EMPLOYMENT TRIBUNALS

Claimants	**Respondent**
v	
Ms M Balbas Brigido (C1) Mr K Mbeki (C4)	London Underground Limited

Heard at: **London Central Employment Tribunal**

On: **18-22 September 2023**

Before: **EJ Webster**
Ms Marshall
Mr de Chaumont-Rambert

Appearances
For the Claimants: **In person**
For the Respondent: **Ms Urquhart (Counsel)**

JUDGMENT

1. The Claimants' claims for breaches of Regulations 5 and 7 1977 of Health and Safety Representatives and Safety Committee Regulations are not upheld.

2. The Claimants' claims for breach of s2(6) Health and Safety at Work Act 1974 are not upheld.

3. The Claimants are ordered to pay the Respondent's Costs as follows:

   Mr Mbeki is to pay the Respondent £3,000.

   Ms Balbas Brigido is to pay the Respondent £4,000.

Note: Reasons for the Costs decision having been given orally at the hearing, written reasons will not be provided unless a written request is received from either party within 14 days of the sending of this record of the decision.

The Respondents sought Written Reasons in respect of the liability decision only.

WRITTEN REASONS

The Hearing

4. The hearing took place in person at London Central ET. On the first day it was indicated by the parties that the second and third respondents had withdrawn their claims. The Tribunal asked for that to be confirmed in writing by the individual Claimants. An email was subsequently sent and a separate Dismissal Judgment has been issued for them.

5. The fourth Claimant did not attend on the first day. No explanation for that was provided other than that he did not think he needed to. We obtained written authority from him confirming that he authorised the First Respondent to speak on his behalf and the Tribunal decided it was appropriate to continue with the hearing as he was not due to give evidence that day. He attended for the rest of the hearing.

6. When discussing the List of Issues with the parties it became apparent that the Claimants believed that a 'failure to consult' claim had also been issued. The List of Issues did not reflect that but the ET1 did. The Respondent accepted that this was clear on the face of the ET1 and they were not disadvantaged by the addition and therefore this claim was added to the list of issues. That is reflected in the list below. The Claimants also confirmed that they did not consider that Regulation 6 of the SRSC Regulations 1977 had been breached and that is also reflected in the List of Issues.

7. We had additional documents provided by both parties which were added by consent and therefore the bundle numbered 402 pages – of which we were taken to relatively little.

8. We had written witness statements for the following:

   (i) Ms Balbas Brigido (C1)
   (ii) Mr K Mbeki (C4)
   (iii) Mr J Linley
   (iv) Mr D Bhardwa
   (v) Mr D Smith
   (vi) Mr N Dent

9. All were available to give oral evidence.

10. Evidence and submissions were completed by the end of day 3, the Tribunal deliberated on Day 4 and Judgment was delivered orally on Day 5.

11. After the Judgment had been delivered the Respondent applied for its costs.

12. The Respondent asked for written reasons in respect of the liability decision only.

The Issues

13. As referenced above these issues had been decided on agreement between the parties at a Case Management discussion on 5 December 2022. This was then clarified and agreed with the parties at the start of the hearing and the fourth issue was added.

14. Safety Representatives and Safety Committee Regulations 1977

14.1 Did the respondent fail to permit the claimants to take such time off with pay during their working hours as was necessary for the purposes of performing their function of carrying out inspections of the workplace in accordance with Regulations 5 and 7 of the 1977 Regulations, contrary to Regulation 4(2)? The dates when these alleged failures occurred were July and October 2022 in respect of the inspections of both depots and uniform stores and hubs.

14.2 Did the respondent fail to provide the claimants with such facilities as they reasonably required under Regulation 5(3) of the 1977 Regulations? The facilities they say they required were paid travelling time to the workplaces for inspection during the July and October 2022 inspections.

14.3 Did the respondent fail to allow inspection and copying of documents by the claimants which documents fall within the meaning of Regulation 7(1) of the 1977 Regulations? The documents the claimants wished to see were an agreement from 2015 between staff side and management side about release for inspections. There is an issue as to whether these are documents which the respondent was required to keep by virtue of any relevant statutory provision. The requests were made:

(i) On 31 January 2022, during an ad hoc heath and safety meeting;
(ii) At a quarter 1 heath and safety council in March 2022;
(iii) Before and after a tier 2 ad hoc directors' meeting on 6 April 2022;
(iv) In a health and safety forum on 9 June 2022.

14.4 Did the Respondent fail to comply with its obligation to consult with the relevant representatives in breach of Health and Safety at Work Act 1974 s 2(6) in that they:

(i) Failed to consult regarding the reduction in frequency of the inspections
(ii) Failed to consult regarding the reduction in time allowed to do the inspections
(iii) Failure to follow a proper procedure/process in respect of changing an existing agreement (namely the 2015 agreement)

15. Remedy

15.1 What declarations must the Tribunal make under Regulation 11(2)?

15.2 Would it be just and equitable to award the claimants any compensation under Regulation 11(2), and, if so, in what amount?

The Law

16. Health and Safety at Work etc. Act 1974 c. 37

s. 2 General duties of employers to their employees.

2.— General duties of employers to their employees.
(1) It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.
(2) Without prejudice to the generality of an employer's duty under the preceding subsection, the matters to which that duty extends include in particular—
(a) the provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health;
(b) arrangements for ensuring, so far as is reasonably practicable, safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;
(c) the provision of such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the health and safety at work of his employees;
(d) so far as is reasonably practicable as regards any place of work under the employer's control, the maintenance of it in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks;
(e) the provision and maintenance of a working environment for his employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work.
(3) Except in such cases as may be prescribed, it shall be the duty of every employer to prepare and as often as may be appropriate revise a written statement of his general policy with respect to the health and safety at work of his employees and the organisation and arrangements for the time being in force for carrying out that policy, and to bring the statement and any revision of it to the notice of all of his employees.
(4) Regulations made by the Secretary of State may provide for the appointment in prescribed cases by recognised trade unions (within the meaning of the regulations) of safety representatives from amongst the employees, and those representatives shall represent the employees in consultations with the employers under subsection (6) below and shall have such other functions as may be prescribed.
[...]1
(6) It shall be the duty of every employer to consult any such representatives with a view to the making and maintenance of arrangements which will enable him and his employees to co-operate effectively in promoting and developing measures to ensure the health and safety at work of the employees, and in checking the effectiveness of such measures.
(7) In such cases as may be prescribed it shall be the duty of every employer, if requested to do so by the safety representatives mentioned in [subsection (4)]2 above, to establish, in accordance with regulations made by the Secretary of State, a safety committee having the function of keeping under review the measures taken to ensure the health and safety at work of his employees and such other functions as may be prescribed.

