

4. The participants were told that it is an offence to record the proceedings.
5. From a technical perspective, there were no major difficulties.
6. There was a bundle comprising of 1203 pages. Some additional documents were added during the hearing. Mrs Mankau and Mr Allen provided introductory skeleton arguments.
7. At the start of the hearing I referred counsel to a number of potentially relevant first instance employment tribunal decisions pertaining to health and safety claims in the context of Covid-19 but neither party subsequently sought to place any reliance on these cases.
8. Witness evidence was given by the Representative Claimants namely Marcos Augusto, Train Operator (Mr Augusto), David Hewitt, Train Operator (Mr Hewitt) and Carlos Barros, Train Operator (Mr Barros) and collectively hereafter referred to as the Representative Claimants. Witness evidence was given on behalf of the Respondent by Michael Smith, Head of Line Operations for the Piccadilly Line (Mr Smith), Emma Burton, Safety, Health and Environment Senior Business Partner (Ms Burton), Michael Graves, Trains Operations Manager (TOM) based at Acton Town, Piccadilly Line Depot (Mr Graves), Brendan Farrell, Trains Manager based at the Upminster Depot (Mr Farrell), Steven Manuel, TOM based at the Morden Depot (Mr Manuel) and Jamiu Akinwunmi, Trains Manager working at the booking on point at Action Town on the Piccadilly Line (Mr Akinwunmi).
9. The Respondent also produced a witness statement for Paul Murphy, TOM at the Barking Depot (Mr Murphy) but he was not called to give evidence.

The Issues to be determined

10. I had heard telephone case management hearings on 15 October 2020, 8 January 2021 and 9 June 2021. At these case management hearings, it was agreed that the generic issues in the case should be decided at a full hearing based on a selection of Representative Claimants (the Test Hearing).
11. As at 9 June 2021 there were a total of 59 claims. These claims were consolidated as a multiple at London Central notwithstanding that some claims had originally been allocated to London South and London East.
12. Prior to the Test Case various Claimants either withdrew their claims in their entirety or withdrew certain elements of their claims. 45 claims remain with 14 having been withdrawn or struck out. At pages 129-132 of the bundle there is a schedule setting out what is agreed to be an accurate list of the remaining Claimants to include the claim number, their home depot and the circumstances of danger relied on for the purposes of claims under s.44(1)(d) of the ERA.
13. In summary the case concerns the Claimants refusal to work on several days following 18 May 2020 and the consequential non payment of normal wages for those days. All Claimants are contending that they were subject to detriments under s.49 of the ERA comprising deductions from wages because of their nonattendance at work given their concerns regarding health and safety pertaining to Covid-19-19.

Agreed List of Issues

14. At pages 126-128 there is an agreed list of issues. In summary this states: All claims are brought under s.48(1) of the ERA.

15. In accordance with the guidance in Oudahar v Esporta Group Ltd EAT [2011] ICR 1406 the Tribunal should apply s.44 in two stages. I will set this out in more detail in the section summarising the relevant law.

16. There are specific issues between the parties as to whether particular concerns now relied upon were in fact raised by individual Claimants at the time (and therefore whether they reasonably believed at the time) but save in relation to the Representative Claimants those matters are not for determination at the Test Hearing and would have to be dealt with separately if individual claims proceed following the outcome of the Test Hearing.

Specific questions for the Tribunal to determine at the Test Hearing

17. Did the following amount to circumstances of danger?

- The risk of contracting Covid-19;
- Being required to take meal breaks at other depots (Mr Augusto);
- Being required to take meal breaks at other depots in circumstances where social distancing measures had not been implemented (Mr Hewitt);
- Being required to take meal breaks at depots where cohorting was not being practised (Mr Barros).

Mr Harrington and Mr Tozer

18. Mr Harrington and Mr Tozer were designated as Representative Claimants in the case of Mr Harrington for being required to take over a train from another Operator and for Mr Tozer walking through busy stations. However, no witness statement was produced for Mr Harrington and whilst an unsigned witness statement was produced for Mr Tozer on 19 October 2021 the Respondent was informed that he would not be attending the Tribunal to give evidence. On 20 October 2021 the Claimants' solicitor wrote to the Tribunal stating that Mr Harrington and Mr Tozer wished to withdraw the elements of their claims on which they had been identified as Representative Claimants.

19. In view of the above the Respondent invited the Tribunal to conclude that taking over a train from another Operator; and/or walking through busy stations did not amount to circumstances of danger; that the Claimants did not reasonably believe such danger to be serious and imminent and that they could reasonably have been expected to avert any such danger.

Findings of Fact

The Respondent

20. The Respondent is a wholly owned subsidiary of Transport for London (TfL) and is responsible for operating the London Underground Train Network. It employs approximately 17,000 employees.

21. The Respondent operates on a line by line basis and each line is divided into two separate functions, trains and stations. Each line has a Head of Line Operations who is responsible for the management of the train side of the line operations. The Head of Customer Services is responsible for everything related to the stations and the customer facing part of the business.

22. London Underground trains are operated by a Train Operator, also known as a Train Driver. The Respondent employs approximately 3,700 Train Operators. Train Operators all have a home depot. It is where they would ordinarily book on for their duties and book off when they have finished. Train Operators work on a single line.

