



EMPLOYMENT TRIBUNALS

Claimants

Respondent

(1) Miss K Tily

v

London Underground
Limited

(2) Mr A
Libberton-Rowe

Heard at: London Central

On: 11, 12 and 13 November 2020 and
16 November 2020 (in chambers)

(via Cloud Video Platform)

Before: Employment Judge Joffe
Mr J Carroll
Ms G Carpenter

Representation

For the Claimants: Mr N Toms, counsel

For the Respondent: Ms J Shepherd, counsel

RESERVED JUDGMENT

1. The claimants' claims of breach of regulation 4 of the Safety Representatives and Safety Committees Regulations 1977 in respect of the 2 February 2019 incident are well-founded and are upheld.

2. The first claimant's claim of breach of regulation 4 of the Safety Representatives and Safety Committees Regulations 1977 in respect of the 31 July 2019 incident is well-founded and is upheld.
3. The second claimant's claim of breach of regulation 4 of the Safety Representatives and Safety Committees Regulations 1977 in respect of the 31 March 2019 incident is not well-founded and is dismissed.

REASONS

Claims and issues

1. In this Judgment the claimants are referred to by their names to aid clarity.
2. The issues in this case were agreed at a preliminary hearing before Employment Judge Adkin on 3 February 2020. They were subsequently amended by agreement between the parties and encapsulated in an agreed list of issues presented to the Tribunal. The issues are as follows:

2 February 2019 incident

- i) What time off was requested by Miss Tily and Mr Libberton- Rowe in respect of this incident?
- ii) Did the time requested relate to functions falling within regulation 4(1)(a) and (b) of the Safety Representatives and Safety Committees Regulations 1977?
- iii) If so, what time off was necessary?
- iv) Did the respondent fail to allow the necessary time?

31 March 2019 incident

- v) What time off was requested by Mr Libberton- Rowe in respect of this incident?

- vi) Did the time requested by Mr Libberton-Rowe relate to functions falling within regulation 4(1)(a) and (b) of the Safety Representatives and Safety Committees Regulations 1977?
- vii) If so, what time off was necessary?
- viii) Did the respondent fail to allow the necessary time?

31 July 2019 incident

- ix) What time off was requested by Miss Tily in respect of this incident?
- x) Did the time requested by Miss Tily relate to functions falling within regulation 4(1)(a) and (b) of the Safety Representatives and Safety Committees Regulations 1977?
- xi) If so, what time off was necessary?
- xii) Did the Respondent fail to allow the necessary time?

Remedy

- xiii) If either Claimant is successful, what remedy are they entitled to?

Facts

The hearingⁱ

3. We were provided with an agreed bundle of 369 pages. The electronic bundle was helpfully paginated and indexed so the electronic page numbers matched the manuscript page numbers, for which we were grateful. The claimants gave evidence on their own behalf. For the respondent, we heard evidence from Mr James Harriss, Train Operations Manager ('TOM') at White City depot at the relevant times, and Mr Alan Slade, Trains Manager.
4. We were grateful to both sides for presenting their evidence and submissions with clarity and efficiency.

Facts relevant to the claims

5. Miss Tily has been employed by the respondent for nearly twenty years as a train operator. She has carried out the role of Tier 1 health and safety representative on behalf of ASLEF members for some twelve years on the Central Line; she has an NOCN level 3 diploma for trade union health and safety representatives.
6. Mr Libberton-Rowe is an instructor operator and has been employed by the respondent since January 2007. He was a Tier 1 health and safety representative at the White City train depot, Central Line, for RMT members from January 2014. He has a stage 3 diploma in occupational health and safety and was a technical member of the Institute of Occupational Health and Safety.
7. As the respondent accepted, both claimants are experienced and knowledgeable health and safety representatives.
8. Mr Harriss has had some training by the respondent in health and safety and also in investigations, although not specifically in health and safety investigations. He did not purport to be an expert on health and safety and would take advice from a health and safety expert from the respondent's Health, Safety and Environment department where necessary. Mr Slade had had basic health and safety training as well as health and safety training as part of his training to be a risk assessor; he had yearly refresher training for his risk assessor role.

Health and safety arrangements in LUL

9. As both sides made clear and we readily accepted, health and safety is of great importance in the rail industry and the recognised trade unions play an important role in health and safety in the respondent organisation.

10. In this respect, the respondent has a collective agreement with the recognised trade unions, the 'Machinery of Negotiation and Consultation' ('the Machinery').
11. The purpose of the machinery is set out at para 3.1:

“to define LUL’s processes for ensuring that health and safety matters that affect employees can be openly discussed between LUL and its employee Health and Safety Representatives as required by the Safety Representatives and Committees Regulations 1977. This will facilitate The identification of health and safety issues, the constructive development and implementation of solutions and continuous improvement of health and safety in the workplace.”
12. Local or 'Tier 1' representatives are appointed by recognised trade unions and are treated as safety representatives for the purposes of the 1977 Regulations. Tier 1 representatives perform their substantive duties alongside their safety representative roles.
13. The respondent is divided into a number of functions, including Stations, Trains, Service control, Track and Signals. There are agreed numbers and locations for safety representatives in the various functions.
14. There are also full time health and safety representatives known as 'Tier 2' representatives. There are six such representatives for train operators, three from ASLEF and three from the RMT.
15. There is one Tier 1 safety representative for trains for each relevant trade union (RMT and ASLEF) in each depot and Miss Tily and Mr Libberton-Rowe performed these roles at the White City depot at the relevant times. Miss Tily and Mr Libberton-Rowe worked together collaboratively on behalf of all of their respective members.