17. The Safety Representatives and Safety Committees Regulations 1977

Regulation 4 - Functions of safety representatives

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

(a) to investigate potential hazards and dangerous occurrences at the workplace (whether or not they are drawn to his attention by the employees he represents) and to examine the causes of accidents at the workplace;

(b) to investigate complaints by any employee he represents relating to that employee's health, safety or welfare at work;

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

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

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

(f) to represent the employees he was appointed to represent in consultations at the workplace with inspectors of the Health and Safety Executive [, the Office for Nuclear Regulation]1 and of any other enforcing authority;

[

(g) to receive information—

(i) in relation to premises which are, or are on, a relevant nuclear site, from inspectors under paragraph 23 of Schedule 8 to the Energy Act 2013;

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

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

but, without prejudice to sections 7 and 8 of the 1974 Act [or sections 102 and 103 of the Energy Act 2013]3 , no function given to a safety representative by this paragraph shall be construed as imposing any duty on him.

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

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

(b) undergoing such training in aspects of those functions as may be reasonable in all the circumstances having regard to any relevant provisions of a code of practice relating to time off for training approved for the time being by [the Health and Safety Executive]4 under section 16 of the 1974 Act.

In this paragraph *"with pay"* means with pay in accordance with [Schedule 2]5 to these Regulations.

Regulation 5 Inspections of the workplace

(1) Safety representatives shall be entitled to inspect the workplace or a part of it if they have given the employer or his representative reasonable notice in writing of their intention to do so and have not inspected it, or that part of it, as the case may be, in

the previous three months; and may carry out more frequent inspections by agreement with the employer.

(2) Where there has been a substantial change in the conditions of work (whether because of the introduction of new machinery or otherwise) or new information has been published by [...]1 the [relevant authority]2 relevant to the hazards of the workplace since the last inspection under this Regulation, the safety representatives after consultation with the employer shall be entitled to carry out a further inspection of the part of the workplace concerned notwithstanding that three months have not elapsed since the last inspection.

[

(2A) In paragraph (2), *"relevant authority"* means—

(a) in relation to a workplace which is, or is on, a relevant nuclear site, the Office for Nuclear Regulation;

(b) otherwise, the Health and Safety Executive.

]3

(3) The employer shall provide such facilities and assistance as the safety representatives may reasonably require (including facilities for independent investigation by them and private discussion with the employees) for the purpose of carrying out an inspection under this Regulation, but nothing in this paragraph shall preclude the employer or his representative from being present in the workplace during the inspection.

(4) An inspection carried out under [...]4[regulation 40 of the Quarries Regulations 1999]5 shall count as an inspection under this Regulation.

Regulation 7 Inspection of documents and provision of information

(1) Safety representatives shall for the performance of their functions under section 2(4) of the 1974 Act [or the relevant nuclear provisions]1 and under these Regulations, if they have given the employer reasonable notice, be entitled to inspect and take copies of any document relevant to the workplace or to the employees the safety representatives represent which the employer is required to keep by virtue of any relevant statutory provision within the meaning of section 53(1) of the 1974 Act except a document consisting of or relating to any health record of an identifiable individual.

(2) An employer shall make available to safety representatives the information, within the employer's knowledge, necessary to enable them to fulfil their functions except—

(a) any information the disclosure of which would be against the interests of national security; or

(b) any information which he could not disclose without contravening a prohibition imposed by or under an enactment; or

(c) any information relating specifically to an individual, unless he has consented to its being disclosed; or

(d) any information the disclosure of which would, for reasons other than its effect on health, safety or welfare at work, cause substantial injury to the employer's undertaking or, where the information was supplied to him by some other person, to the undertaking of that other person; or

(e) any information obtained by the employer for the purpose of bringing, prosecuting or defending any legal proceedings.

(3) Paragraph (2) above does not require an employer to produce or allow inspection of any document or part of a document which is not related to health, safety or welfare.

18. The Safety Representatives and Safety Committees Regulations 1977 SI 1977/500 ('the SRSC Regulations') — passed pursuant to S.2(4) of the Health and Safety at Work Act 1974 (HSWA) — allows independent trade unions to appoint safety representatives from among the employees to consult with the employer about issues of health and safety — Reg 3(1).

19. Health and Safety representatives may also have rights to paid time off under TULR(C)A. However this claim was brought exclusively under Reg 4(2) SRSC Regulations which, as set out above, gives the health and safety representatives a separate right to take time off with pay.

20. That right is qualified in that it must be to take such time off with pay during their working hours as is necessary for the purposes of:

- •
  performing their functions under S.2(4) HSWA and under Reg 4(1)(a)-(h) of the Regulations — Reg 4(2)(a), and
- •
  undergoing such training in aspects of those functions as may be reasonable in all the circumstances having regard to the HSE Code (see the introduction to this chapter under 'Codes of practice') — Reg 4(2)(b).

21. The amount of pay to which the employee is entitled for the period of absence is calculated in accordance with Schedule 2 to the Regulations.

22. A Claimant must show that the paid time off is necessary. This is a stricter test than that of reasonableness. We have had regard to the first instance (and therefore not binding on us) case of *Bennett v London Borough of Camden ET Case No.2200243/17*, where Mr Bennett brought a claim about time off to attend a health and safety course. The time off was considered reasonable but not necessary. His claim therefore succeeded under one piece of legislation but not the other thus demonstrating the different tests that apply.

