EMPLOYMENT TRIBUNALS

Claimant: Mr J Hogg

Respondent: Northumbrian Water Limited

Heard at: North Shields **On: 10 & 11 October 2019**

Before: (1) Employment Judge A.M.S.Green
(2) Mr G Gallagher
(3) Ms L Jackson

Representation

Claimant: Mr J McHugh - Counsel
Respondent: Mr B D Williams - Counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is:

(1) The claimant's claim pursuant to Trade Union & Labour Relations (Consolidation) Act 1992, section 168(4) that the respondent failed to permit him to take time off for carrying out trade union duties is dismissed.

(2) The claimant's claim pursuant to regulation 11(1)(a) of the Safety Reps & Safety Committee Regulations 1977 that the respondent has failed to permit him to take time off in accordance regulation 4(2) of the Safety Reps & Safety Committee Regulations 1977 is dismissed.

REASONS

The Claims

1. By a claim form presented 3 April 2019, the claimant brought complaints that he was refused permission to attend health and safety training courses, contrary to Trade Union and Labour Relations (Consolidation) Act 1992, section 168 (2) ("TULCRA") and Regulation 4 (1) (a) of the Safety

Representatives and Safety Committees Regulations 1977 (the "1977 Regulations"). The respondent defended the claims. In essence they arise from a request made by the claimant for paid leave to attend a TUC course which led to a diploma in health and safety (the "TUC Diploma"), the refusals having been made by the respondent on 3 August 2018 and again on 30 November 2018. The respondent's case is that it has already provided the claimant with leave to attend health and safety training courses and that it was not reasonable for him to attend this additional course.

The Issues

2. The parties agreed a list of issues for the Tribunal to determine as follows.

3. Regarding the claim under TULCRA:

    a. Did the TUC Diploma constitute training in aspects of industrial relations relevant to the carrying out of his duties as an official of an independent trade union listed in section 168 (1) TULCRA?

    b. If so, was the amount of paid time off (being 36 days) reasonable in all the circumstances?

    c. The Tribunal will also take into account any relevant Code of practice, including the provisions of the ACAS Code of Practice (3) "Time off for trade union duties and activities" in determining what is reasonable in all the circumstances.

4. Regarding the claim under the 1977 Regulations:

    a. Did the training for which the claimant requested paid time off for (namely the TUC Diploma) constitute training in aspects of his function as a safety representative under Health and Safety at Work etc… Act 1974 (as amended) and/or Regulation 4 (1) (a) to (h) of the 1977 Regulations?

    b. If so, would the training have been reasonable in all the circumstances?

    c. If so, was it necessary for the claimant to take 36 days' paid time off work at the time requested to undergo the TUC Diploma in order to undergo such training as was reasonable in all the circumstances?

    d. The Tribunal will take into account any relevant Approved Code of Practice (ACOP) including Consulting Workers on Health and Safety (as set out at paragraphs 32 to 36 HSE ACOP and guidance document L146) when determining what is reasonable in all of the circumstances.

5. Regarding remedy:

    a. If successful, what compensation should the Tribunal award to the claimant?

    b. Should the Tribunal make a declaration?

Documentation and hearing

6. The parties filed and served their evidence bundle in advance of the hearing.

7. There was a preliminary matter concerning the admissibility of evidence set out in paragraphs 6-12 of Mr Kindness' witness statement. This dealt with a significant volume of customer complaints which was labelled the "Silver Incident" and which was alleged to have been part of the reason why the respondent had refused the claimant's request for paid time off to attend the TUC Diploma course. Mr McHugh objected to the admissibility of this evidence because it was not pled in the Response and Grounds of Resistance. He also questioned its relevance given that it had not been referred to in the reasons given by the respondent for refusing the claimant's request to take the time off to attend the course. He did accept, however, that the witness statements had been served on the claimant on 21 September 2019 and it was only at the beginning of the hearing that issue was being taken concerning the admissibility of the evidence. Mr Williams responded by stating that the claimant had ample opportunity to object to the admissibility of this aspect of Mr Kindness' witness statement and had failed to do so. He considered it relevant evidence concerning our assessment of the overall reasonableness of the respondent's rejection of the claimant's application. We briefly adjourned to enable the Tribunal to consider the representations from both parties. On resuming the hearing, we decided to admit the evidence on the premise that it would be unfair to the respondent to reject it. The claimant had been given ample opportunity to raise its concerns prior to the hearing when he received Mr Kindness's statement. However, we did recognise that for the sake of fairness to the claimant that he should be given an opportunity to give oral evidence in chief regarding the Silver Incident. Ultimately, it was a matter for the Tribunal to determine whether the evidence was relevant and we did not see that the claimant would suffer more prejudice on admitting the evidence than the respondent would suffer if the evidence was excluded.