Agreement relating to time off for trade union duties

16. We were provided with an agreement dated 20 July 1993, entitled 'Agreement Relating to Time Off for Trades Union Duties and Activities – Operational staff and Operational Managers in the Passenger Services, Engineering and Personnel Directorates' ('the Agreement').
17. Amongst other things the Agreement provide: "A trades union official shall be granted reasonable time off with pay where necessary to enable him or her to carry out trades union duties". There are then examples of when time off will be granted including: "safety inspections and investigations (Safety Representatives only)".
18. Counsel for the respondent submitted that the Agreement covered the types of paid time off which are provided for by statute, rather than making broader provision, and counsel for claimants did not demur from that proposition.
19. Clause 6 of the Agreement provides that the list of examples given in clauses 4 and 5 was not exhaustive and 'any situations concerning trades union duties and activities, which arise will be dealt with appropriately'.
20. We were also provided with a table entitled 'Current agreed release arrangements for TU representatives'. This document was undated and we heard no evidence on when the arrangements in that document commenced.
21. Tier 1 representatives are granted release from duties for a variety of purposes including attending Tier 1 meetings quarterly, attending depot / workplace inspections and attending health and safety conferences. Trains health and safety Tier 1 representatives, uniquely, are released one day every four weeks for 'H & S duties'.
22. The respondent adduced no evidence as to why trains representatives were provided with these additional days. The claimants told us that this was because of the different nature of their substantive duties; they were not at a desk or computer on a regular basis because they were driving trains, so they

needed the days to carry out duties which other safety representatives might be able to carry out in their ordinary working time.

Investigations

23. There are two types of safety investigation in relation to which collaborative working between management and staff side is provided for. The criteria and requirements in respect of such investigations are set out in documents called 'Standards'.
24. The Standard S5557 A11 relates to local investigations or 'LIRs'. Trade union safety representatives may request a local investigation and if one is commissioned, assistance of such representatives must be sought if the incident is one which involves an employee or has the potential to do so.
25. For LIRs, the local business manager and HSE senior manager are to decide whether such an investigation is required. The nature of the investigation may range from 'a fact finding exercise to a detailed local investigation depending on the severity and the likelihood of the incident.' If a local investigation is requested by a health and safety representative and a decision is made by management not to undertake one, the reasons for the refusal must be communicated to the health and safety representatives who made the request.
26. There are criteria for the type of incident which may require a local investigation.
27. Formal investigations ('FIRs') are covered by a different 'standard'. They are required for more serious incidents. It was not suggested that the incidents the subject of these claims required a formal investigation and we did not hear any detailed evidence about formal investigations.

Practice in respect of time off for investigations

28. Mr Harriss' evidence was that there was little flexibility in train operator resourcing. Although there is a small pool of spare operators to cover training and sickness, at times when there are high levels of sickness, lack of operators may result in trains being cancelled. No statistics or data were provided and no specific evidence was given as to the availability of cover on the occasions when the claimants asked for time off for investigations. Mr Harriss did not proffer operational reasons as a reason for refusing time off to the claimants in relation to the incidents under consideration.
29. The claimants' evidence as to past practice was that they had not, prior to 2019, been told they should conduct investigations in their monthly H & S days and nor had their colleagues. They referred to these days as 'admin days'. They had taken part in a number of investigations over the years, apparently averaging about two per year. In December 2018, they had been granted five days in total to carry out two investigations. One was concerning an incident where a member of the public was carrying a firearm at Bond Street tube station. They had asked for a further day to complete the Bond Street investigation which was refused and that investigation remained uncompleted. The matter was referred to a Tier 2 meeting but the time off was not granted. The refusal was not expressed to be on the basis that the claimants should complete the investigation in their monthly H & S days.
30. The allocation of time off for health and safety duties was agreed at the beginning of the year to assist the respondent and the representatives in planning and rostering.

What the claimants did on H & S days

31. We did not hear evidence as to what Tier 1 trains health and safety representatives used their H & S days for across the underground network but only as to the use made by the claimants of those days.
32. Mr Libberton-Rowe said that he used them for a variety of tasks, including chasing up defects, updating inspection reports, writing minutes of the

Platform Train Interface Committee and dealing with questions from members. He would open and action items in the Health and Safety mailbox from members, update his notice board with changes and events. He would update the 'topic of the month'. He and Miss Tily would be very busy, often sorting out mountains of 'defect slips' (slips filled in by members of staff relating to minor defects on trains). They might also be planning agenda items for the PTI and Fleet Liaison Committees, which they did not have other time to complete. Miss Tily sat on the Fleet Liaison Committee and Mr Libberton-Rowe on the PTI Committee.

33. Miss Tily said that she would be dealing with emails, talking to members about local issues, liaising with Tier 2 representatives about particular issues, finishing writing referrals, preparing items for the Fleet Liaison Committee and checking minutes. She said that she was constantly busy on those days and would eat at her desk.
34. Mr Harriss in evidence said that he did not know what claimants were doing on those days. He never discussed the matter with them. He accepted that they appeared hardworking and he had no reason to disbelieve their assertion that they were busy on those days.
35. We were provided with reports on the amount and disposition of time off for health and safety duties each of the claimants had had in 2018 and 2019. Neither claimant had seen these documents prior to the proceedings and Miss Tily had some doubts over the accuracy of the record. At the beginning of the period, the monthly days were referred to as 'Admin Days' and later in the period as 'H & S Duties'.

Incidents

2 February 2019

36. On the night of 2 February 2019, there was a planned suspension of the Night Tube to enable track patrols. Miss Tily said that what should have occurred is that trains ceased running during the suspension and returned to their depots.

In fact there was a change to the details of the suspension and trains remained on various parts of the Central Line.