The Facts

Background

23. The first Claimant (C1) works as an administrator for the Respondent and has been employed since 28 February 2005. She is also a Trade Union Health and Safety representative for Unite Union.

24. The fourth Claimant (C4) works a trains side duty manager. He has been employed since October 2006. He is a Health and Safety representative for TSSA.

25. The Unions and the Respondent have various meeting and inspection arrangements for various levels of Health and Safety Representatives. Although the Claimants appeared to place great weight on the differences between Tier 1 and Tier 2 representatives and their associated duties – the differences and significance of that was never really explained to us. The

Claimants are both Tier1 and Tier 2 reps simultaneously. They are both members of the **MATS** Function Council.

26. The MATS FC meets 4 times a year. There is a Chair of the Function Council – at the relevant time that was Dale Smith.

27. Prior to December 2021, the TU representatives had been given 10 days of releases, four times a year to carry out health and safety inspections. That arrangement was agreed in December 2015 by the previous chair, Richard Jones. Mr Linley, who we heard from, was instrumental in negotiating those release days from the union side. The fact that this amount of time was agreed and allowed between 2015 and September 2021 was not in dispute between the parties.

28. In December 2021, Mr Smith, who was newly appointed as Chair of the FC, questioned why 10 days were needed 4 times a year. He considered that one day per inspection was too much and that it was reasonable to expect them to perform two inspections a day. He therefore, subsequently, only approved 5 days release four times a year. It is this reduction that is the core of this case – both the mechanism by which the reduction was made and the fact of the reduction itself. Key to the Claimants in this issue is whether the Claimants' travel time to the initial inspection site ought to count as working time and was therefore included in the calculation of what was 'necessary' to undertake the inspections.

The relationship between the Respondent and the Unions

29. Mr Smith's witness statement explained the different levels of union representatives and their functions. As this evidence was not challenged by the Claimants we adopt Mr Smith's descriptions in full (paragraphs 10-16).

"Safety Representatives and Safety Committees are organised within the Respondent pursuant to an agreement made between the Respondent and the recognised trade unions. This agreement is known as the Health and Safety Machinery and is set out in a document of 17 April 2000 (as amended) ("the Agreement") (pages 64 to 74). The Agreement sets out that local Safety Representatives will represent local constituencies covering specific staff groups in certain defined locations, such as Station Staff within a group of stations, and Train Operators and Instructor Operators within a Train depot.

The Claimants have been nominated by their respective trade unions in respect of employees within the Managers, Administrative and Technical staff and Support staff ("MATS") of LUL. MATS stands for Operational Managers (excluding Service Control, Track & Signals, Fleet & Stations, Structural Maintenance) Support Managers, Administrative & Technical Staff.

There are overall Health and Safety Councils which meet quarterly to discuss health and safety issues for the specific staff group they represent. These Councils are known as Tier 2 and on the union side involve a small number of safety representatives nominated by the union, who must also be local safety

representatives. In addition, in some business areas the Health and Safety Machinery also provides for formal local arrangements for the local safety representatives to meet, referred to as Tier 1 meetings.

The Agreement sets out that local Safety Representatives will represent areas within each function covering specific staff groups in certain defined locations, such as Station Staff within a group of stations, and Train Operators and Instructor Operators within a Train depot. The local constituencies were formed in agreement with the recognised trade unions.

The constituencies are defined by grade and functional areas, and also for MATS by reference to Service Delivery Units ("SDUs") namely, Bakerloo, Central and Victoria ("the BCV"), Jubilee, Northern and Piccadilly ("the JNP") and Sub Surface ("the SSR"). The functional areas are broken down as follows:

(i) Trains
(ii) Stations and Revenue
(iii) Service Control
(iv) Track and Signals
(v) Fleet
(vi) Stations and Structural maintenance
(vii) Operational Managers (excluding Service Control, Track & Signals, Fleet & Stations,
(viii) Structural Maintenance) Support Managers, Administrative & Technical staff (MATS).

These constituencies have been formed and agreed with the trade unions based on specific areas of LUL's business due to its diverse environment. It was agreed by both LUL and the trade unions that the optimum way to divide up the business into constituencies was to identify the type and location of the work being carried out. This also makes it easier to arrange release and to resolve issues locally as they arise.

Those that fall within MATS tend to be locations where Trains Managers, and administration staff are based i.e. offices within a train crew depot. A table identifying all of the locations inspected by the MATS H&S representatives can be seen at pages 230. They include locations such as the Trains Manager's office, meeting rooms, administrative office(s), kitchen and toilet facilities and store rooms."

<u>The MATS meeting schedule and functions</u>

30. The function of the quarterly meeting was for the Chair to discuss any issues that the unions may raise or that management may have in respect of Health and Safety. We have focused only on the issues relating to inspection days. Any days where the representatives were given time off for trade union duties were referred to as 'release days/dates'. It disputed before us whether the release dates were to be agreed and signed off by the Chair or just to be 'rubber stamped' in light of what the Claimants referred to as the 2015 Agreement.

31. Mr Smith said that when he took on the role of Chair he was told that the release dates were for him to consider and approve both in respect of the dates but also their number and purpose. The Claimants considered that the number of days was not open to discussion because in 2015, 10 days, four times a year had been agreed and therefore that arrangement could not be amended. Further it was their view that the time allowed and the processes they followed were working and there was no need to revisit the arrangements. The purpose of the Chair's role in their view was, it appears, to have been a rubber stamping exercise insofar as how much time would be agreed. They also state that the agreement made in 2015 was made on the basis that representatives were allowed to include their travelling time within the day's work and that this became both an entitlement for any of the TU safety representatives and was necessary to perform the inspections.

32. We address the travelling time point below. We find that the 10 days allowance per set of inspections was open to change by the Chair and that it was his decision as to approve, or not, the submitted days put forward by the unions for releases.