8. The Tribunal heard evidence from the following witnesses who adopted their witness statements:

    a. The claimant;

    b. Andrew Kindness- the respondent's Customer Service Manager;

    c. Brett Stinton - the respondent's Head of Health, Safety, Environment and Quality; and

    d. Janet Watts - the respondent's HR manager

9. The representatives provided written submissions to the Tribunal. The representatives also made closing submissions.

Basis of the Tribunal's decision

10. In reaching our decision, the Tribunal has carefully considered the oral and documentary evidence, the written and oral submissions and the record of proceedings. The fact that the Tribunal has not referred to every document produced should not be taken to mean that it is not been considered.

Burden and standard of proof

11. The claimant must establish his claims on a balance of probabilities.

Findings of fact

12. Having considered the evidence, we make the following findings of fact.

13. The claimant commenced working for the respondent on 6 May 2003. On 20 August 2007 he became a Customer Complaints Manager (Grade 11). The respondent operates a two stage customer complaints process. The claimant worked in the second stage of that process after complaints had been initially dealt with but not resolved by colleagues at the first stage. The claimant continues to be employed by the respondent.

14. On 5 February 2015, the claimant started flexi-work on a permanent basis of 37 hours, 4 days per week (Monday-Thursday). One day equalled 25% of his working time.

15. The respondent recognises four trade unions: GMB, Unite, UCATT and Unison. In order to understand the context of the claimant's claims it is essential to refer to the respondent's policy called "Together in Water" [134] which establishes an employee relations framework through which employees, managers and trade unions can work in partnership to discuss and resolve matters. The framework consists of the Negotiation and Consultation Group and three Regional Consultation Groups.

16. In the section headed "Supporting Successful Representatives" in Together in Water [138] we note the following concerning training and development of representatives:

> *Training*
>
> *We will support the development of representatives to carry out their duties and to this end we will work with the recognised trade unions to agree a manageable and relevant schedule of training annually in advance. All representatives will receive relevant training as soon as possible after they've been elected to maximise their effectiveness in the role, and then receive "refresher" or new training periodically to allow them to update their knowledge and skills.*
>
> *All training requests will be submitted to Janet Watts in HR at Pity Me, with appropriate notice, by the trade union's full time officers rather than by the representatives themselves.*

Training for employee elected representatives will be arranged by the Company as appropriate.

Time

We support reasonable time off for representative duties relating to Company issues, as exhibited below and in the Constitution and Recognition Agreement. Whenever possible, time off needs to be planned and agreed with the line manager and the amount of time should be what is reasonably necessary assuming an appropriate spears of representatives across the business.

Representatives recognise that there is a need for balance, they have important jobs within the Company and their role as a representative should not create a situation where their performance in the job is seriously disrupted, however requests for time off will not be unreasonably refused.

…

Time off with pay will be provided during working hours to carry out the following :-

…

All H & S representatives will be given reasonable time paid time off to complete either the IOSH training courses, or a TU accredited H&S course…

17. The claimant became the Unite Accredited Health & Safety Representative on 16 October 2015.

18. It is agreed by the parties that the claimant attended the "New Reps Induction" training. He was given paid time off for the course. This course was run by Unite and was provided over 10 days in the first quarter of 2017. This course was designed for all new representatives (including both workplace and health and safety representatives) and designed to give all representatives the same skills and knowledge to carry out their elected posts within the workplace.

19. On 4 January 2018, the claimant completed the one-day course entitled "Everyone Home Safe Every Day Workshop". This focused on the respondent's health and safety culture, the tools used to encourage, promote and manage health and safety and to engage health and safety representatives in a collaboration with managers.

20. In February/March 2018, the claimant was approved to attend the Introductory session leading onto the Mental Health First Aid Course (2 days) in June 2018.

21. On 9 April 2018, the claimant was appointed to sit on the respondent's Health & Safety Forum. The Health & Safety Forum is the respondent's senior health and safety body. Its main role is:

a. Consultation on Health & Safety policy and strategy;

b. Monitoring of implementation of policy and strategy; and

c. Steer and review effectiveness of the health & safety consultation process

22. It is agreed by the parties that the claimant attended a course entitled "Health and Safety Representatives Certificate (Stage 2)" between 5 April and 21 June 2018 (the "Stage 2 training"). This course was run by Unite and provided on a day release basis over 12 weeks. He was given paid time off for this course which was designed to appraise the claimant of, among things, "[his] rights and role as a health and safety representative and the law which applies to those functions".The course covered several topics to advance some of the claimant's key skills in his role as a Unite Health and Safety Representative.

23. On 29 June 2018, the claimant was elected as Workplace, H & S, and Equalities Representative for Unite.

24. On 4 July 2018, the respondent moved to Silver Incident mode. Although it was suggested that the claimant was required to assist with Stage 1 complaints, having heard Mr Kindness' oral evidence there was no evidence that the claimant actually worked in such capacity. The claimant dealt with Stage 2 complaints which barely changed in their volume during the period of the Silver Incident.