23. There are 30 train depots on the network, with at least two on each major line. Each depot has a TOM who is responsible for the management of all Train Operators based at that depot and is their direct line manager. They are assisted by a number of Train Managers at each depot who work on a shift basis to cover the day to day management of the train service, such as the booking on and off of Train Operators around the clock.

Trade Union recognition

24. The Respondent recognises four Trade Unions. These are the National Union of Rail, Maritime and Transport Workers (RMT), the Affiliated Society of Locomotive Engineers and Fireman (ASLEF), the Transport Salaried Staff Association (TSSA) and Unite the Union (Unite) and collectively hereafter referred to as the Unions.

25. The arrangements the Respondent has for negotiating and consulting with the Unions about industrial relations issues are set out in a recognition agreement called the Machinery of Negotiation and Consultation.

26. In summary, there are three different levels of consultation with the Unions which in descending order comprise company wide issues which are dealt with by the London Underground Company Council (the Lucc or Company Council), the Functional Council of which there are eight different Councils covering different parts of the Respondent and then local representation by way of local level one meetings at each depot.

27. The above structure is replicated in separate arrangements for consulting with the Unions about health and safety matters.

Train operating arrangements

Normal train operations

28. The Respondent has a timetable data file which links in with the operation for signalling system for individual lines. A schedule involving separate numbered duties is then compiled for the Train Operators. There is then a roster for each depot.

29. Once a Train Operator gets on their train, they can operate for a maximum of 4 hours 15 minutes before taking a break or 5 hours and 15 minutes in total from the start of their shift.

30. Train Operators have a 30 minute meal break, also known as a meal relief. There is no obligation that they spend this time in any particular location and they are free to leave the meal relief depot.

31. Train Operators have a staggered start time. There is flexibility amongst Train Operators at a particular depot to swap shifts in what is known as the syndicate or the mafia.

Impact of Covid-19

32. The service was initially impacted by unprecedented levels of staff absence. There was also a very substantial reduction in the number of passengers dropping to a low of 5% of normal.

33. London Underground introduced an emergency timetable during the initial phase of the pandemic. Mr Smith explained that this was not really a timetable at all but involved running what were in effect shuttle services on individual lines. A by-product, but not an intended consequence, of the emergency timetable was that Train Operators would not take meal reliefs at foreign depots.

34. There is a dispute in the evidence as to whether Trains Operators worked, as the Respondent contends, substantially reduced hours during the emergency timetable. The Respondent says that many Train Operators would undertake a single rounder (in effect a trip from one end of the line to the other and back to the place of departure or a variant thereof) and then be released sometimes after as little as two and a half hours. The Representative Claimants strongly challenged this.

Restoration of the normal train service

35. It became apparent by the end of April 2020 that as a result of a need to minimise the possibility of overcrowding and in expectation of a gradual return to work from offices and other business premises that there would need to be a resumption of a more normal service. This involved significant planning and a series of meetings between the Respondent and the Unions.

Communications with employees and consultation with the Unions

36. A bulletin was sent by email to all employees advising them of an intended introduction of revised Covid-19 timetables and duty schedules. This was initially intended to start from 26 April 2020.

37. On 28 April 2020 there was an Ad Hoc Trains Functional Council Meeting with ASLEF and the RMT. This included consideration of booking on times and meal break issues.

38. There was a further Ad Hoc Trains Functional Council Meeting on 6 May 2020. This included consideration of meal reliefs at foreign depots. Mr Smith stated that he

understood the principal concern of the Staff Side was to reduce the number of meal reliefs at foreign depots.

39. The note of the meeting recorded that London Underground would revert to the pre-Covid-19 schedules from 17 May 2020. This was subsequently delayed until 18 May.

40. There was an Ad Hoc Trains H&S Council Meeting on 7 May 2020.

41. A 7 May 2020 bulletin to all staff stated that planning was underway with the aim of being able to ramp up the services quickly, safely and as sustainably as possible, where necessary.

42. There was a meeting of the LU & TLL Company Council and H&S Group on 7 May 2020. In the section entitled H&S management update reference was made to consideration being given as to what controls were needed to aid recovery and restart. Unite stated that there was not enough time to consider the implications of the proposed changes. The RMT said that there needed to be involvement of local H&S reps in reviewing risk assessments and CAPs.

43. Mr Smith says that the Unions always say that there is insufficient time. He acknowledges that London Underground were under considerable pressure from the Department of Transport to restore a more normal service as soon as possible. He says that this would not have been implemented had he and his colleagues considered that it would have given rise to unreasonable safety concerns.

44. The Respondent produced a document providing guidance for all Line Managers on managing through the Covid-19 outbreak dated 7 May 2020. This provided guidance that all employees are required to discuss their personal circumstances with their Line Manager and for those that need to be at home, the Line Manager would need to agree ongoing regular contact arrangements.

45. An employee communication of 11 May 2020 referred to the Prime Minister's announcement the previous day of the Government's road map for reopening society, emphasising that people should still continue to work from home if they could. The document referred to a progressive building of service levels. A figure of at least 70% on the tube network was stated.