33. Mr Smith relied upon the Machinery which we were taken to frequently by both parties. The Machinery sets out who attends which meetings and the process by which meetings and discussions are held and disputes resolved. We were also provided with a document entitled Trade Union release arrangements (p 74-95) which was not challenged and records the number of days that different types of TU reps are entitled to have as release dates away from their normal job. On page 84 it stated that the MATS Health and Safety Tier 2 Reps were entitled to 4 H and S meetings per annum with a day for each meeting, a day before each meeting and a day after each meeting along with 6 surgery days. It specifically also stated that for Tier 1 there were no formalized agreed release arrangements other than that required for Safety Inspections.

34. We accept Mr Smith's evidence that he was told that the release days for Health and Safety inspections were for consideration and although he could have chosen to rubber stamp them, he instead queried why there were so many and what they were used for. There was nothing that we were shown preventing him from undertaking that exercise. We find that it was open to him to consider the number of days regardless of the number approved in the previous 6 years. Certainly we were provided with no documentary evidence to suggest that this was not within his remit or power as chair.

35. The Claimants appeared to approach this matter as if it were a breach of contract case. They stated that because it had become custom and practice the Chair could no longer change the number of days. However it is clear that the number of days changed in 2015 and the Chair had allowed that change following discussions. There was no set mechanism or process for that change; it took place following a request by a TU representative.

36. In 2021 the proposal was that the days would be reduced as opposed to increased, but it was not clear to the Tribunal what processes or mechanisms had changed within the Machinery or the relationship between the unions and

the Respondent that meant that a change to release dates was now not allowed. The only difference here was that the Claimants disagreed with the change. We were given no information to allow us to determine that the mechanisms had changed or that the power of the Chair had changed.

The 2015 'agreement'

37. Mr Linley gave us evidence as to how the decision to allow 10 release days was reached in 2015. The methodology was that he submitted to the Chair (Mr Jones), a breakdown of how much time was spent in carrying out the inspections and within that breakdown he included an average travel time based on his own primary work location.

38. Mr Linley suggested that a sub committee ought to be established, in accordance with the Machinery, to consider the proposal. Mr Linley and Mr Bhardwa were members of that committee. It was duly agreed by Mr Jones at the recommendation of the committee.

39. There was considerable discussion as to how this agreement had been recorded. We were taken to various emails which refer to the fact that 10 days would be allowed. We were also told that it had become custom and practice within the organization for there to be 10 days.

40. We accept that there was no complete written document which recorded the 2015 arrangements. The Claimant says that she sas repeatedly asked for a copy of a complete written and the respondent say that if there ever was such a document they no longer have a copy. We note that none of the witnesses who appeared before us had seen the document including Mr Linley and Mr Bhardwa who were Trade Union representatives at around that time.

41. The Claimant did ask for a copy of the agreement

    (i) On 31 January 2022, during an ad hoc health and safety meeting;
    (ii) At a quarter 1 health and safety council in March 2022;
    (iii) Before and after a tier 2 ad hoc directors' meeting on 6 April 2022;
    (iv) In a health and safety forum on 9 June 2022.

42. The Respondent did not refuse or ignore those requests. We were taken to emails which demonstrated that they attempted to find it. None of the witnesses before us, including Mr Linley, had ever seen a copy and none of the Unions have provided the Claimants with a copy of a single document recording this arrangement. We conclude that there was no single document.

43. This further enforces our finding that such agreements were not on a par to the machinery or the Trade Union release arrangements regarding other trade union duties that were provided to us in the bundle. If it had been we consider that it would have been recorded more formally.

44. We consider that the lack of the document setting this out goes to support the fact that this agreement whilst in place and agreed for that year was not something that was as formal or binding as the Machinery or the days set out

in the table at page 84. This was an arrangement that was reached in 2014/2015 and implemented accordingly. There was nothing to say that it could not be revisited by either side and that is what Mr Smith chose to do in 2021. The Claimants have provided nothing to demonstrate to us that once an agreement was made with regard to these particular release dates, it was not possible for that agreement to be revisited nor that the Chair was no longer allowed to consider and discuss the release dates with the Unions as part of his function as Chair of the MATS FC.

The 'Consultation' process

45. Part of the Claimants' case was that even if the Respondent could change the arrangements, no proper process had been followed in making that decision and that in effect Mr Smith had unilaterally imposed the reduced days and shut down any subsequent discussions on the topic. C1 in particular painted Mr Smith as hostile during the meetings.

46. There was a meeting in September 2021 which C1 could not attend. When the dates were submitted by the unions in an email the week before, Alexa Hughes Alderson responded asking for clarification as to what they were used for. At that meeting the frequency and duration of the inspections was not discussed at any great length but it was made clear by Alexa Hughes Alderson that the dates would be considered by the staff side as opposed to any final approval having been given.

47. At the December 2021 meeting there was what appears to be a relatively lengthy discussion (3.5 pages of notes) where all representatives and Mr Smith and Alexa Hughes Alderson were discussing the arrangements for inspections in terms of what was involved, how long they took, and whether both the frequency and the number of release days needed to be reconsidered.

48. When Mr Smith emailed the Claimants (amongst others) on 24 January 2021 setting out the proposed dates, he proposed 5 release dates 3x a year. We accept that the reduction to 3x a year or every 4 months had been proposed by the RMT representative during the December meeting. However we do not think that the reduction from 10 to 5 days had been notified to the Trade Unions before this email was sent.

49. In the following email exchanges, Mr Smith states (p 179) that he had not understood that the MATS days had already been booked in. This is in dispute because he was copied into the original emails putting forward the release dates before the meeting in September 2021. We accept that nobody staff side had actually agreed to those dates nevertheless we think it was reasonable that the TU reps assumed they were going ahead until they received the 24 Jan email from Mr Smith as this had been how it had always worked in the past. The TU reps wrote and objected to this proposal saying that the 2022 dates had already been agreed and booked in and he could not change them now. He responded saying that he was confused as the discussion they had had at the previous meeting had the action point that he would put forward a proposal and the TU reps would then consider it. We find that it is clear that the parties

had been talking at cross purposes. The Trade Union representatives had assumed that any conversation about reduction had been about some time in the future, possibly the following year, whilst Mr Smith and the HR representative had understood it to be a discussion about whether the releases sent to him in September 2021 were to be approved for 2022. The representatives duly asked for an ad hoc meeting which was allowed for under the Machinery.