25. The claimant completed the one day "Mental Health First Aid Training" on 16 July 2018.

26. On 17 July 2018, the claimant was accepted by Newcastle College for the TUC Diploma. This is a trade union accredited health and safety course. The parties agree that this was a 36-week course on day release. This would equate to the claimant being released 1 day per week which amounted to a 25% reduction in his working hours. The claimant was due to start a course on 19 September 2018. In summary, according to the prospectus [126] the course was designed specifically for experienced health and safety reps and provided learners with the opportunity to question the development and function of health and safety law, discover how to build trade union organisation for health and safety and tackle some of the health, safety, welfare and environmental problems that workers currently face. Furthermore, we note that the course would help the claimant to:

a. Question the development and function of health and safety law;

b. Discover how to build trade union organisation for health and safety;

c. Tackle some of the health, safety, welfare and environmental problems that workers currently face.

27. On 17 July 2018, the claimant sent an email to Janet Watts regarding the TUC Diploma as required pursuant to Together in Water. He attached the

letter confirming his acceptance on the course and asked her to confirm as soon as possible that he would receive paid release for this [52]. He made his application for paid release some five weeks after completing the Stage 2 training. As at the time of his application on 17 July 2018, the claimant had no experience in health and safety. He had simply completed the necessary training.

28. On 18 July 2018, Janet Watts replied to the claimant. Having considered his application, Ms Watts went on to say:

> *We do provide reasonable paid time off work for health and safety reps to attend TU accredited health and safety course, for example the Unite Stage 2 Health and Safety Certificate course that you attended earlier this year. Could you please provide me with details of what the Diploma course entails and how this differs from the Unite Stage 2 course, so that we can thoroughly consider your request? Any guidance from Unite to the Union or the TUC on recommended training courses for H & S reps would be helpful to please.*

29. Later the same day, the claimant responded to Ms Watts in the following terms:

> *… the Diploma can only be done after completing stage 2 Unite course or equivalent. It does not duplicate. It is the equivalent to NEBOSH if you have access to TUC hazards at workbook you will see on page 25 Unite has won tribunal case when safety rep was refused permission to do this course. If you just google the title of the course it is very well known and there is a lot of information on the course.*

30. On 3 August 2018, Ms Watts emailed the claimant notifying him that his application to attend the course had been rejected [59]. We note that she said the following:

> *We are pleased that you have such a keen interest in and want to progress your knowledge and skills in this area. With that in mind we have carefully considered your request, taking into account the expectations for release for trade union health and safety representatives, our Together in Water agreement, Unite's training regime for health and safety reps and guidance on who should undertake this specific training.*
>
> *We have noted that: –*
>
> - *We provided paid release to you to attend Unite's training for health and safety reps. The Health and Safety Reps Certificate stage 2 completed April-June 2018 on a day release basis overall 12 weeks.*
> - *The TUC Diploma course "is designed specifically for experienced health and safety reps".*

Can you please confirm that you have attended Unite's new reps induction training, which is designed for all new workplace reps and health and safety reps, and when this was completed?

Our decision at this time is to decline your request for paid release to attend the TUC Diploma course on the basis that the course is specifically for experienced safety reps, and we have supported your efforts to gain knowledge with 12 days paid release this year to attend the health and safety reps stage 2 course. Whilst we recognise you are taking your safety rep duties seriously, and keen to put your learning into practice, your experience is growing and we do not believe you are an experienced safety rep at this stage which would warrant further consideration for this diploma course to be attended.

We appreciate this decision will be disappointing to you. We will support your development where relevant and appropriate and will give your request further consideration in the future subject to the relevance of the course to NWL's working environment, your representative role and your continued growth and experience. Is it your intention to purely become a health and safety representative or are you seeking to perform both the workplace rep and the health and safety rep role? Your total time off will be something we consider in terms of what is reasonable given that you have been provided with paid time in terms of the required training for Unite safety reps.

Clearly you are passionate about health and safety John, and we were pleased to hear you and keen to work in partnership with the business to focus on the health and safety of our people. Brett is looking to organise a day of the business and TU Safety Reps to come together to discuss the governance and framework arrangements for how we work together in this arena, and I imagine that the subject of training, etc, can be discussed to ensure we understand the requirements of all of our three recognised trade unions.

31. Having considered the evidence on the reasons for the first refusal, we had no hesitation in finding that the operative reason was the claimant's lack of experience. We also find that without specifically referring to the 36 days that the course would run for, it is reasonable to infer that the respondent was also concerned about the amount of time that the claimant had already taken off and what the impact would be on his duties should he take the course he was applying for. We also find that the tone of the letter was supportive about the claimant's activities in developing his expertise as a health and safety rep. In particular, it was clear from the letter that the respondent would be prepared to reconsider an application in the future. The tone of the letter is overwhelmingly supportive of the claimant's career development. Ultimately, the respondent judged that the claimant was not ready to embark on the course because of his lack of experience. This is borne out by the evidence that we have referred to above concerning his lack of experience in health and safety matters. We feel it appropriate to add that whilst Mr Kindness claimed that the Silver Incident was also a reason for refusing the application, there is nothing in the refusal letter either express or implied to support that contention. Indeed, there as no evidence

that the claimant provided support to his stage 1 colleagues during the Silver Incident.