46. There was a further Ad Hoc Trains H&S Council Meeting on 12 May 2020. Mr Smith is recorded as stating that he would like local reps to be involved and that he would ask TOMs to include them in this work.

47. ASLEF left the call at 13:07. Apparently, they were instructed to do so by their head office.

48. In the section entitled social distancing when booking on/social distancing and meal breaks/social distancing and travelling on the cushions the RMT expressed concern that some mess rooms and areas shared lines, or were also used by bus drivers and BTP and how could these additional numbers be safely managed.

Government guidance entitled Safer Transport; Guidance for Operators dated 12 May 2020

49. This includes at s.3:

“Where social distancing is not possible try to minimise, the time spent within two metres of others, and keep groups of workers in teams that are as small as possible (cohorting)”.

The UK Government’s Covid-19 recovery strategy May 2020

50. The Tribunal was referred to this document and specifically Annex A which includes:

“Reduce the number of people you spend time with in a work setting where you can, you can lower the risk of transmission in the workplace by reducing the number of people you come into contact regularly, which your employer can support where practical by changing shift patterns and rotas to match you with the same team each time as fitting people into smaller, contained teams”.

51. The Respondent says that this was not applicable to Train Operators as they spend the majority of their working days on their own and were not required to come into contact with a significant number of people at any time during their working days.

52. A bulletin to all employees of 12 May 2020 made reference to increasing the working timetables.

53. There was a further meeting of the LU H&S Group on 12 May 2020.

54. A bulletin to all employees of 14 May 2020 advised that starting on Monday 18 May 2020 the Respondent’s intention was to build up service levels and to start operating as much as possible of the pre Covid-19 working timetables. It went on to state:

“At the heart of our plans is your safety and that of our customers”.

55. On 15 May 2020 there was a further of the Ad Hoc Trains H&S Council Meeting. This included at s.14 of the meeting note the RMT raising concerns about plans to ramp up the service and saying that there was unease amongst Train Operators who would be using foreign depots for meal relief. They said the preference was to create cohorts.

56. A bulletin to all employees at 2148 on 15 May 2020 included a bullet point list of measures undertaken. Mr Augusto says that as far as he was concerned many of these measures had not been taken as at 18 May 2020.

57. A bulletin to employees at 1626 on 17 May 2020 referred to the intention that with effect from the following day LU would start building up service levels on the tube. Embedded within the bulletin was a link to the Change Assurance Plan (CAP). Also, via this link the risk assessment documents could be accessed. They were also available on the Respondent’s share point site.

Social Distancing Information Packs

58. A template document was prepared by the Respondent involving a series of check list questions regarding social distancing arrangements.

59. Information packs following a common template were prepared for individual depots. This included the statement that in conjunction with trade union and H&S reps that LU had assessed all available space and taken steps where necessary to promote social distancing.

60. The individual depot documents included photographs of available rooms for meal reliefs, some showing taped walkways or individually allocated spaces to maintain social distancing, a bar chart showing the number of people throughout the day on meal relief in the depot with a red line showing the maximum number at any one time and a maximum occupancy forecast together with a maximum available space.

61. Whilst the printed versions of these documents in the bundle are in some instances partially corrupted and are absent some of the photographs the Respondent produced evidence that the electronic versions disseminated on or about 18 May 2020 were fully intact and comprehensible. We accept this to have been the case.

62. At 17:37 on 17 May 2020 Mr Smith sent an email to heads of line operations providing supplementary information to assist managers taking staff through the refusal to work on the grounds of health and safety policy. The attachments comprised guidance measures adopted to reduce risk, a bulletin from Nick Dent, a RMT flyer referring to rear cab travel, and ASLEF flyer referring to rear cab travel, guidance – questions to consider for refusals to work and guidance – travelling between locations.

Refusal to work policy

63. The Respondent's document number S5547 concerns refusal to work on the grounds of health and safety. Section 3.2 applies to potential dangers affecting more than one location. Section 3.2.2 mirrors the statutory language in s.44 in that it refers to a "series and imminent danger".

64. Section 3.2.9 sets out the process to be followed where the existence of a serious and imminent danger is confirmed. Section 3.3.2 provides that pending completion of the investigation the following options apply:

- a) The employee shall undertake reasonable alternative work within the workplace until the end of the working day/shift.
- b) The employee shall undertake reasonable alternative work at another designated location/workplace until the end of the working day/shift.
- c) The employee shall remain at the workplace, or other designated location/workplace until the end of the working day/shift.
- d) The employee shall be sent home.

The Claimants

65. Given that the Tribunal needs to apply a subjective as well an objective test it is necessary to set out the particular circumstances of the Representative Claimants.

Mr Augusto

66. He has been employed as a Train Operator since 6 October 2014. He is based at the Morden depot (Morden). He is a member of ASLEF.

67. During the emergency timetable he had all of his meal reliefs at Morden. He says that there was in effect a cohort or bubble comprising of those Train Operators who had Morden as their home depot.

68. He was concerned that with the change from the emergency service to a more normal level of service with effect from 18 May 2020 that he would be required to have his meal reliefs at foreign depots namely Golders Green and High Barnet. He was concerned that the canteen at Golders Green is shared with Alstom staff, bus drivers and British Transport Police (BTP) officers.