50. Mr Smith sent an email at p 194 saying that the inspections arranged in Jan/Feb 2022 are able to go ahead and that the remaining days would be discussed at the next MATS FC meeting. We consider that this demonstrates that he was listening to their concerns and recognising that the discussion needed to continue before he changes were put into operation.

51. Mr Smith joined them at the Hammersmith depot on 31 Jan 2022 to watch an inspection. He then engaged in the ad hoc meeting that they had requested. We accept that this ad hoc meeting was at the request of C1. She says that it was not properly constituted either with the right level of representatives or the right unions represented. We could not understand what her concerns were with regard to the constitution of the meeting. All 3 unions were represented. No decisions were made at the meeting but a discussion was held. It is clear that Alexa Hughes Alderson states that all of these discussions should in any event be considered properly at the next MATS FC meeting.

52. The next MATS FC meeting was on 9 March 2022. C1 raised that there was a failure to agree. However we did not have an explanation of what function the Claimants considered registering a ‘failure to agree’ had. We have therefore taken the phrase at face value, namely that it meant that the Unions and the staff side had not been able to agree the change to the volume of inspection release dates. Mr Smith says in his witness statement that, at this level of discussions between the two sides, there is no formal ‘failure to agree’ mechanism in place and that it had no particular function at this point.

53. C1 said that all options at resolution had been exhausted at the 9 March 2022 MATS FC meeting. It is not clear why she unilaterally decided that the proposed changes which she did not agree with, brought any discussion within the MATS FC forum to a close. That has not been explained to us. It has not been explained to us by the Claimants what registering a ‘failure to agree’ was meant to do to the process or the conversation. It was not we suggest, a mechanism by which the conversation would be halted and no change to the release arrangements. It was not clear to us what the Claimants wanted to happen next from a procedural point of view.

54. Nevertheless it was clear C1 did not agree to the changes. From the notes of all the relevant meetings C1 does not at any point say why she disagreed with the reduction other than to say that this was how it had always been done and could not be changed. She did not set out any information as to how their time was being spent or why they needed more time from a practical point of view. She repeatedly requested the 2015 Agreement but did not explain why the existence or content of the Agreement would change the current situation or

alter Mr Smith's standing to amend the amount of time or frequency allocated to these inspections.

55. C1 states in her witness statement that Mr Smith clearly misunderstood the purpose of the inspections and what was involved. We saw no evidence of that. Throughout the early meetings Mr Smith was seeking clarification of what was involved and they explained it to him. He observed one of the inspections and we accept that he had carried out numerous similar inspections in his career, albeit from the management side of the process.

56. Due to the lack of agreement the next step possible in the Machinery was to have a Tier 2 Director meeting. It was also open, as accepted by Mr Bhardwaj, for the representatives to suggest a sub-committee to discuss the situation as they had in 2015 but the representatives did not suggest or request that in 2022.

57. Subsequently there was a Tier 2 Director's meeting with Mr Dent on 5 or 6 April 2022. The outcome of that meeting was confirmed in the letter dated 28 April 2022 (p 227-229). That letter refers to travel time. Mr Dent is clear in that letter that travel time to the starting point of an inspection is not and has never been provided before nor is it provided to anyone across the network. Mr Smith and Mr Dent both stated that any travel before work starts e.g. to training at a different location or a meeting at a different location, is considered commuting time and is not paid for and not considered working time.

58. The Claimants' evidence regarding this point was that travel time had been included to date and therefore ought to continue to be so. They also said that it was an integral part of the reason the case put forward by Mr Linley that led to the 2015 Agreement and therefore ought not to be disregarded. They say that this is why they were given 10 days back in 2015 because of the email exchanges between Mr Linley and Mr Jones.

59. What is clear is that Mr Dent did listen to the concerns and responded to them. He disagreed with them but we do not consider that he ignored them. He then came to a final conclusion as to what the release arrangements ought to be for that year. He raised the frequency of inspections back to four times a year but reduced the number of release days from 10 to 5.

60. Both Mr Smith and Mr Dent confirmed that part of their consideration regarding the release arrangements included the financial cost to the Respondent at a time when the organisation was in financial difficulties following the Covid crisis. The Claimants asserted that this was wrong and demonstrated a failure to consider what was necessary. Our conclusions are set out below but we find as a question of fact that the finances were only a part of the decision making process.

<u>The Inspections</u>

61. The inspections that the Claimants took part in were primarily office based spaces but included bathrooms and kitchen areas attached to those. They also

included small isolated spaces such as cabins. They did not include operational spaces such as tracks or platforms.

62. We understand that the inspection itself included walking around the relevant areas which differed in size and complexity from place to place and therefore took different amounts of time. The reprsentatives would make notes and complete a report at the end of the inspection. The inspection was carried out by all 4 different union reps at once so they were group activities. They had to meet up with the TOMs for each inspection either to discuss the situation or to obtain keys or both. The Claimants told us that an important part of the inspection was also meeting the staff at that workplace and building trust and rapport with them. It was in dispute between the parties as to whether the discussions with staff formed part of the health and safety inspection. We address that below in our discussions regarding necessity in our conclusions.

63. The evidence we were provided with appeared to suggest that inspections took anywhere from 30 minutes to 3 hours. Even on C1's own evidence at pages 367-368 when she submitted her concerns in August 2023, she records that the longest time actually spent inspecting a site was 3 hours.

64. Mr Linley, when working out the average in 2015 said that average inspection time would be 3 hours.

65. The Claimants were at pains to tell us that the actual inspection was only a fraction of the time they needed to perform the entirety of their obligations. They said that in addition to the inspection time they also needed time to complete the reports, time to travel there and back and time to speak to the TOMS and the staff.

66. We were provided with no evidence or precise information at all by the Claimants as to how long they needed to speak to staff for, to wait for TOMS or speak to TOMs nor how that varied over time or place. We accept that Mr Linley's table at page 345 gave averages but the Claimants, at no point, have given us detailed evidence on why or how this time was accrued. Whilst we do not doubt that there was waiting time and discussion time necessary within the inspections they have not given us information as to how much time that added for them.