32. The claimant responded to Ms Watts on 3 August 2018 expressing his great disappointment. He pointed out that he was deemed to be sufficiently experienced to be offered a place on the course by Newcastle College and he concluded that the respondent was forcing him to take the course in his own time [59].

33. On 23 August 2018 the claimant commenced early conciliation through ACAS. This did not not result in a complaint to the Tribunal.

34. The claimant corresponded with Jenny Noble at Newcastle College between August and November 2018. In particular, he enquired what experience was required to enroll on the TUC Diploma course and whether there would be a January 2019 intake for which he could apply. On 6 August 2018, Ms Noble emailed the claimant informing him that the experience that he required was the Health & Safety 1 course and the Next Steps course or a union's equivalent course which the claimant had. In her opinion, the claimant was an ideal applicant. She said that no other experience was necessary [77]. Ms Noble confirmed to the claimant that there would be vacancies for new learners in January 2019 [75].

35. Regarding the claimant's health and safety experience, we find that he had the following as set out in his record after his first application for paid time off to complete the TUC Diploma course and when he applied for the second time [116]:

    a. Inspection – Northumbria House – 30 July 2018 – 6 hours.

    b. Inspection – Bolton House – 06 August 2018 – 4 hours.

    c. H&S Forum – 09 August 2018 – 3 hours.

    d. H&S Forum – 10 September 2018 – 1.5 hours

36. On 31 October 2018, the claimant emailed Ms Watts asking for paid release to attend the TUC Diploma for the intake on 23 January 2019 [72]. In support of his application, he stated the following:

    - *I would like you to consider that I have confirmation from the TUC Education Department which states "There experience required is the H & S Stage 1 Course and the Steps Course OR a union's equivalent courses which you have. So you are an ideal applicant. No other experience is necessary".*

    - *I was appointed a Health and Safety Representative on 22 May 2017 and with state that in terms of Northumbrian Water I am the most experienced union safety representative within the business-no other union safety representative has undertaken a safety inspection, investigated a member's health and safety complaint, investigated a dangerous occurrence, developed co-ordination with the HSE, asked*

for and received health and safety documentation. I also believe it is fair to say that I have taken the lead in developing the role of trade unions in health and safety.

This course will allow me to make a real contribution to our shared aim of keeping our staff safe.

37. On 6 November 2018, the Claimant met with an HR representative of the respondent to discuss the necessity of the TUC Diploma course [80].

38. On 20 November 2018, Ms Watts emailed the claimant regarding the TUC Diploma. She summarised the discussions that have taken place with the claimant. She said, amongst other things:

I explained that you can be a workplace rep or a health and safety rep, or both, and the business is willing to support you in any of these options. This is balanced by the fact that you do a valuable role as an employee and there is a limit to the overall time you can reasonably be given from that role as leave for aggregate representative duties in any one year.

We discussed the possibility of you focusing on one or the other rep role allowing more time to be granted for that area. I acknowledge your interest and passion in health and safety and wanting to develop your experience in a health and safety rep role. I asked you to consider whether your aim is to become an expert rep in this area rather than trying to cover both this and the workplace rep role. We went on to discuss whether it would be possible to develop the skills and experience of your new workplace reps to enable you to focus on health and safety matters.

We discussed the necessity of this course and I explained that we had different views on this. Whilst we understand you are eligible from a TUC perspective, the business has not considered it a course which is necessary to adequately perform the health and safety rep role.

We left it that you would explore whether this course will have any other start dates during 2019 and that she would consider the points we had discussed. Your email below makes reference to that, thank you.

We will consider your latest request again and take into account the information you have provided and I will come back to you by 5 PM Wednesday 28th November with the business decision.

39. On 26 November 2018, the claimant's union wrote to the respondent asking for the claimant to be allowed time off as an elected workplace safety representative [82].

40. On 30 November 2018, Ms Watts emailed the claimant notifying him that his application for paid leave to attend the TUC Diploma course had been rejected [83]. We note the following, amongst other things:

We have considered your request and reviewed the reasons for declining day release leave in August 2018 (see email in the string below).

We are still of the view that you have already had reasonable time off for training in recent times. We have provided paid release for you to attend Unite's training for health and safety reps; the Health and Safety Reps Certificate Stage 2 being completed in April-June 2018 on a day release basis over 12 weeks.

We are not of the view that this TUC training is necessary for you to undertake your H & S rep role or that the learning you received earlier this year requires updating at this stage. Therefore, taking all things into consideration we do not consider it reasonable at this time to approve leave to attend this 36 week course on a day release basis.

As you know, we are developing our arrangements for consulting with employees on health and safety matters at work and an element of this includes training for health and safety representatives. This currently proposes IOSH Managing Safety training for all reps and the possibility of further qualification needs. Once the arrangements are finalised, we will understand the training and development opportunities that will be available for health and safety reps within our organisation, and can discuss the potential of this with you at the appropriate time.