69. He was not originally rostered to work on Monday 18 May 2020 but swapped his shift with another Train Operator pursuant to the local syndicate.

70. On 18 May 2020 his scheduled duty was roster 604 from 04:54am to 13:20pm.

71. At 5:38am his train departed from Morden and arrived at High Barnet at 6:47. He then left High Barnet at 6:55 arriving back at Morden at 8:03.

72. Mr Augusto says that he was surprised and concerned to see that his next driving duty would be to depart from Morden at 8:16 and arriving at Golders Green at 9:12 where he would then take a meal relief. He was unwilling to have his meal relief at a foreign depot.

73. Mr Augusto was asked by the DRM if he was refusing to work to which he replied that he was not, but he would like his meal relief at Morden. He then spoke with Andy Boylet, Train Manager at Morden, who told him he had to fill out some paperwork and then speak to Mr Manuel. He was given some paperwork to read by Mr Manuel. He had two interviews with Mr Manuel.

74. Mr Augusto says that he brings his own lunch which he eats at a depot during his meal relief. Whilst he normally stays in the canteen during his meal relief there are some occasions where he would leave the premises to run errands, e.g. visit the post office. He says that whilst the majority of Train Operators remain in the canteen approximately 20% go to local cafes.

75. A document entitled refusal to work on the grounds of safety was signed by the Claimant and Mr Manuel at 9am on 18 May 2020. Mr Augusto disputes that this took place by 9am and says that it was later. The document recorded that Mr Augusto believes that there was an increased risk of him catching Covid-19 and thereby affecting his family. Mr Manuel informed him that he was not in serious and imminent danger.

76. Mr Manuel then presented Mr Augusto with a standard letter entitled "continued refusal to work". This included:

"As result of your actions you are considered to be making yourself unavailable for work and as a consequence, normal pay is at risk".

77. Mr Augusto says that it was not until 12:20pm on 18 May 2020 that he left Morden. He says that he had to wait an hour to be called by Mr Manuel and then had two separate interviews of 20 minutes each.

78. In a letter to Margaret Waite, Head of Line Operations on the Northern Line, dated 10 June 2020 Mr Augusto complained that £145.53 had been deducted from his pay on 18 May 2020 as a result of his concerns about the risks of exposure to Covid-19 during the course of his duties. He claimed to have been subject to a detriment in breach of his statutory rights.

79. Mr Augusto raised a grievance about the deduction from his wages on 10 June 2020. Following a grievance hearing on 23 July 2020 the outcome that his grievance was not upheld was sent to him on 11 September 2020. He appealed the decision and following a hearing on 9 November 2020 was informed that his appeal had not been upheld in a letter dated 20 November 2020. It is not necessary to set out the details of the grievance, the hearings and the appeal and outcome as in effect they replicate the issues to be determined by the Tribunal and the issues to be determined represent those in the period 18 May 2020 to 23 May 2020.

80. Whilst he did not dispute the reversion to the normal timetable, he considered it to be rushed.

81. He did not have an issue with meal reliefs at High Barnet but solely Golders Green. He says that High Barnet was restricted to Train Operators whilst at Golders Green there were also bus drivers and BTP.

82. He did not consider the option of having his meal relief on the disused station platform at Golders Green to be a satisfactory option. He said that it was open to the elements albeit from the photo provided there is evidence of a roof. Further, it is not disputed that the weather between 18-23 May 2020 was warm, dry and sunny.

Mr Hewitt

83. Mr Hewitt is a Train Operator based at Morden. He is also the local health and safety representative for the RMT at Morden.

84. He was concerned that with the return to the normal timetable with effect from 18 May 2020 he would have to travel to other depots on the cushions (this means travelling within the train carriages with passengers), having to take over trains which have been driven by another Train Operators without time to air the cab, "hot seating" in foreign canteens (by this he meant sitting in a seat which had recently been occupied without full cleaning being undertaken) and rear cab travel whilst moving between stations. However, the only issue we need to determine is that concerning meal reliefs in foreign depots.

85. His concern regarding meal reliefs at Golders Green particularly involved the presence of bus drivers.

86. He says that he has a severely autistic son with immune deficiency issues. He was self evidently concerned to minimise any risk of his son being infected with Covid-19.

87. He says that on refusing to do a journey involving meal relief at Golders Green on 18 May 2020 he had to wait for nearly four hours to be interviewed. He says whilst waiting he was in an overcrowded canteen with other Train Operators.

88. Mr Manuel advised him that there was no higher risk than there would be having his meal relief at Morden. Mr Manuel handed him the standard continuing to refuse to work letter

89. On arriving at work on 19 May 2020 and was advised that he would have to have a meal relief at Golders Green. Again, he refused.

90. On 20 May 2020 he was offered a staff taxi from East Finchley to High Barnet. He worked normally this day and thereafter.

91. He raised a grievance about the deduction of his wages on 30 May 2020. A grievance hearing took place on 28 May 2020 and again on 22 June 2020. He was informed that his grievance had been rejected on 26 August 2020. He appealed the decision in a letter dated 31 August 2020 and there was an appeal hearing on 9 October 2020. His appeal was not upheld and he was advised of this in a letter dated 6 January 2021.

