of employees at the workplace, at the meeting on 13 February 2018. The tribunal agrees with the respondent’s representative that Regulation 4(1)(h) of the 1977 Regulations is parasitic on the functions set out above it and therefore the tribunal will focus on the function set out in Regulation 4(1)(d).

53. The respondent’s position is that the GAPS project concerning the upgrade and positioning of the OPO CCTV cameras that monitor the PTI was to ensure customer rather than employee safety. The tribunal finds that the positioning of OPO CCTV and the train operative’s view of the PTI is relevant to both employee health, safety and welfare at work as well as customer health and safety. Mr Taggart accepted in evidence that accidents can be stressful for employees. The tribunal finds that it cannot be said matters concerning the PTI interface only affect customers, even if customers are the main focus of concern. The tribunal therefore does not accept the respondent’s submission that risk to employees and impact on employee welfare was too remote for attendance at the meeting of 13 February to be covered by the 1977 Regulations. The risk of dragging and other incidents at the PTI was at a level that the respondent considered the project was necessary to implement.
54. The tribunal finds through their role in the GAPS project, the RMT health and safety representatives were carrying out the function of making representations to the employer on general matters affecting the health, safety or welfare at work of employees at the workplace, as making representations that reduced the likelihood of accidents and incidents at the PTI would have a positive impact on the health, safety or welfare at work of employees. The respondent originally planned for union representatives to take part in the project and the tribunal notes Mr Dent’s comment: *“There is no dispute that consultation in relation to this issue was necessary”*.
55. Mr Libberton-Rowe could not attend the review meeting on 13 February 2018. The claimant was experienced in PTI issues and had deputised for Mr Libberton-Rowe previously. The meeting had been rescheduled by the respondent at short notice. The original plan was that a RMT health and safety representative would be at the review meeting, when real footage would be reviewed for the first time. A review stage of viewing the dual footage was clearly seen as an important stage of the process and the tribunal finds that it was. The tribunal does not accept the respondent’s position that attendance at the meeting was not necessary because relevant functions were performed at earlier stages. The tribunal finds relevant functions were indeed performed at earlier stages but that the function set out in Regulation 4(1)(d) was also to be performed at the review stage. Adjustments were made to camera angles and views. The tribunal finds that just because major changes were not made at the end of the meeting on 13 February 2018 it does not mean representations at that stage were irrelevant. The tribunal notes the evidence given by Mr Libberton-Rowe that during a previous upgrade representations were made that more cameras were required to address obscured views that continued to be in place. Just because in retrospect a major problem was not identified does not make a review any less important.

56. The respondent's position is also that attendance at the review meeting was not necessary because Mr Libberton-Rowe and Mr O'Neil were given the opportunity to review the footage after the meeting but before the new system went live. The tribunal does not accept this submission. At the time the claimant was denied the time off to attend the meeting no alternative proposal had been put forward for any such review to take place. In any event the tribunal finds that even if it had been feasible for Mr Libberton-Rowe or Mr O'Neil to carry out a review of the footage by themselves (which at least for Mr Libberton-Rowe it was not), the tribunal finds this would have been far less effective. The tribunal has found that that gathering the relevant project members together to review the footage at the same time in a meeting allowed for effective representations and discussions about what was and was not possible with angles, views etc. The tribunal also finds that representations would be more effective if they were made prior to the review stage being signed off by the project team. The tribunal finds representation made after other project members had signed the review stage off, very shortly before the footage from the cameras was due to be live would carry far less weight. Accordingly the tribunal finds that time off was necessary to attend the 13 February review meeting to perform the function of making representations to the employer on general matters affecting the health, safety or welfare at work of the employees in the workplace.
57. Both parties agree operational matters are not relevant to the question of whether time off to attend the review meeting was necessary. The tribunal agrees with that position.
58. The respondent submitted attendance by the claimant was not necessary at the 13 February 2018 meeting since a safety representative was permitted time off, namely the ASLEF representative who did attend and performed their function and that the reference to "an employer shall permit a safety representative in Regulation 4 (2) means that the respondent has fulfilled his duty by arranging for the release of any representative. The claimant's representative accepted that had another RMT health and safety representative been available to attend, such as Mr Libberton-Rowe it would not have been necessary for the claimant to attend the meeting but did not accept that it followed that because an ASLEF representative was available the claimant did not need to attend.
59. The tribunal notes the language in the Machinery Agreement that local representatives will represent all staff regardless of whether they are a trade union member or not but considers this does not assist in the statutory position between representatives appointed by different recognised trade unions. The tribunal notes that the Machinery Agreement provides for both RMT and ASLEF representatives for Trains and makes no reference to one union substituting for another. The tribunal accepts that the ASLEF health and safety representative, as a train operative would carry out the same function as the claimant. However, having considered the submissions by the claimant's representative regarding the importance of trade union independence enshrined in statute, that health and safety representatives are appointed under statute by their union to represent the union's members and be accountable to those members, the tribunal finds that the fact that an ASLEF representative was present at the 13 February meeting did not mean

that it was not necessary for an RMT representative to be present. Accordingly the tribunal finds that the facts in this case are different from those in the case of Coats v Strathclyde Fire Board.

60. In light of the findings made above the tribunal concludes that by not allowing the claimant time off to attend the meeting on 13 February 2018 the respondent failed to permit the claimant to take necessary time off in accordance with Regulation 4(2)(a) of the 1977 Regulations.
61. The claimant's representative did not invite the tribunal to make an injury to feeling award and in accordance with the reasons given (albeit obiter) in Rowe v London Underground Ltd EAT/0125/16 the tribunal considers that such an award would not be appropriate.
62. The claimant in this case suffered no personal financial loss. The tribunal notes the position set out in Skiggs v South West Trains Ltd [2005] IRLR 459 regarding compensation in the absence of identifiable financial loss. The tribunal however finds that it would not be just and equitable to award compensation to the claimant in this case. The purpose of any such award is to compensate the claimant having regard to the employer's default. In this case, the tribunal accepts that the review meeting was rescheduled at short notice due to a delay in the project. It was planned that an RMT health and safety representative would be present at the meeting. In accordance with the Collective Agreement Mr Taggart genuinely considered he had a legitimate reason to refuse the request to release the claimant to attend the 13 February meeting, namely operational reasons. The tribunal accepts Mr Taggart genuinely considered that there was a risk trains would need to be cancelled. It was clear to the tribunal that the respondent does provide for the release of health and safety representatives on a regular basis and did release the ASLEF representative to attend the 13 February meeting. After the decision was taken not to release the claimant the respondent did suggest alternative ways an RMT representative could review the new CCTV footage. There was no suggestion that the claimant sought to review the dual CCTV footage himself on another occasion.



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Employment Judge Wisby

Date 29-04-2019

JUDGMENT and REASONS SENT TO THE PARTIES ON

7 MAY 2019



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FOR THE TRIBUNAL OFFICE