You mention that the facility time given to Unite would be less than another Union who has more reps sitting on NCG. When we consider the facility time for reps, it is not in terms of the amount of aggregate time for each Union, but about the amount of time we give to each individual rep balanced against the valuable work that they do in their normal role. We discussed the possibility of Unite developing its workplace reps over time to help reduce the demands on your individual time and I have received notification today of the two new additional workplace representatives.

As you mention, we have a shared aim of "Everyone Home Safe Every Day" and we appreciate the important contribution that you and the other health and safety reps make in this regard.

41. The question of the relevance of the TUC Diploma was covered in oral evidence at the hearing. In particular, it was suggested that as the claimant was the only Unite member of the Health and Safety Forum, he would have benefited from taking the course because it covered the strategic role of unions in formulating health and safety policy. Under cross examination, Mr Stinton's evidence was that the forum's purpose was not to initiate health and safety concerns but to resolve matters that had been raised by the committees below the forum. The forum was more strategic regarding health and safety policy. He accepted that members of the forum could challenge health and safety strategy. This meant that the claimant could become involved with discussions about health and safety policy and strategy and he could influence it. When it was put to him that the TUC Diploma covered the strategic role of a union and given that the claimant was the only Unite representative on the forum, he acknowledged that the syllabus talked about strategy and building a health and safety organisation

but then went on to say that the respondent already had such arrangements in place having the benefit of a professional health and safety department. He also believed that the trade unions and the respondent should have a common strategy regarding health and safety and that there should not be any difference. Mr Stinton's evidence was also that the value of the safety representatives from the trade unions was not so much a matter of their technical knowledge but of the clear input that they could give relating to their day-to-day activities deriving from their work. Knowledge of health and safety law was not central in this regard. Mr Stinton is an experienced health and safety professional. We regarded his evidence to be both cogent, plausible and credible. We give it weight.

42. We also noted from Mr Stinton's evidence that none of the other trade union representatives on the forum had the TUC Diploma or equivalent qualification. The essential qualifications were the Trade Union Representative induction plus Stage 2. These qualifications furnished the health and safety representatives with the necessary skills. Furthermore, the TUC Diploma was generic in nature. Given that generic quality, the respondent was proposing to develop bespoke training which would lead to a National Examination Board in Occupational Safety and Health (NEBOSH). This is explored in Mr Stinton's witness statement at paragraph 7. Throughout 2018, he states that he was developing plans for a new, more formal consultation arrangement for health and safety matters which he wished to agree with the respondent's recognised trade unions. These are the key features of this work:

    a. There will be joint health and safety committees for the respondent's various directorates through which the respondent would inform and consult with both trade union appointed and employee health and safety representatives on health and safety matters.

    b. There would be an overarching company health and safety forum on which senior members of the respondent's management would sit alongside trade union and employee representatives to inform and consult on why the health and safety policy and strategy issues.

    c. Linking the above committee consultation structure into the respondent's existing Negotiation and Consultation Group through which the respondent consults with trade union and employer representatives on changes to employee terms and conditions.

    d. There would be an industry recognised training for both trade union and employee representatives on health and safety matters, including IOSH Managing Safely training for all health and safety representatives and, where there was a specific technical requirement due to an appropriate representative representing employees in a high risk work area, potentially more advanced National Examination Board in Occupational Safety and Health (NEBOSH) training.

43. Having considered the evidence, we find that the reasons why the respondent was unwilling to allow the claimant to attend the TUC Diploma was primarily because it believed that he was adequately trained for his role as a health and safety representative. We also find that there were

subsidiary reasons for the refusal. The respondent anticipated that it would be introducing new bespoke training which was set out in the respondent's draft consultation framework. A further subsidiary reason for the refusal was that the claimant had already been given time off for training.

Applicable Law

44. Section 168 TULCRA provides as follows:

> *(1) An employer shall permit an employee of his who is an official of an independent trade union recognised by the employer to take time off during his working hours for the purposes of carrying out any duties of his, as such an official, concerned with:*
>
> *a) negotiations with the employer related to or connected with matters falling within section 178 (2) (collective bargaining) in relation to which the trade union is recognise by the employer, or*
>
> *b) the performance on behalf of employees of the employer of functions related to or connected with matters falling within that provision which the employer has agreed may be so performed by the trade union, or*
>
> *c) receipt of information from the employer and consultation by the employer under section 188 (redundancies) or under the Transfer of Undertakings (Protection of Employment) Regulations 2006, or*
>
> *d) Negotiations with a view to entering into an agreement under regulation 9 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 that applies to employees of the employer, or*
>
> *e) The performance on behalf of the employees of the employer of functions related to or connected with the making of an agreement under that regulation.*
>
> *f) He shall also permit such an employee to take time off during his working hours for the purpose of undergoing training in aspects of industrial relations:*
>
> *i) relevant to the carrying out of such duties as are mentioned in subsection (1), and*
>
> *ii) approved by the Trades Union Congress or by the independent trade union of which he is an official.*
>
> *iii) The amount of time off which an employee is permitted to take under this section and the purposes for which, the occasions on which and any conditions subject to which time off may be so taken are those that are reasonable in all the circumstances having regard to any provisions of a Code of Practice issued by ACAS.*

…

(4) An employee may present a complaint to an employment tribunal that his employer has failed to permit him to take time off as required by this section.