67. With regard to form filling the Claimants were taken to several forms within the bundle. In each of the forms we saw examples of the matters raised that required rectification. They were generally minor, though we accept important. They ranged from cobwebs in a room to pigeon droppings on a handrail or out of date PAT testing on equipment.

68. We were told that the reports were done in collaboration between the representatives and required significant discussion. It is not clear why they adopted this approach nor why it is necessary. We accept that one report between the 4 is sensible but not why it would take any significant levels of discussion given that they are all together during the inspection and presumably have time to discuss and note the issues then.

69. We accept that there will invariably be an element of formatting and possibly an element of pushback from the stations once the reports are delivered – all of which takes time. Nevertheless that does not detract from our finding that the report forms are straightforward proforma forms that, in general, ought not to take very long to complete even if 4 people need to sign them off.

70. The Claimants asserted that they could not complete the discussions and forms on site and had to return to Griffiths House to perform that task. Griffiths House is near Baker Street and houses the Union offices and equipment. The reasons given for completing reports there were the need for privacy for the discussions and the need to work at a laptop that everyone could see.

71. Whilst we are sure that some locations would not provide appropriate meeting spaces, we do not consider that all of the stations would be the same. When looking at the chart of locations we could see that most of them had meeting and/or training rooms and cafeterias. We had no evidence from the Claimants that they had tried to use on site spaces where privacy could be obtained. Further we do not accept that using the union IT equipment was necessary given that the forms could be completed on a phone. The representatives may have preferred the round table discussions at Griffiths House but we have not been given evidence that they were necessary as opposed to preferable..

72. There was considerable discussion regarding the number of sites that needed inspecting. Mr Smith stated that the number of sites were reduced in 2017/18 because workplace representatives took on a lot of the sites. The Claimants disagreed. C1 said that in fact the workplace reps had always inspected those sites and very little if anything had changed. She had no other evidence to substantiate that. Further she said that the chart we were provided at p230 was not accurate and had left out a number of the sites that they were still required to inspect. Again she provided no documentary evidence to back that up. Nor had she challenged the table despite it being provided with the Tier2 outcome letter from Mr Dent in April 2022 suggesting that sites had been omitted.

73. We accept the Respondent's evidence that the number of sites was reduced in 2017/18 and that this led to only 11 sites needing to be visited over the 10 release days as opposed to approximately 20. We consider that when the original 10 days had been agreed in 2015, it was still Mr Jones' intention that on average, each inspection took ½ a day. This was also evidenced in the table at page 106/107 which recorded ½ day per site. We accept that the provenance of these documents is in dispute – nevertheless we do not accept that the respondent has manufactured them for the purposes of this case and in the absence of any evidence from the Claimants to the contrary we accept that they are broadly accurate.

Travelling time

74. The issue regarding travel time was a significant one. In closing submissions the Claimants stated that all they were seeking from us was a declaration that travel time ought to be included in the hours considered necessary for

undertaking the inspections. It was not in dispute that any travel between the sites once the working day had started ought to be included if more than one site was visited in a day.

75. The Claimant's case was that they considered that travel to the first inspection site and home from the last inspection site ought to be included in the time allowed for inspections.

76. The Claimants' employment contracts have a mobility clause in them which states that they can be asked to work anywhere across the network. C1 made it clear that she has never been a peripatetic worker and at present she only works in Highgate. This was not challenged by the Respondent.

77. Both Claimants accepted that they ought not to be paid for commuting time between their home and their normal place of work on a normal day. So for C1 that would be her commute to Highgate.

78. The Claimant's answers regarding where she travelled to before and after the release day changes in 2021 differed when Ms Urquhart and the Tribunal asked questions. Initially, in response to Ms Urquhart she said that, before the changes, she travelled straight to the inspection site but after the changes she would travel first to Highgate and then set off from there as a matter of principle. When the Tribunal asked her to explain her travelling practices she said that she would in fact travel directly to the sites after the changes. We are still not clear what her intended explanation was. During her answers she also referenced the Working Time Regulations but did not say how they applied nor how her claim before us somehow related to them.

79. On balance, we do not accept that C1 ever travelled to Highgate first before going to the inspection site. Instead, in the past, she had travelled to Griffiths House first where the union equipment was in order to print out the relevant paperwork. This was also where she was based before her move to Highgate so it was convenient. It had nothing to do with her travel time but convenience to her in respect of preparation. We found her evidence on this point disingenuous and intentionally misleading because she was seeking to assert that her travelling before the changes had been due to necessity as opposed to her personal convenience.

80. When the same point was put to C4, he said that travelling to his place of work first did not make sense for him. It is therefore clear that it was a matter for each representative to decide as opposed to either a point of principle or a requirement or necessity as C1 maintained in evidence.

81. We can see however that in the email in 2015, Mr Linley had included travel time from Rickmansworth in his schedule submitted to Mr Jones. What we do not have anywhere is a record of Mr Jones accepting that this was to be part of the inspection day. Mr Linley said that they had a sensible swings and roundabouts approach to the issue as some days they had very little travel and other days they had a lot. We accept that built into all of the time calculations from both sides was an element of understanding and flexibility as each site

had different requirements. Further each representative would have to travel from different home locations so travel times could not be ascertained with any certainty for each and every representative that would ensure that each person was able to include all their travel time to and from the first and last inspection.

82. We accept both Mr Dent and Mr Smith's evidence that it was the norm across the business for all staff members to be expected to travel to meetings whether union related or otherwise as commuting time if they had to be somewhere at the beginning of their working day.

83. Whilst we accept that neither Claimant was a peripatetic employee, that does not mean that the respondent could not require them to commute elsewhere on occasion in accordance with their mobility clause in their contract and in accordance with normal practice across the organisation. It appears to have been normal practice across the business and in fact C4 confirmed that he sometimes travelled for training or meetings without complaint and without believing it ought to be part of his working day.