37. The following day Miss Tily became aware that colleagues were discussing what had taken place the night before. She heard that trains had been held at various places along the line for an extended period with drivers and customers still on the trains. The conditions reported included a lack of heating and lack of easy access to toilet facilities. One train had been stopped at Woodford where the line is outside and the temperature had reached minus 4 degrees. Another driver had had to work outside his 'parameters' in respect of driving time.
38. Miss Tily emailed Mr Harriss on 3 February 2010 to raise concerns about what she had heard:

'I'm sorry to say that last night became a complete debacle. For some reason the plan we had been advised off was abandoned – we need to know when, by whom, and for what reason. The attached shows the first Twitter notification, at 15:32, showing just 2 hours of suspension. Trains were left in platforms through the centre, so how was that track patrolled? Drivers were just left on trains, and one of ours spent 6 hours on a train, only for the L C to expect them to have MR [meal relief] & continue afterwards! It doesn't look as if there was such a mess on the [Piccadilly Line]. Please inform us forthwith of what type of investigation you will be carrying out, at the very least LIR.'
39. Two Central Line drivers complained to management. The claimant raised the issue at a Line H & S meeting and sent an email to Mr Harriss on 12 February 2019:

'Just a reminder that I requested some information regarding the N[ight] T[ube] service on Sat 2nd February. This was the WLCC log books for the night, and all information regarding the 'plan' that was put in operation. It would be good if I could have this by Thursday.'
40. Miss Tily said in evidence that she identified other trains and drivers who would have been on open platforms during the stoppage. Some of the drivers involved would have been based at the Leytonstone depot.

41. Mr Harriss responded that day to say that he would chase up the matter. He said that as a local team they would be looking at the matter from a crewing perspective and he would make sure that their findings were shared with Miss Tily and Mr Libberton-Rowe.
42. On 20 February 2019, Miss Tily chased Mr Harriss for the requested information again.
43. 1 March 2019, Mr McGrath, trains manager for White City, wrote to the claimants and Mr Harriss:

‘After receiving complaints from Night Tube Train Operators about the service and disruption on Saturday 2nd February during the engineering works, I have done a local investigation into what happened and how this impacted our Train Operators. I’ve spoken with James and he said that there is a company wide review on going about the reasons focussing on the timing of the works and our operational response. My report purely looks at the impact on the issues which Train Operators at White City raised to the TM team and the lessons learned.’
44. He attached his report which summarised how the situation had come about: ‘A plan (fig 1) detailing where and when each train would be stabled was sent out by the Service Control Manager on Friday 1st February. The White City Trains Manager then made cards for each book-on so they knew how their duty would be affected.

On Saturday afternoon it was announced by the S C M that as the track team had secured additional staff, that the track patrols could be done in a much shorter timescale than initially envisaged and this previously communicated plan (fig 1) would not be required. The new arrangement meant that we could provide a better service for the customer for longer, and the S C M communicated the following to explain what was going to happen with the Night Tube service;

In essence the Service Control team will now be arranging traffic hours possession arrangements with the track team. This will mean that we will be able to provide a service for a longer period of time. There will be a dedicated Service Manager dealing with the arrangements later as well as your normal staff arrangements.

The following is a brief overview:

The Inner and Outer loop will be closed at different times to allow us to continue running a through service. Customers journeys may therefore take longer whilst this occurs, so listen out for comms from the Service Control team. We will be closed fully from 03:00 until 05:00.

If the walks are completed earlier then we hope to be in a position to start services in line with this. However if the inspections do find any defects then we can all expect this closure to go beyond 05:00. So it will be important to understand that the process is a little more fluid than we would normally like. We do though have additional E R U resources as signed purely for the Central Line, hopefully they will not be needed.

On the evening some trains were stabled and others were held around 02:50 for protection.

Some of these trains were held at stations with a Train Crew Accommodation, allowing the Train Operator to shut down the train and stay in the T C A until the protection was over.

Four trains were held in the tunnelled section, one train was held at Ealing Broadway and another at Woodford.'

45. We understood that 'stabled' meant that trains returned to their depots and 'for protection' referred to trains being left on the line to prevent other trains passing through to areas of track being worked on.

46. Mr McGrath made recommendations

'Recommendation 1: Crew Management - there should have been better Communication between the Line Controller and desk TMs about which trains would be used to be held for protection so that crews could have been managed effectively and within parameters .

Recommendation 2: Communication to Stations and trains - the plan... should have been clearly communicated to the entire Central Line team in partic focussing on the arrangements for trains being held in station platforms.'

47. Mr Harriss' evidence was that Mr McGrath spent 7 – 8 hours on this investigation. He had looked at the two complaints which had been received from drivers, one of whom had had to work outside parameters and one of whom had remained on an unheated train in cold conditions because there was still a customer on the train.

48. Mr Libberton-Rowe wrote to Mr McGrath that same day to ask: 'Can you explain why the safety representatives were not included in the local investigation as per the standard?' He understandably had understood that Mr McGrath was referring to a local investigation in the technical sense, ie an LIR.

49. Mr McGrath replied to say that he had been in error describing the investigation as a local investigation and explaining that he had conducted an investigation into the complaints which had been made by two train drivers from White City. 'I was not specifically looking at it from a health and safety perspective.'
50. Miss Tily then wrote to Mr Harriss to say that they had still not received all of the information they had requested and that 'we are still looking at needing an investigation into this.'
51. On 6 March 2019, Miss Tily wrote again to ask for more detail of the companywide investigation referred to by Mr Harriss and also to ask for the drivers' complaints. Mr Harriss was not able to provide any further information in his reply that day.
52. On 26 March 2019, Ms Tily wrote to Mr Harriss saying that she and Mr Libberton-Rowe would be conducting their own investigation into the incident following management's refusal to carry out a collaborative LIR or provide information about the companywide investigation. She provided some terms of reference for the investigation and said that she and Mr Libberton-Rowe required five days for their investigation, which they proposed should be 6 – 10 May 2019.
53. Mr Harriss replied on 27 March asking for further information about what they wanted to investigate and how it related to their members. He asked her to identify what had not so far been investigated. He said that the issue of what had been done in terms of a 'combine-wide investigation' would have to be raised at Tier 2 as it 'sits above us at a local level'.
54. Miss Tily replied on 28 March 2019 saying that they had not been able to acquire any information about the combine-wide investigation. She said that they wished to investigate actual and potential hazards to staff from known welfare issues from being left at platforms and potential issues from passengers.