45. Regarding the activities identified in TULCRA section 168 (1)(a) TULCRA section 178(2)(a) provides that this covers:

> *terms and conditions of employment, or the physical conditions in which any workers are required to work;*

46. There are two limbs to TULCRA section 168. First, the time off in question must be for the purpose of carrying out the duties of a union official and, secondly, those duties must be connected with a number of activities adumbrated in the section. For present purposes, the claimant relies upon negotiations related to or connected with matters falling within the lost of collective bargaining matters set out in section 178(2) in relation to which the union is recognised. The wording in section 168(1)(a) is restrictive. In this case, the crucial condition is that the negotiations/functions in question must relate to or be connected with one of the collective bargaining matters set out in 178(2)(a). There must be a sufficient nexus between the negotiations/functions and the collective bargaining. The relevance must be assessed objectively on the basis of the whole of the evidence (**Chloride Technical Ltd v Cash, Roberts and Doyle EAT 37/84**). The sufficiency of information available to the employer at the time of the employee's request could be an important factor in deciding the subsequent question of whether, and how much, time off was reasonable.

47. Regulation 4 of the 1977 Regulations provides:

> *(1) In addition to his functions 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:*
>
> *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;*
>
> *b) to investigate complaints by any employee he represents relating to that employee's health, safety or welfare at work;*

c) to make representations to the employer on matters arising out of sub- paragraphs (a) and (b) above;

d) to make representations to the employer on general matters affecting the health, safety or welfare at work of the employees at the workplace;

e) to carry out inspections in accordance with Regulations 5, 6 and 7 below;

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 for Nuclear Regulation and any other enforcing authority;

g) to receive information:

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;

ii. otherwise, from inspectors in accordance with section 28 (8) of the 1974 Act.

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 sections 102 and 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:*

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

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.

48. Regulation 11(1)(a) of the 1977 Regulations provides that a safety representative may complain to the Tribunal that the employer has failed to permit him to take time off in accordance with regulation 4(2) of the 1977 Regulations.

49. The time off rights referred to are subject to the proviso the time off must be reasonable. The ACAS code which is relevant to TULCRA lists various factors of which employers and unions should be aware and which will influence a Tribunal's assessment of what is reasonable. For example, unions should have regard to the operational requirements of the business, taking into account such factors as:

    a. The size of the organisation and the number of workers.

    b. The production process.

    c. The need to maintain a service to the public, and

    d. the need for safety and security at all times.

50. As for employers, they should take account of the difficulties unions may face in ensuring effective representation and communications with, for example:

    a. Shift workers.

    b. Homeworkers.

    c. Teleworkers or workers not working in a fixed location.

    d. Those employed at dispersed locations.

    e. Workers with particular domestic commitments including those on leave for maternity, paternity or care responsibility reasons.

51. Obviously, when the factors on both sides are taken together, the usual balancing process will occur. The union official's duties towards his or her members will have to be balanced against the duties owed to the employer and the needs of the business. The Code suggests that union representatives should minimise business disruption by being prepared to be as flexible as possible in seeking time off in circumstances where the immediate or unexpected needs of the business make it difficult for colleagues or managers to provide cover for them in their absence. Equally, employers should be encouraged to take reasonable steps in the planning and management of representatives' time off and the provisions of cover or workload reduction, taking into account the legitimate needs of such union representatives to discharge their functions and receive training efficiently and effective.

52. The Code stresses that employer and union should seek to agree a mutually convenient schedule for time off that minimises the effect on production services.

53. Although TULCRA section 168 (3) appears to indicate that an employee should be entitled to precisely the amount of time off which, assessed objectively, is reasonable, the EAT seems to have adopted a broader test of reasonableness in line with the one applicable to unfair dismissal cases. This involves asking whether, in the circumstances, the refusal of time off fell within the range of reasonable responses of any reasonable employer

(**Ministry of Defence v (1) Crook (2) Irving 1982 IRLR 488, EAT**). The difference is subtle but significant in that the test which the EAT enjoins tribunal is to adopt precludes them from determining whether the request for time off was reasonable in the circumstances but instead requires them to look at matters from the employer's point of view and to ask whether, in those circumstances, the employer's refusal of time off was reasonable.

54. It has to be said that the decision in **Crook** is open to question. TULCRA section 168 (3) permits an employee to take such time off as is reasonable. The statutory provision does not state that the entitlement to, or amount of time off, time off is governed by what the employer considers to be reasonable, or that entitlement is governed by the question of whether the employer acted reasonably in dealing with the employee's request. Furthermore, **Crook** is arguably inconsistent with the EAT later decision in **Chloride Technical Ltd** which held that "all the circumstances" is not limited to the knowledge which an employer may have at a time when he refuses permission rather, the Tribunal must "stand back and look at all the circumstances surrounding the application, the nature of the duty, and so on".