84. Even if the Claimants have shown, though Mr Linley's evidence, and their activities since 2017/18, that travel time had come to be included in the time required to carry out inspections, that does not mean that the time taken to get to the inspection sites was not considered commuting time by the respondents nor that they could not change it.

85. C1 pointed out concerns regarding her ability to do the inspections in August 2023. She sent a list of the places she had been and the time taken to carry out various aspects of the inspection. In each example, after the inspections had taken place, she and the other representatives travelled back to Griffith House. They said that they wanted to do this to use the Union equipment and privacy. It is clear in all of the examples that there is a significant period of time spent travelling to Griffith House. It is clear that travelling to Griffith House whilst convenient from the representatives' point of view, takes up a huge amount of time.

Conclusions

86. We want to make some overall observations in respect of these claims. First, it seems to us, that the Claimants have failed to appreciate that it is for them to establish that the working hours and travel time they sought were necessary to carry out their inspections. They have provided us with no evidence as to what was entailed in completing the inspections nor why it was not possible for them to complete the inspections within the 5 days allocated by Mr Smith.

87. They have, at best, given us anecdotal evidence of how they choose to perform the inspections. They have not provided us with any information or evidence of why the time that was removed in 2022 was necessary for health and safety purposes. Their case before us has been the same as their position was to the Respondent during discussions; simply that it had been done across 10 days before and so it ought to continue that way. Further, they have provided us with no evidence whatsoever that in July and October 2022 they had any difficulties

carrying out the inspections within the reduced amount of time. The overall approach and arguments made to us by the Claimants has been to suggest that in effect, the respondents breached their contract by reducing the hours. That was not the legal case before us – not that we think such a case would succeed in any event.

88. We have taken into account that the Claimants were litigants in person but we have also taken into account that both are committed Union members and representatives and have therefore had access to their advice and representation.

Did the respondent fail to permit the claimants to take such time off with pay during their working hours as was necessary for the purposes of performing their function of carrying out inspections of the workplace in accordance with Regulations 5, and 7 of the 1977 Regulations, contrary to Regulation 4(2)? The dates when these alleged failures occurred were July and October 2022 in respect of the inspections of both depots and uniform stores and hubs.

89. In essence this is a question of whether the reduction from 10 days to 5 has meant that the Claimants do not have the necessary time to complete the inspections.

90. We were provided with no evidence whatsoever that in July and October 2022, the claimants were not able to complete their inspections within the 5 days allowed. At no point were any health and safety issues raised by the Claimants either after the 5 days were introduced from April 2022 onwards or in fact, before. It is striking that throughout the entire process the Claimants have not given us or the Respondent any information regarding a health and safety risk created by the reduction in inspections. For example, at no point during the hearing before us did the Claimants inform us for example that they had not been able to fit in the inspection of Acton Town within the 5 days and/or that there been any health and safety repercussions as a result.

91. In addition to the lack of evidence, what we were provided with was ample evidence from the Respondents that suggested the inspections could be done in a far shorter period of time than that which the Claimants now assert is needed. This assessment takes into account travel time, report writing time, inspections, and discussions with the relevant parties. We are not here to criticise the ways of working of the Claimants but it appears to us that the Respondent has established that if the Claimants wanted to, they could organise their work differently and complete the inspections more quickly. What we have to assess is what is necessary – not what is preferable.

92. It is clear to us that it is not necessary that each report involves discussions between the different Union representatives lasting hours, nor that each report involves travelling to Griffith House nor that each report involves speaking to staff to establish rapport and trust. The Claimants said that it was essential to speak to staff but they did not explain why. They said it was to foster relationships with their members so that they could trust them and raise health hand safety issues with them. We accept that relationship building must be an

important part of being a representative – but that does not mean it is an important part of a health and safety inspection. Nowhere was it demonstrated to us that an inspection necessarily includes speaking to members in that way. Further they have not established that they did not have other time within their union work schedules when such outreach work could be done. A vague assertion that it was important is not the same as evidencing its necessity.

93. We therefore do not uphold this part of the claim.

Did the respondent fail to provide the claimants with such facilities as they reasonably required under Regulation 5(3) of the 1977 Regulations? The facilities they say they required were paid travelling time to the workplaces for inspection during the July and October 2022 inspections.

94. Firstly we query whether travel time to the inspection sites is capable of being a facility. We were not addressed in any great detail on this point by either party though the respondent made it clear that they did not accept it was as such and this was recorded in the written submissions. We agree. We think that facility is more likely to refer to tangible aspects of a role such as equipment or meeting rooms. We do not consider that time amounts to a facility in this context.

95. However if we are wrong in that, we do not accept that travel time to and from the inspection sites in this particular case would be reasonably required. Both Claimants' contracts have a mobility clause and they can be asked to work in different locations across the network. It is a respondent wide practice that commuting time is not paid for and that was accepted by both Claimants.

96. Both Claimants travelled to and from the inspection sites from their homes before the changes as well as after the changes. We do not accept C1's evidence that she now travelled to Highgate before going to the inspection site. Her previous practice of travelling to Griffith House was convenient to her, not because it is what is expected or needed or even reasonably required to carry out the inspections.

97. The Claimants have not told us what the difference was to their commutes on the inspection days. We have no evidence to suggest that, their journeys to the inspection sites were longer than that to their home station. We are sure it was longer on occasion but equally, on some occasions, it may well have been shorter. Nor have they established that their travel time from home depots (as opposed to their home) to the inspection sites could not in fact be fitted into a normal working day. Taking into account the swings and roundabouts approach that everyone agreed was applied to whole exercise of inspections, coupled with the fact that it is clear that commuting time was not meant to be included within the working day, we consider that the Claimants have failed to establish that they reasonably expected or needed travel time to be included within their inspection day timetable.

98. The Claimants said in their submissions that they wanted us to make a declaration that the travel time somehow formed a contractual right or a necessary part of the inspections. What they have instead established is that in

2015 it was probably taken into account in assessing the number of release days for inspections. However even if it was, we do not accept that it could not be revisited in 2021 nor that in 2015 or in 2021/2022 it was reasonably required to carry out the inspections. The inspection times outlined by the Claimants allow for huge amounts of time on other aspects of the inspections but they have not been evidenced as being necessary or in fact reasonable in some cases. It is clear that the days could be organised differently thus providing more time for travel should that be needed.

99. Our first finding then is that the Claimants did not have a 'right' to commuting time or to the difference between their normal commuting time and the travel to the inspection sites as they had a mobility clause which is commonly implemented at the respondent for example to ensure travel to training days or meetings elsewhere in the network.

100. Even if it could be said to be reasonable to allow some additional time for a significantly longer journey to get to an inspection site, they have not established that they could not allow for this within their inspection days if they were organised differently, nor have they provided us with any calculations or evidence that in fact, overall, their journeys were always longer than their normal commute.

101. We therefore do not find that they have established that they reasonably required the facility of paid for travelling time.

Did the respondent fail to allow inspection and copying of documents by the claimants which documents fall within the meaning of Regulation 7(1) of the 1977 Regulations? The documents the claimants wished to see were an agreement from 2015 between staff side and management side about release for inspections. There is an issue as to whether these are documents which the respondent was required to keep by virtue of any relevant statutory provision. The requests were made:

(v) On 31 January 2022, during an ad hoc heath and safety meeting;
(vi) At a quarter 1 heath and safety council in March 2022;
(vii) Before and after a tier 2 ad hoc directors' meeting on 6 April 2022;
(viii) In a health and safety forum on 9 June 2022.

102. C1 did request the documents on the occasions set out above. Nevertheless we find that the 2015 Agreement did not exist as a single document on which all aspects of the Agreement were recorded or explained. What was provided by the respondent was correspondence concerning what had been agreed and that was supplied to the Claimant.

103. Even if a single document did set out all the information in one place, it no longer exists and the Respondent could not comply. The Unions notably have not been able to provide a copy. The Claimants and their witnesses have never seen a copy. Nor have we seen copies from other years recording release dates, including one reflecting the recent changes that somehow set out both the number of releases agreed and how they would be utilised and

broken down. In fact what we heard from all witnesses was that how the Unions used the days was up to them. They could have arranged their time in any way that they saw fit and therefore it seems very unlikely that beyond the rough calculation of ½ day per inspection being allowed (which we have seen) that any further break down would have been set out in the document. We therefore do not accept that the 2015 agreement, if it ever existed as a single document, would have performed the function that the Claimants seem to think it would – namely that the calculation of 10 days included paid for travel time. As we have said above, it may have been a factor in Mr Jones' approval that year but that does not assist us with our decision for the purposes of these claims nor did it bind the Respondent regarding all future decisions regarding release days in this context.

104. We do not uphold this part of the Claimants' claims.

Did the Respondent fail to comply with its obligation to consult with the relevant representatives in breach of Health and Safety at Work Act 1974 s 2(6) in that they:

(iv) Failed to consult regarding the reduction in frequency of the inspections

(v) Failed to consult regarding the reduction in time allowed to do the inspections

(vi) Failure to follow a proper procedure/process in respect of changing an existing agreement (namely the 2015 agreement)

105. We were not provided with a definitive explanation of what 'consultation' ought to have been in these circumstances. There is not statutory definition and it was not included within the Machinery document. The Machinery sets out how to resolve disputes or disagreements. It was used in this case because the situation was referred to a Tier 2 Directors meeting with Mr Dent when the Claimants stated that there was a 'failure to agree'. The Claimant has not explained to us what format they would have expected. They asked the respondent witnesses what Consultation meant to them but they have not explained to us what it meant to them, other than that they felt Mr Smith provided them with a fait accompli in his letter dated 24 Jan 2022. Something we have found to be incorrect.

106. We find that the Respondent did consult with the union representatives over the course of 6 months from September 2021 when the matter was first raised until April 2022. The Claimant's main concern seemed to be that Mr Smith effectively put forward a fait accompli with his emails in December 2021 and January 2022 and that there would be no further discussion. However he clearly states that they were a proposal and subsequently went on to discuss their concerns with them at subsequent meetings. Further, the reduction from 4 times a year to 3 times a year was proposed by one of the union reps. All of it was clearly a proposal for discussion and when challenged the Respondent listened and Mr Dent reinstated the 4 times a year aspect of the inspections thus demonstrating that they were listening. Further Mr Dent made the release

days a standing agenda item for review at each MATS FC meeting and no union representative has raised it as a concern to date.

107. C4 said that a sub-committee ought to have been set up to discuss the matter. However it is clear that the unions did not suggest that even though they knew it was open to them.

108. Instead C1 clearly states, from March 2022 onwards that there is a failure to agree and refuses to engage further with Mr Smith. She says that this was because of his hostility to the situation but we think it is more because he disagreed with her. It is notable that at no point throughout any of this hearing or any of the objections raised by the Claimants, have they been able to point to anyone's health and safety being put at risk nor have they been able to carry out the inspections within the time now allowed. The timings she provided were relevant to August 2023 and do not, in our view, set out any difficulties or gaps as a result.

109. When valid concerns were raised, the respondent listened and responded accordingly thus demonstrating that this process was a consultation within the normal meaning of the word.

110. The release dates were always something which could be considered and approved (or not) by the Chair of the committee. The fact that the change in Chair resulted in a different approach and a fresh consideration of the time spent does not mean that what had gone before could not be reconsidered. The Claimant has not shown us a set process by which a change ought to be enacted. There is no set process for the Chair to approve (or not) the release dates. We do not accept that it was established as a quasi contractual right that required some sort of formal notice and agreement to be changed. Nevertheless we note that there was a consultation process and that none of the Unions have, since April 2022, objected or raised, to the best of our knowledge, an issue with the changes that health and safety has been compromised as a result.

111. Therefore this part of the Claimants' claim is not upheld.

Employment Judge Webster

Date: 20 October 2023

JUDGMENT and SUMMARY SENT to the PARTIES ON

20/10/2023

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FOR THE TRIBUNAL OFFICE