92. Mr Hewitt is adamant that leaving the canteen during his meal relief would be wholly unacceptable. He says that there is wi-fi in the canteen. He says that he needs to return to the cafeteria at the end of the meal relief to hear the tannoy regarding any train reformations.

93. He says that he likes warm food. He does not regard the option of bringing his own food as acceptable as it would get hot and deteriorate in the cab. He says that it is not possible to take hot food out of the canteen.

94. He denies encouraging other Train Operators at Morden to refuse.

95. He was not paid for 18-19 May 2020 which totals £290. He worked on 20 May 2020 under duress and says he has continued to work under duress. .

Mr Barros

96. Mr Barros is a Train Operator/Instructor Operator and Health and Safety Representative based at the Acton Town Depot (Acton Town). With a return to a more normal service with effect from 18 May 2020 he was concerned that he may have to take his meal relief at foreign depots but also that there would be a higher occupancy rate at Acton Town.

97. He says his partner has severe asthma and a compromised immune system and that his son has severe asthma. As a result, he was particularly concerned about his potentially contracting Covid-19 and then infecting his family members.

98. He said that during the initial period of the pandemic he would have his lunch in his car in the car park at Acton Town. This would not be an option if he was required to take his meal relief at a foreign depot.

99. On 19 May 2020 he attended work at around 16:00 for a late shift. He claims that the return to a more normal timetable would increase interactions during meal reliefs at Acton Town tenfold. However, the figures the Tribunal saw did not support this assertion and Mr Barros conceded that it may have been an exaggeration.

100. In a memo of 19 May 2020 to the Acton Transport Manager Mr Barros raised a series of concerns regarding Covid-19 related safety measures. He complains that there were no specific answers to these questions. Mr Graves says that most of the questions have been given generic answers in the documents provided to Mr Barros on his immediate refusal to work.

101. Mr Barros was not scheduled to work on 20 May 2020 and returned to work on 21 May 2020 but as a result of not having answers to the various questions he had raised he again refused to work.

102. Mr Akinwunmi held an interview with Mr Barros on 21 May 2020. Mr Barros said that he had expected and hoped that his safety concerns would have been addressed and complained that he had merely received a general response and had been refused sight of various risk assessments. He requested alternative work which allowed him to remain safe. Mr Akinwunmi said that this would not be possible and advised him that a continuing refusal to work would put his normal pay at risk.

103. He returned to work normally on 24 May 2020 notwithstanding his concerns not being fully addressed.

104. There is no canteen at Acton Town just vending machines. There is a Sainsburys, but it is approximately 700 to 800 metres away.

105. The bundle contained an extensive chain of WhatsApp messages from groups of Train Operators including Mr Barros. These were disclosed by Mr Barros on a piecemeal basis.

106. On 23 May 2020 Mr Barros completed a handwritten document setting out his refusal to work on the grounds of safety and commenting that after three days he had still not received the information in response to the questions he had raised. He said that he was prepared to work under certain circumstances.

107. He was not paid for 19, 21, 22 and 23 May 2020. On these days he would have had his meal relief at Acton Town save for 22 May when it would have been at Northfields.

108. He attended a meeting on 28 May 2020 with Mr Graves in which he asked to reduce his hours to work flexibly. In effect this would involve limiting his driving hours to 4 hours 15 minutes and thereby avoiding any possibility of being required to have his meal relief at a foreign depot. Under the Professional Train Operators' Agreement (PTOA) a change to normal working arrangements can continue to up to 90 days but reviewed at 30 days intervals. Any such arrangement would have meant him retaining his full salary. This request was rejected by the Respondent.

109. On 28 May 2020 he attended a meeting with Mr Graves in which his request for POTA working was considered. He suggested working 4 hour 15 minute shifts without taking a meal break.

110. In a letter dated 29 May 2020 following the flexible working request meeting Mr Graves asked him to provide medical evidence that his partner and son were shielding as a result of their vulnerable status. He did not provide this documentation.

111. Following Mr Graves' decision not to allow him PTOA he went on sick leave with stress until 12 July 2020.

112. Mr Barros raised a grievance about the deduction from his wages on 15 June 2020. He attended a hearing on 29 July 2020 and was advised that his grievance had been rejected in a letter dated 15 September 2020. He appealed this decision and an appeal meeting took place on 6 October 2020. He was notified that his appeal was not upheld in a letter dated 19 November 2020.

Train Operator availability 17-24 May 2020

113. We were shown a document setting out on a line by line and depot by depot basis the required number of Train Operators, the number absent and the number refusing on the days between 17 May and 24 May 2020.

114. On 18 May 2020, 2052 were required, 885 were absent and 48 refusing to work. 24 of these were based at Morden and 1 at Acton.

115. On 19 May 2020, there were 40 refusals with 13 at Morden and 3 at Acton.

116. On 20 May 2020, there were 12 refusals with 3 at Morden and 1 at Acton.

117. On 21 May 2020, there were 6 refusals with 1 at Morden and 4 at Acton.

118. On 22 May 2020, there were 3 refusals all at Acton.

119. On 23 May 2020, there were 2 refusals both at Acton.

120. On 24 May 2020, there were no refusals across the network.

121. There were no refusals beyond 23 May 2020. Whilst speculative the Respondent's position is that if a Train Operator had continued to refuse there may then have been exploration as to what alternative non driving duties they may be required to undertake. However, this situation did not arise in practice.