55. TULCRA, section 168(3) states that the time off must be reasonable "in all the circumstances". This means that the employer and the Tribunal may consider broadly relevant matters such as the employee's absence record, the amount of time off already given for other purposes (including other union duties and activities) and whether it would be possible to defer training whilst there is a backlog of work in particular departments.

56. The EAT made some general observations regarding what it considered to be reasonable industrial practice in relation to time off for union duties in **Hairsine v Kingston upon Hull City Council 1992 ICR 212, EAT**. It held that it was in the interests of good industrial relations that there be a joint responsibility for ensuring sensible arrangements for time off for trade union duties. The essential basis for such arrangements must be reasonableness on the part of both the employer and the union.

57. The right to time off under regulation 4(2) of the 1977 Regulations is to such time "as shall be necessary" to perform the relevant function or to undergo the relevant training. This can be contrasted with TULCRA section 168(3) where the right is to such time off as may be "reasonable in all the circumstances". The test of necessity is stricter and less flexible than the test of reasonableness.

58. Under the 1977 Regulations, an element of reasonableness is incorporated into the statutory test. However, as the right to time off for training purposes under regulation 4(2)(b) permits such time off as is necessary for the purposes of undergoing such training as may be reasonable under all the circumstances, having regard to the HSE Code. Case law suggests that there is a two stage test to be applied under regulation 4(2)(b) of the 1977 Regulations as follows:

    a. Is the training reasonable in all the circumstances?

    b. If so, has the employer permitted such time off as is necessary for the safety representative to undergo such training?

59. We are reminded that in **Duthie v Bath and North East Somerset Council 2003 ICR 1405, EAT** the EAT held that the test if necessity under regulation 4(2)(b) focuses on whether time off is necessary to attend a course, not on whether the training course itself is necessary. In its view, the Tribunal must first ask whether "it is reasonable in all the circumstances" for the employee to undergo the training. The test of necessity only arises once it has been decided that a course is reasonable in all the circumstances.

60. In **Walker v North Tees and Hartlepool NHS Trust EAT 0563/07** the EAT emphasised that whether it is necessary for a safety representative to have paid time off for a training course and whether the training is reasonable are two separate questions. The EAT agreed with the Trust that the Tribunal had wrongly conflated necessity and reasonableness by deciding that it would be reasonable for the claimant to attend the course because of its content and relevance and, therefore, that his attendance was necessary. The test of necessity applied to the amount of time off; the test of reasonableness to the relevance of the training to the representative's health and safety duties. The question the tribunal should have answered was whether the two and a half days off per week that the employee was already allocated was sufficient time for the discharge of his functions as a safety representative and to cover such training in that function as was reasonable. If so, it was not necessary for further time off and there was no breach of regulation 4(2) of the 1977 Regulations by the Trust.

61. When assessing whether it is reasonable for the employer to undergo the training, regard may be had to the HSE Code. As with the ACAS Code, a breach of the HSE Code does not in itself constitute a breach of the time off provisions (Health and Safety at Work Act 1974, section 17).

62. The HSE Code states:

> *3. As soon as possible after their appointment safety representatives should be permitted time off with pay to attend basic training facilities approved by the TUC or by the independent union or unions which appointed the safety representatives. Further training, similarly approved should be undertaken where the safety representative has special responsibilities or where such training is necessary to meet changes in circumstances or relevant legislation.*
>
> *4. With regard to the length of training required, this cannot be rigidly prescribed, but basic training should take into account the functions of the safety representatives placed on them by the Regulations. In particular, basic training should provide an understanding of the role of safety representatives, of safety committees, and of trade unions policies and practices in relation to:*
>
> *(a) the legal requirements relating to the health and safety of those at work, particularly the group or class of people they directly represent;*
>
> *(b) the nature and extent of workplace hazards, and the measures necessary to eliminate or minimise them:*

(c) the health and safety policy of employers, and the organisation and arrangements for fulfilling those policies.

5. Additionally, safety representatives will need to acquire new skills in order to carry out their functions, including safety inspections, and in using basic sources of legal and official information and information provided by, or through, the employer on health and safety matters.

6. Trade Unions are responsible for appointing safety representatives. When the trade union wishes a safety representative to receive training relevant to their function, it should inform management of the course it has approved and supplied a copy of the syllabus, indicating its contents, if the employer asks for it. It should normally give at least a few weeks' notice of the safety representatives it has nominated to attend. The number of safety representatives attending training courses at any one time should be that which is reasonable in the circumstances, bearing in mind such factors as the availability of relevant courses and the employers' operational requirements. Unions and managers should endeavour to reach agreement on the appropriate numbers and arrangements and resolve any problems that may arise using the relevant agreed procedures.

63. If the Tribunal upholds a claim under TULCRA or the 1977 Regulations it must make a declaration to that effect. It also has the discretion to award such compensation as it deems just and equitable in all the circumstances, having regard to the employer's default and any loss sustained by the employee. In **Skiggs v South West Trains Ltd 2005 IRLR 459, EAT**, the EAT held that the wording of TULCRA section 172(2) and, in particular, the reference to 'any' loss sustained was wide enough to include compensation to an individual for the fact that a wrong has been done to him or her, even in the absence of any financial or other loss

64. In their submissions, both Mr McHugh and Mr Williams have identified the issue of what is the correct test to apply in determining reasonableness. They go further to suggest that different tests apply regarding reasonableness under TULCRA, section 168(3) and under regulation 4(2) of the 1977 Regulations. We have considered these submissions below.