55. That day Mr Harriss wrote to Nicki Selling, HSE manager, asking for confirmation of his view that the incident did not merit an LIR or FIR.
56. In terms of whether there was ever a wider investigation, Mr Harriss' evidence was that there a high level conference call with senior management but he was not privy to that discussion and was not able to say what had been discussed.

Incident on 31 March 2019

57. On 31 March 2019, there was a 'Code Generator Failure' (signal failure) incident which Mr Libberton-Rowe was involved in. He was operating a train when the signal failure occurred and was concerned that he was authorised by service control staff to drive into an area of line already occupied by another train. He described this as not having been a dangerous occurrence because he was able to see the train in front and stop safely but he said that it was a potential hazard.
58. He emailed Mr Harriss on 1 April 2019 to raise his concern about the incident. He said that he and Miss Tily would require time the following week to review a variety of information including logbooks and radio calls to decide what sort of investigation to call for. He wrote again on 2 April asking for confirmation that he and Miss Tily could do the work on 8 April 2019. Mr Harriss wrote back to say that he was speaking to HSE to confirm the level of investigation required.
59. Ms Selling wrote to Mr Harriss on 5 April 2019 confirming a telephone conversation she had had with Mr Harriss in which she had said that the Night Tube and Code Generator Failure incidents did not meet the LIR or FIR criteria. There were lessons to be learned and she recommended a joint fact find between trains and service control including representatives.
60. On 8 April 2019, Miss Tily asked for an update on the two incidents. Mr Harriss replied on 10 April 2019 to say that he had spoken to HSE and neither incident met the criteria for and LIR or an FIR. He said that the claimants were

welcome to investigate under the 1977 Regulations but that he thought it would be reasonable for them to do so in the days on which they already had release every four weeks. He said he was happy to rearrange their respective release days to the same day so that they could work on the investigation together.

61. Mr Libberton-Rowe wrote to Mr Harriss on 11 April 2019. He asked for the HSE advice. He said that the investigations 'fall outside of our admin day' 'as they will require more time' and there were other H and S functions they undertook on those days. He asked for an urgent Tier 1 meeting if Mr Harriss did not agree the time off. Mr Harriss declined to call an ad hoc Tier 1 meeting and said that the matter should be discussed at the meeting which was scheduled for 28 April 2019.
62. On 26 April 2019, Mr Harriss wrote to two train managers at White City, Mr McDonnell and Mr White, asking them to investigate the 31 March 2019 Coode Generator failure issue.
63. Mr McDonnell produced a report at some point prior to July 2019 on the Code Generator failure incident.
64. At the Tier 1 meeting held on 28 April 2019, Miss Tily said that they wished to carry out their own investigations into both incidents but release had been refused for both incidents. She indicated that they would still prefer an LIR be carried out. Mr Harriss said that he was happy for the incidents to be investigated in the time already released for H and S duties. Mr Harriss undertook to speak to HSE again about whether LIRs were appropriate, otherwise Miss Tily said she would refer the issue to Tier 2.
65. On 3 May 2019, Mr Harriss wrote to the claimants:
'I have revisited the two incidents from the Tier 1 (BMB and Night Tube) and I suggest that we conduct a fact find into these two incidents to see if any lessons can be learnt. I will put together a plan and timescale next week and we will find some time to release you to review it all with us.'

66. We considered that the email was ambiguous on its face as to whether the claimants were being asked to review the 'plan and timescale' or the fact find. The claimants understood they were being invited to review a fact find by management and it was not suggested by the respondent that the claimants were wrong about that.
67. Miss Tily wrote a referral to Tier 2 on 7 May 2019.
68. On 10 or 11 July 2019, Mr Harriss met with the claimants and discussed the fact finds on the two incidents. They were asked to review the investigations done by the respondent. They expressed dissatisfaction.
69. On 15 July 2019, the issue was discussed at a Tier 2 meeting. This was chaired by Mike Smith, head of line operations, and attended by other managers and by Tier 2 representatives. We saw the minutes of this meeting but did not have evidence from anyone who had attended the meeting. Mr Harriss and the claimants were all at Tier 1 level.
70. The minutes recorded:
- In relation to the Night Tube incident:
'MS said that joint investigations were recommended as best practice, and this had been offered by the White City TOM: this offer still stands. MS added that a joint investigation may help to promote positive relations in this location.' We note that the offer in fact made was to review management's fact find.
The action recorded was: 'LU to clarify under what circumstances Tier 1 H & S representatives conduct H & S investigations in the Centurion Pack.' We understand 'centurion' to be manager at a particular level.
The Centurion Pack extract we were shown included the following: 'TfL Standards / the Working at TfL pages state that H & S Representatives are appointed to the investigations where an accident or incident involved the groups of staff whose health and safety was or could have been significantly affected by the incident. Where this involves H&S representatives, release for investigations can be in addition to the standard agreed release, unless agreed locally.'

- In relation to the Code Generator incident, the minutes suggest that Mr Smith told the meeting that HSE had said that a joint fact-finding meeting had taken place on 11 July 2019 (which was arguably incorrect) and that ‘The framework gives stand alone Tier 1 release for investigations.’
71. In July 2019, Mr Slade was asked to investigate the Night Tube and Code Generator failure incidents; his work was to be a review of the existing investigations. He says that he spoke with the claimants to ask what further investigation they required. The claimants could not recall speaking with Mr Slade prior to being provided with his revised investigation reports.
72. Mr Slade reviewed the evidence and in the case of the Code Generator failure, requested and relistened to some voice recordings. His evidence was that he spent three to four hours on each investigation. There were very minimal changes to the reports, largely cosmetic. Mr Slade said that he felt that the investigations had been reasonably thorough and sound in their conclusions.
73. There was an email from Mr McGrath to Mr Harriss dated 19 December 2019 in which he said that he spent about 7 – 8 hours on his Night Tube investigation.
74. Miss Tily’s evidence about the time which would have been required to investigate the Night Tube incident was as follows:
- The first day would be used by the representatives to agree terms of reference and methodology, formatting the report and writing in the terms of reference and methodology. Although these had been drawn up and agreed previously, they would need revision because of the time lapse since the initial referral and the likelihood of new information being available;
 - The evidence would need to be collated, which Miss Tily estimated would take three days.
 - o This included investigating internal systems to identify trains and drivers affected, speaking to drivers involved from White City and Leytonstone, some of whom might have changed depots by that point.

She estimated half an hour per driver, although some information might be obtained via email;

- Other tasks she considered necessary were:
 - Speaking to drivers from other lines to ascertain if any had relevant information;
 - Requesting train managers' log books (four from the relevant depots), reading relevant entries and making notes;
 - 'Speaking to Train Managers about how and when they were informed of the changes to the plan, what details they were given and any issues they had about what had happened on the day of the incident.'
 - Speaking to station staff / managers as necessary;
 - Visiting sites as necessary;
 - Listening to and transcribing relevant radio calls. There were 39 to consider;
 - Reading Line Controllers' Log Books, relating that to other information. If deemed necessary, speaking to Controllers/Service Control Manager;
 - Reading and dealing with relevant emails, meeting notes, letters and other relevant correspondence. Re-reading and collating the information;
 - Looking into any previous similar incidents/investigations.
- A final day would be used for finalising writing the report, agreeing on recommendations, attaching appendices and sharing with recipients.

75. It was suggested to Miss Tily in cross examination that the work done by Mr McGrath would not need to be duplicated. Miss Tily disagreed. She said: 'Mr McGrath had not started from the beginning like we would.' He had only investigated the circumstances of the two drivers who had complained. He has listened to a limited proportion of the possibly relevant calls and these would still need to be listened to by the claimants although some transcription might not need to be repeated. Miss Tily said in her evidence that she was careful not to underestimate how long the investigation would take after the experience she and Mr Libberton-Rowe had had in respect of the unfinished investigation of the Bond Street incident in 2018.

76. Mr Libberton-Rowe also said that the Bond Street investigation had caused them to be more realistic about their timings. He said that he and Miss Tily take pride in their investigations and tried to make sure that the reports were well thought out and clearly presented.
77. Mr Slade's evidence was that no such investigation should take more than two days unless it was so complex or represented such a risk that an FIR was required.
78. His comments on Miss Tily's account were as follows. Miss Tily's response in cross examination is interleaved in italics.
- Terms of reference should have taken no more than an hour especially as there was already a draft of the terms of reference;
The draft would need to be revised. Her estimate was based on experience of previous investigations. There would need to be discussion and agreement with Mr Libberton-Rowe.
 - Emailing drivers would have been more efficient or interviews could have been carried out by telephone;
There were nine potential drivers to speak to, not the two who had made complaints and were investigated by Mr McGrath. Not all drivers even have email addresses and they are not at desks. Emailing was less efficient for asking follow up questions.
 - He could not see why drivers from other lines would need to be spoken to, unless they had moved since the Night Tube incident
It might be relevant to look at what happened on the Piccadilly Line because it was the only other line with a planned suspension but it had not had the same issues. This might be relevant to an enquiry as to why the plan had changed and how the issues had arisen on the Central Line.
 - Train manager log books contain little relevant information so would not take a long time to read;
There was a large pile of log books which might have several pages each which were relevant.
 - He could not see what visiting sites would achieve;

They might want to take photographs to record the circumstances drivers found themselves in.

- Listening to and transcribing calls was time consuming but only relevant calls would need to be transcribed and audio files could form part of the report
- Service control log books are not detailed and staff could be spoken to by phone or email;
- Looking into previous incidents and investigations seemed beyond the scope of the investigation unless there was some obvious relationship.

79. Mr Slade's view was that both the Night Tube and Code Generator failure incidents could have been completed in two days total.
80. Mr Libberton-Rowe did not give detailed evidence about how long the Code Generator failure incident would have taken to investigate. He said that there would have been lots of calls for 20 – 25 trains and that the investigation would have been more than one day.

31 July 2019 incident

81. On 31 July 2019 there was an incident when a driver on a train approaching Leytonstone station leant on the glass in a door in the cab (the 'M door') and the glass came away from its fixings on three sides.
82. Miss Tily heard about the incident and wrote to Dale Smith, head of Central Line operations, on 4 August 2019 asking for an urgent fleet meeting to discuss the incident. She had a number of specific concerns including the fact that other drivers had not been warned about the potential issue with M doors until 6 and a half hours after the incident, that there had been no urgency checking the fleet, no duty of care evidenced to the driver concerned and no feedback as to what the issue was
83. Mr Smith replied on 5 August 2019. He said that when he knew about the incident he had arranged a check of rolling stock during engineering hours. The entire Central Line and Waterloo and City Line fleets were checked and

confirmed as safe to enter service. They believed it was an isolated incident but further investigations were being undertaken.

84. Miss Tily replied that day to say that her questions had not been answered and asking for a meeting as soon as possible.
85. Mr Curtis, the TOM from West Ruislip, who had been copied in to the correspondence, responded further on 6 August 2019 providing some additional information and suggesting the discussion be added to a meeting scheduled for 9 August 2019.
86. At that meeting, there was a discussion about the M doors; Mr Curtis said that he would be conducting a fact find.
87. On 3 September 2019, Miss Tily asked for an update and Mr Curtis replied on 9 September 2019 saying that an investigation by Fleet and SQE (apparently another name for HSE) was ongoing. On 13 September 2019 he wrote again explaining that the problem had been a mastic failure in ten new replacement doors which had been ordered. The other nine relevant doors had been tested. Miss Tily replied that day asking for additional information about the operational response to the incident. She remained concerned in particular about the time taken to inform drivers of the potential fault.
88. On 30 September 2019, Miss Tily wrote to Mr Harriss to say that she intended to carry out her own investigation with Mr Libberton-Rowe. The terms of reference would be based essentially on the unanswered questions. She asked for two days and said they would endeavour to complete the investigation in that time.
89. Mr Curtis wrote further to Miss Tily on 3 October 2019 but did not answer the questions she had asked in a satisfactory manner.
90. On 15 October 2019, Ms Tily and Mr Libberton-Rowe wrote to Mr Harriss chasing the release issue. Mr Harriss responded that day saying that the claimants should investigate during their existing release days and that he was happy to rearrange these so that they could work together.

91. Miss Tily's evidence about how the two days she proposed would have been spent was that:
- She would have to draw up terms of reference, methodology and the format of the report. She would then have to identify the information required and request it for management. Those tasks would take at least half a day.
 - 'Further: I would want to interview:
 - the Driver concerned;
 - the Driver who relieved them and took the train to the Hainault depot;
 - The Duty Reliability Manager that attended Leytonstone;
 - The Train Technician that attended Leytonstone
 - The remote Control Room Technician, since the West Ruislip TOM alluded to their involvement;
 - Relevant Service Controllers;
 - Any relevant Trains Manager/s;
 - Possibly other Drivers/ reps as witnesses.
- These would be face-to-face where possible and I would need to take notes. There would be some travelling involved in this.
- If I was not able to interview face to face, I would need to email with a list of questions and consider the responses.
- The above would take at least a day.
- I would need to listen to and transcribe Connect Radio calls, and observe Controllers' Log Books and possibly the Train Managers' Log Books. This would take half a day.'

92. We noted that Miss Tily had not included in her estimate any time for writing up the report. Although the initial proposal had been for Miss Tily and Mr Libberton-Rowe to carry out the investigation together, it appears that the claimants' case was that Miss Tily would have carried out the investigation herself. The reason for this was not articulated in evidence but we speculated that it may have been because this was the period when Mr Libberton-Rowe was preparing to relinquish his trade union duties as discussed below.

Mr Libberton-Rowe ceasing to be a safety representative

93. Mr Libberton-Rowe ceased being a safety representative in November 2019. He had been moved to an office-based role temporarily because of a depressive episode and a change of medication which meant he was unable to drive trains.

December meeting

94. On 18 December 2019, Mr Harriss met with Miss Tily and the new RMT safety representative to discuss Mr Slade's revised reports. Miss Tily said that she was not happy with the investigations. One issue was that the 'who when why' of the Night Tube incident happening in the first place had not been investigated.

Evidence of effect of refusals to grant further release for investigations on the claimants

95. Miss Tily said she felt stressed and frustrated by the refusals because she takes her role very seriously.
96. Mr Libberton-Rowe has a history of anxiety and depression. He gave evidence that he felt Mr Harriss had criticised him in Tier 1 meetings in relation to his handling of the Code Generator fault incident which caused him anxiety. He said that the refusal of release for investigations had caused him stress and he felt made him look like a poorly performing safety representative to his members. The refusal of release and the correspondence and 'fighting' around the issue made him feel embattled and contributed to him feeling that his work/life balance was poor. He did not allege that his depressive episode / change to medication which caused him to relinquish his health and safety role was solely caused by the release issue but said 'it didn't help' and he felt played a major part in his health issues. He did not produce any medical evidence.

Law

97. Safety representatives within the meaning of the Safety Representatives & Safety Committees Regulations 1997 have a list of functions under regulation 4(1) which includes, at regulation 4(1)(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'.
98. Under regulation 4(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' to carry out the functions set out in regulation 4(1).
99. An employee may present a complaint to an employment tribunal that an employer has failed to permit him to take time off in accordance with regulation 4(2): regulation 11(1)(a).

Remedy

100. Where a tribunal finds a complaint under regulation 11(1)(a) 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': regulation 11(3).
101. A tribunal has power under s 172 Trade Union and Labour Relations (Consolidation) Act 1992 , which is in similar terms to regulation 11(3), to award an appropriate sum as compensation to an individual union official for being deprived of time off for union duties in breach of section 168 even though no financial or other special loss is claimed or proved, though the principle remains compensation and not punishment: Skiggs v South West Trains Limited [2005] I.R.L.R. 459.

102. An award for injury to feelings is not available in a claim under regulation 11 of the 1977 Regulations: Rowe v LUL [2016] 10 WLUK 331, EAT (obiter).

Submissions

103. Both parties provided us with helpful written submissions and supplemented those submissions with oral submissions.

Conclusions

General findings relevant to all three incidents

104. There was a fundamental disagreement of principle between the claimants and Mr Harriss about the use of the monthly H & S release days. The claimants took the view that they could not be required to use these days to carry out their investigations under the 1977 Regulations. Mr Harriss took the view that they should use those days for such investigations.
105. We canvassed with the parties whether there was any legal impediment to the respondent asserting that time off provided in the form of H & S days should be utilised for investigations under regulation 4(1)(a). Mr Toms was not able to point to any such impediment. We concluded that there was no such impediment; the respondent was obliged to allow paid time off to do work which falls under the 1977 Regulations but was not obliged to allow time off for health and safety work not falling under the Regulations.
106. We concluded that the resultant question for us in relation to each proposed investigation was whether the time off allowed by the respondent, which would include any available time on H & S days not already taken up by duties under the 1977 Regulations, was sufficient to be the time 'necessary' to conduct that particular investigation.
107. We were not able, on the basis of the evidence we heard, to quantify the amount of time the claimants spent on their H & S days which amounted to

work under the Regulations. It appeared to us that at least some of that work *did* fall within the Regulations. Dealing with emails from employees no doubt included some work under regulation 4(1)(b) for example. The work of updating the bulletin board, on the other hand, was no doubt welcomed by Mr Libberton-Rowe's members but did not appear to us to be work which fell within regulation 4(1).

108. We considered that it was significant that the trains representatives alone were provided with these monthly release dates and that they were allocated to take place on a monthly basis spread throughout the year. The allocation of the days appeared to recognise that trains representatives would have regular work under the Regulations which they could not be expected to fit into their normal working day. That work might include work on investigations but it might include other work.

109. We therefore concluded that the claimants would regularly have had some work to do under the Regulations on each H & S release day, but they would also have some time which they spent on other health and safety work which was not work under the Regulations.

2 February 2019 incident: Night Tube

Issue: What time off was requested by Miss Tily and Mr Libberton- Rowe in respect of this incident?

110. The claimants asked for five working days each.

Issue: Did the time requested relate to functions falling within regulation 4(1)(a) and (b) of the Safety Representatives and Safety Committees Regulations 1977?

111. The respondent did not dispute that potential hazards were identified in relation to the temperature / access to facilities and to drivers driving outside parameters. The existence of a relevant potential hazard triggered the obligation on the respondent to allow paid time off to investigate. The issue

between the parties in this respect was the scope of the investigation which was necessary to investigate the potential hazard identified. Another way of conceptualising the issue would be to ask whether the potential hazard encompassed other Central Line drivers caught up in the Night Tube incident or only those who had made complaints.

112. We consider those matters in considering the next issue.

Issue: What time off was necessary?

113. Was the respondent correct to say that the potential hazard only encompassed the two drivers who had complained to management and the scope of the investigation should be limited to those two drivers? Miss Tily told us that she identified seven other trains that had been stopped in open sections of track.
114. It seemed to us that the potential hazard was not properly limited to the drivers who had complained. Other drivers had stopped on open platforms; it was unclear whether other drivers had worked outside parameters. It was necessary in order to assess the size of the problem to consider what had happened in relation to those other drivers and their experiences might have fed into the lessons to be learned from the incident.
115. How long was necessary to conduct an investigation of that scope? We considered what the claimants had said about each aspect of the investigation together with what the respondent's witnesses had said in reply. We bore in mind that the claimants had extensive experience in health and safety investigations and Mr Harriss and Mr Slade had no specific experience of those investigations. We bore in mind that Mr McGrath's limited investigation took 7 – 8 hours and that Mr Slade's review took 3 – 4 hours. We also took account of the fact that the claimants were being careful not to underestimate how much time they needed after the unfinished Bond Street investigation and we took the view that they were erring on the side of allowing a generous amount of time. We have done our best with the

evidence which we had, keeping in mind that the claimants' and respondent's own estimates of time would be 'best guesses'.

Terms of reference and methodology

116. We accepted that a day for these tasks seemed overstated, particularly in circumstances where there was already a draft terms of reference and methodology. We took the view that this was probably no more than a couple of hours work for each claimant.

Collating the evidence for the report

117. We have not commented on every aspect of the investigation but our relevant conclusions are as follows:

- We accepted that some interviewing could not sensibly be done by email or indeed by telephone and might most conveniently and effectively be done face-to-face.
- We accepted that there would be work to be done identifying the drivers involved. There might well be issues getting hold of individuals because of shift working.
- We could not see that site visits to take photographs of facilities were necessary.
- We did not accept that listening to and transcribing connect radio calls would only take as long as the length of the calls themselves. Transcription of audio files takes considerably longer to do accurately than the time taken to listen to the files.
- We were not persuaded that speaking with drivers from other lines was a necessary part of the investigation.
- We accepted that a reasonable amount of time would be required to read train manager log books and service control log books.
- It would take time to speak to service control personnel whether that was done by telephone or in person.
- We accepted that it would be necessary to speak to up to four train managers and that this could reasonably have taken two hours.

- We accepted that some use could have been made of the work already done by Mr McGrath but did not take the view that it would have saved the claimants a great deal of time given the more limited scope of his investigation.
 - We accepted that a day would be required to write up and finalise the report.
 - We considered that not all tasks would be required to be done by both claimants but that discussion and review between the two claimants would itself add some time to the tasks they did individually.
118. Our best assessment on the basis of the evidence we heard was that there was approximately five days of work to be split between the two claimants, which included one day for writing up, three days for investigation and a day for drafting terms of reference and methodology plus the time need for the claimants to review and discuss each other's work.
119. What the respondent offered in response to the claimant's request was that they could carry out the work in their existing release days and that these could be rearranged to allow the claimants to carry out the work together. In submissions, Ms Shepherd said that, by the time the request was made, the claimants had had a number of H & S release days .
120. We did not accept that the respondent's submission that it was appropriate to regard release days which were already in the past (but which post-dated the incident) as at the date the request was made as having been made available for the investigation. The claimants had wanted a collaborative investigation and only identified that they would have to do their own investigation when it became apparent that all they would be offered was an opportunity to review a management fact-find. It was appropriate to consider what time the respondent made available from the date of the request.
121. It was submitted by the respondent that the investigation was not urgent and could have been carried out on existing H & S release days over several months.