122. Those Train Operators who initially refused, but then agreed to resume duties before the end of a working day were paid in full. At the point that their concerns were assuaged they would then potentially be available for some driving activity that day. However, the Respondent's position was that until a Train Operator unconditionally relinquished their refusal to work that they would not be assigned alternative driving duties which would negate any possibility of being required to take their meal relief at a foreign depot.

Mr Smith's evidence

123. Mr Smith suggested that the Unions had been at least in part resistant to the resumption of normal timetables as a result of a wish to minimise the number of working hours for Trains Operators or at least the number of days upon which there would be

required to work. He is of the view that this was their primary concern rather than health and safety.

124. He says that the resumption of normal work did not constitute a timetable change requiring a 28 day notice of implementation but rather a return to normal, or more normal, train operating in accordance with the pre pandemic timetable.

125. He says that there was significant political pressure to increase train operations. In response to a question from the Tribunal he said that whilst a gun was not being held to the head of LU that it was being waived in their direction. Nevertheless, he emphasised that there would have been no return to a more normal service level if there had been serious health and safety concerns.

126. He says that he and a team of 15 to 20 employees spent several weeks more or less exclusively engaged in the process leading to the resumption of normal service, to include mitigating health and safety measures, consultation with the Unions, the production of individual depot documents and the cascading of these materials to employees.

127. He says that cohorting was not applicable to Train Operators. They are not a group, such as maintenance operatives or health and safety responders, who would need to work in a cohort or bubble given that they work alone for the majority of their working day. We accept this position.

128. Mr Smith says that he perceived that the relatively high number of refusals at Morden was linked to a higher union influence than elsewhere.

Ms Burton's evidence

129. In relation to meal reliefs she says that as long as appropriate social distancing measures were in place at each depot, having a meal relief at a different depot should not result in an increased risk of exposure to Covid-19.

The Law

The ERA

130. Section 44(1) of the ERA provides:

An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that –

- (d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work.

131. In accordance with the guidance in Oudahar we need to apply s.44 in two stages.

Stage One

132. At Stage One, the Claimants must satisfy the Tribunal on the balance of probabilities that the following elements of s.44(1)(d) are established:

- (a) That circumstances of danger existed (an objective test);
- (b) Which the employee reasonably believed to be serious and imminent. This involves both a subjective and objective test;
- (c) Which he could not reasonably have been expected to avert; and
- (d) That he left (or proposed to leave) or (whilst the danger persisted) refused to return to his place of work or any dangerous part of his place of work.

133. The Respondent accepts that contracting Covid-19 could be “serious”.

Stage Two

134. At Stage Two if the Claimants succeed in establishing the reason for refusal to work, the Respondent has the burden under s.48(2) of demonstrating that the principal reason for the detriment was not that the Claimant refused to work on health and safety grounds. The Respondent accepts that this has no application in this case if the elements at Stage One are made out.

135. Mrs Mankau says that in considering whether the Representative Claimants’ belief was reasonable the following (non exhaustive) factor should be taken into account:

- a) The nature of the factual scenarios relied upon by the Claimants;
- b) The personal circumstances of the Claimants;
- c) The information available to them at the time;
- d) Whether there was any reason to question any assurances given to them by the Respondent;
- e) The Government/Public Health Advice in force at that time; and
- f) The nature of the virus and potential consequences of contracting it.

Submissions

136. Mr Allen produced detailed written submissions which represented an expanded version of his opening submissions. Mrs Mankau made oral submissions. Whilst it is unnecessary to summarise the submissions it is relevant to highlight the following points made in the respective submissions.

Respondent

137. That it is not about whether the employer acted reasonable or potentially breached the implied term of trust and confidence. The focus is on the reasonableness of the employees’ behaviour.

138. Mr Allen says that in terms of causation there were potentially alternative reasons for the actions of the Representative Claimants and he referred specifically in the case of Mr Hewitt to what he characterised as “political” reasons and in the case of Mr Barros as gleaned from the chain of WhatsApp communications “more strategic/political” motivations.

139. He says that as a Test Hearing the position in respect of the matters relied on for the purposes of s.44 needed to be determined generically rather than with reference to the specific individual circumstances of the Representative Claimants and specifically that of their allegedly vulnerable family members.

140. He says that part performance is not performance relying on Miles v Wakefield MDC [1987] ICR 368. Mrs Mankau does not dispute this.

141. He says that if the Respondent reintroduced the normal timetable in “haste” it had a good reason to do so given that the necessity of responding to the Government’s announcement on 10 May 2020 and that of the Department of Transport on 12 May 2020 concerning the easing of lockdown restrictions and that those who could not work from home should return to their work premises.

142. He rejects the suggestion that the Representative Claimants were taken by surprise by the resumption of the normal timetable. He points to documents circulated to employees indicating that this was the Respondent’s intention.