Application of the law to the facts

65. By way of general observation, we are satisfied that the respondent dealt with the claimant's requests for paid time off for training consistently with the policy set out in Together in Water.

66. Mr Williams' position is that the TUC Diploma did not constitute training in aspects of industrial relations relevant to the carrying out of the claimant's duties as an official of an independent trade union listed in TULCRA section 168(1). He argues that the training requested was not relevant to the duties listed in TULCRA section 168(1). The training was for a Diploma level qualification for health and safety. He submits that the claimant wholly failed

to plead why the TUC Diploma meets the specific duties covered by TULCRA section 168(1). Mr Williams submits that the subject matter of of the TUC Diploma course did not relate to the very specific matters listed in TULCRA section 178(2)(a) because it is outside the ambit of the TUC Diploma.

67. Mr McHugh's submission is that TULCRA section 168(1)(a) is engaged because it provides that duties can include negotiations with the employer related to or connected with the matters in TULCRA section 178(2). In this case, he relies on section TULCRA section 178(2)(a) and submits that a health and safety representative would be concerned with negotiations around the physical conditions in which any workers are required to work. The TUC Diploma is, in his submission, plainly relevant to that aspect of the duty.

68. We agree with Mr Willams' analysis. A crucial condition under TULCRA section 168(1)(a) is that the negotiations/functions in question must relate to, or be connected with, one of the collective bargaining matters set out in TULCRA section 178(2)(a). When we look at the ACAS Code we see examples of matters falling within TULCRA section 178(2)(a). Thus

> *"terms and conditions of employment, or the physical conditions in which workers are required to work" could include pay, hours of work, holidays, sick pay, pensions, vocational training, equal opportunities, notice periods, the working environment and the utilisation of machinery and other equipment.*

69. The prospectus for the TUC Diploma operates at a much higher level when addressing health and safety. For example, it does not suggest that the claimant would be learning about negotiating with the respondent on health and safety matters and we do not think that it is possible to draw such an inference from the prospectus. Rather, it is more concerned with questions such as the development and function of health and safety law, building trade union organisation for health and safety and tackling health, safety and welfare and environmental problems that workers currently face. We do not think that there is a sufficient nexus between the negotiation/functions and the collective bargaining which is an essential requirement. Consequently, TULCRA section 168 is not engaged and the claimant's claim must necessary fail. His claim under TULCRA section 168 is dismissed.

70. We now turn to the claim under regulation 4(2) of the 1977 Regulations. We accept that the training for which the claimant requested paid time off for work, namely the TUC Diploma, was training in aspects of his functions as a safety representative. It was designed specifically for experienced health and safety reps. He is a health and safety representative and he had some experience (14.5 hours) in that role when he applied for the second time for paid time off to attend the TUC Diploma.

71. The next issue we must determine whether it is reasonable in all the circumstances for the claimant to undergo the training offered by the TUC Diploma. Much was made by the representatives as to the correct test to be applied to determine reasonableness. The Tribunal finds that unlike the

unsatisfactory position under TULCRA, the test to be applied under regulation 4(2) of the 1977 Regulations is clear cut and is set out in **Duthie** and in **Walker**. We have applied that test.

72. Reasonableness is the first stage of the test specified in **Duthie**. We do not believe that it was reasonable, in all the circumstances, for the claimant to embark on the TUC Diploma for the reasons given by Ms Watts in the her 30 November 2018 email. The claimant had already received the necessary basic training that he required to be a health and safety representative when completing the New Reps Induction training and Stage 2. The respondent followed the HSE Code by enabling the claimant to undergo basic training which equipped the him with an understanding of the role of the safety representatives, of safety committees and of the Unite union's policies and practices relating to:

    a. The legal requirements relating to health and safety of persons at work, particularly the group or class of persons he directly represented.

    b. The nature and extent of workplace hazards, and the measures necessary to eliminate or minimise them.

    c. The respondent's health and safety policy, and the organisation ad arrangements for fulfilling those policies.

73. In determining reasonableness, it is also significant that the claimant had only just completed his Stage 2 training and, some five weeks later, he applied for paid time off to study for the TUC Diploma. We saw no evidence that justified the claimant having to acquire new skills by studying for the TUC Diploma in order to carry out his functions on the respondent's health and safety forum. Indeed, it was clear that no-one on the forum had completed the TUC Diploma. Furthermore, there was no evidence to suggest that there had been any changes in health and safety law that would justify the claimant embarking on further study at that time.

74. The reasonableness test has not been met, and, therefore, there is no requirement for the Tribunal to consider the second stage. The question necessity does not arise.

Employment Judge A.M.S. Green

Date 18 October 2019