122. We gave careful consideration to that submission and ultimately rejected it, for several reasons. It seemed to us that it would be very inefficient to have to take up and continue an investigation which had been left for as much as a month at a time. There would be rereading and refamiliarising to be done and the overall time would be increased. Threads and contacts with individuals might be lost.
123. Even if a health and safety investigation is not perceived as urgent, it seemed to us that it was inappropriate for it to be spread out over unnecessarily long periods. If there were risks to be identified and lessons to be learned, there was a need for reasonable expedition. Furthermore, the longer the investigation took, the more memories could be expected to fade, in circumstances where there had already been delay whilst the respondent decided not to conduct a joint investigation.
124. In other words, we concluded that the concept of ‘necessary’ time relates not only to quantity but to the disposition of that time. To take an extreme example, an employer who told a health and safety representative: ‘You may have the time off to do this investigation, but you may take the time off in twelve months’, might well be failing to comply with its obligations under the Regulations.
125. Looking at the position when Mr Harriss told the claimants that they should conduct the investigation in their existing H & S days on 10 April 2019, the time being granted was something less than a day a month each, allowing for other work under the Regulations being carried out on those days. Even allowing for a modest increase in the overall time to be taken because the investigation would have to be put down and picked up again, it seemed to us that the investigation would have been spread out over a minimum of three and up to five months, assuming that no other investigations which the claimants were also required to carry out on their H & S release days materialised. We concluded that this was not the time which was ‘necessary’ under the Regulations.

126. It follows that in respect of the 2 February 2019 Night Tube incident the respondent breached regulation 4 of the 1977 Regulations in relation to both claimants.

31 March 2019 incident: Code generator failure

Issue: What time off was requested by Mr Libberton- Rowe in respect of this incident?

127. The respondent's submission was that Mr Libberton-Rowe did not make a request for time off for a regulation 4 investigation and therefore this claim must fail; in Mr Libberton-Rowe's email of 1 April 2019, he simply asked for time to consider what type of investigations the claimants would prefer to call for.

128. We did not accept that there was no request for time to do this investigation. The Tier 1 meeting minutes from 28 April 2019 record the claimants saying that they wished to carry out their own investigation and Mr Harriss responding that it should be done in the existing H & S release time.

129. It is however clear that the time requested was not quantified.

Issue: Did the time requested by Mr Libberton-Rowe relate to functions falling within regulation 4(1)(a) and (b) of the Safety Representatives and Safety Committees Regulations 1977?

130 Mr Libberton-Rowe identified that there was a potential hazard of a train moving into a section of track already occupied by another train. The respondent did not suggest to us that this was not a potential hazard, so regulation 4 was engaged.

Issues: If so, what time off was necessary? Did the respondent fail to allow the necessary time?

131. We take these two issues together because we did not have evidence before us which enabled us to determine how much time was necessary for this investigation. The respondent's evidence was that this investigation and the Night Tube investigation would together have taken two days. We did not accept the respondent's evidence in relation to the Night Tube investigation but, in the absence of clear evidence from Mr Libberton-Rowe as to how long the Code Generator failure investigation would have taken, we are not able to say that it is longer than would have been available to Mr Libberton-Rowe in a reasonably proximate H & S release day. We bore in mind that Mr McConnell took 7 – 8 hours to conduct his investigation and Mr Slade 3 – 4 hours to review that investigation, but we simply did not have any clear evidence as to whether any and if so how much time would have been saved by Mr Libberton-Rowe making use of Mr McConnell's investigation. We were therefore unable to conclude that the respondent failed to allow the time necessary under regulation 4.

31 July 2019 incident: M doors

Issue: What time off was requested by Miss Tily in respect of this incident?

132. Miss Tily requested two days release.

Issue: Did the time requested by Miss Tily relate to functions falling within regulation 4(1)(a) and (b) of the Safety Representatives and Safety Committees Regulations 1977?

133. It was not suggested by the respondent that the M door defect did not constitute a potential hazard so regulation 4 was engaged.

Issue: If so, what time off was necessary?

134. There was no detailed challenge in evidence to Miss Tily's account of how much time was required and, bearing in mind that she had not included writing up the report in her estimate of two days and looking at the work she

outlined, we considered that two days seemed a reasonable and proportionate estimate of how long this investigation would take. We rejected the respondent's submission that single day would have sufficed for the preliminary work, conducting the investigations and writing up the report.

135. We also rejected a submission by the respondent, which had not been canvassed in evidence, that because the driver who discovered the original M door fault was not a White City driver, no investigation by Miss Tily was required. Miss Tily's members were potentially affected by the defect and she was the health and safety representative who had chosen to pursue the issue.

Issue: Did the Respondent fail to allow the necessary time?

136. Again, the time allowed was the time already provided, ie such time on the H & S monthly release days as was not already taken up by work under the Regulations. For Miss Tily to complete the investigation on her own would have required at least three months of work in her existing release days. This did not appear us to be a timely and efficient way to conduct this investigation. A significant amount of time had already gone by, for reasons which were not Miss Tily's fault, by the time the request was made. The necessary time at this point was two full days provided at a point reasonably proximate to the request.
137. It follows that in respect of the 31 July 2019 M door incident, the respondent failed to allow Miss Tily the necessary time off in breach of Regulation 4 of the 1977 Regulations.

Remedy

138. We are obliged to and do make declarations in respect of the two breaches of the Regulations we have upheld.

139. We discussed with the parties during the hearing the possibility that it might be appropriate for us to hear further submissions on remedy, in particular as to whether awards of compensation should be made and, if so, in what amount, once we had made our liability findings. We concluded during our deliberations that that would be an appropriate course. The parties are invited to consider and agree between themselves whether they would like to make further submissions in writing or at a hearing and then write to the Tribunal with their proposals and dates to avoid up to March 2021, if they are requesting a hearing.

Employment Judge Joffe
London Central Region
09/12/2020

Sent to the parties on:
10/12/2020

For the Tribunals Office

ⁱ 1. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under rule 46. The parties agreed to the hearing being conducted in this way.

2. In accordance with Rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net.

3. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no material difficulties .

4. No requests were made by any members of the public to inspect any witness statements or for any other written materials before the tribunal.

5. We were satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.