Representative Claimants

143. Mrs Mankau disputes Mr Allen’s reliance on the Representative Claimants’ ultimate return to work as being key. She referred to the Representative Claimants assuming the risk thereafter.

144. She says that the word “imminent” should not be interpreted too restrictively. She says being required to take meal relief on a given day at a foreign depot gave rise to a potentially imminent risk. She says that the damage would already have been done once the Train Operator was within the foreign depot. She disputes that there was any obligation on individual Train Operators to check the situation out at the foreign depot before refusing to work.

145. Whilst the parties have asked the Tribunal to reach conclusions as to the issues raised by Mr Tozer and Mr Harrington, she acknowledges she is not able to rely on any evidence as to their concerns.

Judicial Notice

146. I raised with the parties matters in respect of which the Tribunal may give judicial notice. In response to potential issues raised Mr Allen advised as follows:

- (a) Supermarkets and shops were all open by mid-May 2020.
- (b) The daily Covid-19 death figure on 15 May 2020 was 384 and the seven day rolling average circa 400.

Conclusions

147. The parties were in agreement as to the questions the Tribunal needed to address in accordance with the guidance in Oudahar. In reaching our conclusions we considered that the circumstances of Mr Augusto, Mr Hewitt and Mr Barros were in all material respects identical in that they all involved being required to take meal breaks at foreign depots. Whilst Mr Hewitt referred to social distancing measures not having been

implemented this in effect represents one of the reasons common to all of the Representative Claimants. It is therefore not specific to Mr Hewitt. Further, Mr Barros' reference to cohorting not being practised at the foreign depots also in effect represents part of the generic reasons as to why the Representative Claimants had concerns about taking their meal reliefs at foreign depots.

Stage One

Did "circumstances of danger" exist (an objective test)?

148. The Respondent concedes that contracting Covid-19 would constitute a circumstance of danger. We consider that a circumstance of danger potentially existed in that Train Operators having their meal reliefs at foreign depots would potentially be exposed to an additional risk of contracting Covid-19 because of increased interaction with Train Operators outside their cohort and third parties e.g. bus drivers, BTP, maintenance contractors etc.

149. In reaching this conclusion we looked at the position as it existed in the relevant period between 18 May and 23 May 2020 when there was a generally heightened level of anxiety about the risk of contracting Covid-19. There was mandatory Government guidance regarding measures to avoid, or minimise, the extent of contact with non family members. It is in these circumstances that we consider that potential exposure to additional social interactions objectively constituted a circumstance of danger.

Which the employee reasonably believed to be serious and imminent

Subjective belief of the Representative Claimants

150. This involves both a subjective i.e. the employee must believe it; and an objective element i.e. it must be a reasonable belief.

151. We have no doubt that the Representative Claimants had a subjective belief that circumstances of danger which they believed to be serious and imminent existed. In reaching this decision we have focused on their perception of danger to them as individuals rather than the potential vulnerability of their family members as in the cases of Mr Barros and Mr Hewitt.

152. The reversion from the emergency timetable to the normal timetable, which we resulted in a necessity of some meal reliefs being taken at foreign depots, undoubtedly represented a significant change for the Train Operators. It would no longer be possible for them to limit their in person contact to those taking meal reliefs at their home depot. We also accept that there was an initial subjective degree of uncertainty and concern amongst the Representative Claimants as to the adequacy of social distancing measures being implemented by the Respondent. This in part arose as result of the haste with which the reversion to a normal timetable was being undertaken.

Which was objectively reasonable

153. A more difficult question for us was whether the Representative Claimants' concerns were objectively reasonable. After careful deliberation we found that they were and did so for the following reasons:

- (a) Whilst the Respondent clearly had a legitimate, and in effect mandatory, obligation to reintroduce a normal timetable we nevertheless consider that the process was in some respects unduly hasty. Even a relatively limited deferral of the resumption of a normal timetable, by for example a matter of days, would have provided greater opportunity for collective consultation and perhaps more significantly individual consultation and discussion with concerned Train Operators. For example, a small additional time window would have provided an opportunity for the information packs, which were presented to those Train Operators refusing to undertake shifts involving meal reliefs at foreign depots, to have been provided in advance and questions then answered in response to concerns raised. In effect what happened was that Train Operators came into work on 18 May 2020 and encountered a defacto position that they were required to revert to the normal timetable and then only if they had such heightened concerns that they were unwilling to undertake their normal duties were they provided with the reassurance information packs.
- (b) That the Respondent did not give consideration as to the full application of its refusal to work policy and whether the steps as outlined in s.3.2 (and particularly s.3.2.9 and s.3.3.2) should have been followed.
- (c) That the reassurance documents were only provided to Train Operators on a piecemeal basis and specifically the social distancing documents referable to individual depots were provided belatedly.

154. We took account of the fact that the overwhelming majority of Train Operators continued to work normally on the resumption of the standard timetable. Nevertheless, it is apparent that there were concerns raised by the Unions, and albeit small in percentage terms, nevertheless not insignificant in actual numbers of Train Operators who expressed concern. Whilst it is apparent that many of the initial refusals subsequently relented on the first day once they had been provided with the information packs, and all of the refusals had relented by 24 May 2020, it is nevertheless necessary for us to consider the position as it existed in the period 18 until 23 May 2020. For the reasons set out above we consider that the concerns of the Representative Claimants in this period were objectively reasonable.

Which he could not reasonably have averted (an objective test)

155. We find that the Representative Claimants could all have been reasonably expected to avert the danger. We reach this finding for the following reasons:

- (a) That having a meal relief, whilst incidental to the working day, does not form part of the core duties.
- (b) That there is no obligation on Train Operators to have their meal relief within the depot. Approximately 20% of Train Operators do not do so. We do not accept that health and safety would be compromised by Train Operators having their meal relief outside the canteen.
- (c) We consider that in circumstances where a Train Operator perceived that the canteen gave rise to a circumstance of danger it would have been entirely reasonable for them to have averted that danger by having their lunch outside

the canteen. This could, for example, have involved purchasing food from the canteen but then eating it in one of the other available rooms at the depot, taking food to eat on the seats on the disused platform at Golders Green, bringing their own lunches and eating them on an external bench or finding somewhere to sit and eat outside the depot or purchasing food from a nearby supermarket or takeaway.

- (d) Whilst we acknowledge that this may not have been an individual Train Operator's preference, or normal practice, nevertheless the circumstances were wholly exceptional. It was at a time when the majority of the population, both in their personal and working lives, were having to, or choosing to, change their normal routines. In this context having a meal relief outside the canteen would have been a relatively minor step to take and one which we consider would have been entirely reasonable. In reaching this decision we give notice to the fact that a substantial proportion of those required to attend work premises at this stage of the pandemic would not have been able to eat their lunches in a canteen or café and many would have been left with no alternative than to bring their own lunches or purchase lunches from supermarkets to eat on park benches or elsewhere.
- (e) We also consider it relevant that this would have been for a short period of time. The Representative Claimants all said that after their initial refusals they returned to using the facilities within foreign depots, to include the canteens, once they had satisfied themselves that the level of risk was not as great as they initially feared.
- (f) Whilst we acknowledge that the Representative Claimants would almost certainly have been required to use the toilet facilities at foreign depots we consider that this in itself would not have been a sufficiently serious and imminent danger to provide potential protection under s. 44(1)(d) of the ERA.
- (g) We find that it would have been reasonable for the Train Operators to travel to the foreign depot at which they were required to take their meal relief and assess from the window or doorway as to whether they considered adequate social distancing measures were in place. If on arriving they perceived that the premises were overly crowded with inadequate social distancing that danger could have been averted by having lunch outside the canteen. Further, they could have reported their concerns to the depot's TOM. They did not do so but rather immediately refused to perform that part of their working day which would have involved a foreign depot meal relief or in some instances to perform any duties at all on the day or days in question.
- (h) We find that the Representative Claimants adopted an intransigent approach regarding the grounds for their objections. Whilst we have found that their overall concerns regarding serious and imminent danger were subjectively and objectively reasonable we nevertheless find that some of the reasons why they could not avert the danger were unreasonable. For example Mr Hewitt saying that he liked to log on to the WIFI over his meal relief and that it would not be possible for him to take a hot meal to eat on the disused platform because he might burn his legs (we accept the evidence that trays were available). Mr Hewitt says it was not permitted to take food outside the canteen in circumstances where there was no evidence that he asked to do so or that the Respondent would have refused such a reasonable request. We also consider that the Representative

Claimants concern regarding their being stopped by the police if they were walking outside the depot to be unreflective of the position as it existed at that time. Whilst police guidance was that people should not be making unnecessary journeys it certainly did not extend to preventing people from visiting shops and taking a walk during their working day.

156. A more general factor we took into account was the position of the Representative Claimants compared with workers within the wider economy during the material time period. We considered it significant that a relatively small proportion of the Representative Claimants' working day comprised a meal relief and further it was not a part of the day when they were compelled to be in close proximity to other people. There was an obvious means of averting any concerns in this respect by not spending their meal relief in the canteen. This contrasts significantly with the position of millions of key workers during the pandemic, for example those in the NHS, Care Homes and the Emergency Services who would have no means of avoiding exposure to multiple other people for the entirety of their working days. Many such workers would undoubtedly have had serious concerns but no means of taking reasonable steps to avert them. This contrasted with the position of the Representative Claimants. This is relevant in our consideration as to whether the danger could reasonably have been averted.

Mr Harrington and Mr Tozer

157. Given that no evidence was presented that taking over a train from another driver and walking through busy stations gave rise to circumstances of serious and imminent danger, we find that these concerns are not made out and therefore these claims fail.

Overall Conclusion

158. Therefore, in these circumstances we find that the claims of the Representative Claimants under s.44(1)(d) of the ERA fail. Given that all of the required limbs under s.44(1)(d) are not satisfied the Representative Claimants are not able to establish that the detriment relied on i.e. not receiving full pay for the days in question, is made out. Given that the claim is solely predicated on s.44(1)(d) we do not need to consider whether the Representative Claimants were subject to an unauthorised deduction from their wages under s.13 of the ERA.

159. Attached to this Judgment is a Schedule of the Claimants within the multiple and the individual case numbers.

Employment Judge Nicolle

7 November 2021

Sent to the parties on:

08/11/2021.

For the Tribunal: