



EMPLOYMENT TRIBUNALS

Claimant: Mr L Blake-White
Respondent: Govia Thameslink Railway Ltd
By: Employment Judge Ramsden, Ms Y Batchelor and Mr C Wilby
On: 11 and 12 March 2024

JUDGMENT

The complaint of **indirect age discrimination** is struck out.

REASONS

1. By an email dated **1 February 2024** the Respondent applied to the Tribunal to strike-out the Claimant's complaints of: (a) indirect age discrimination, and (b) detriment arising from his exercise of the statutory right to take adoption leave, pursuant to Rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013, on the basis that each has no reasonable prospect of success.
2. At a hearing dated **11 and 12 March 2024** the Claimant made representations as to why those complaint should not be struck out.
3. In essence, the Respondent's argument was that the Claimant has no reasonable prospect of success as regards the indirect age discrimination complaint because:
 - a. he has no evidence that the age group he avers suffers a particular disadvantage did in fact suffer that disadvantage; and
 - b. he has no evidence that he suffered that disadvantage.
4. The Claimant said:
 - a. The Respondent upgraded the trains concerned before it would permit an expert assessment of the noise levels – i.e., the Respondent destroyed relevant evidence and he should not see his complaint struck-out on that basis;
 - b. That he took an audio recording of the noise levels on his iPhone; and

- c. Audiogram testing that the Respondent conducts on its Drivers could be used to demonstrate the group disadvantage among younger Drivers.

5. The Respondent responded as follows:

- a. It denied the Claimant's contention that it destroyed evidence. In any event, the trains have been upgraded, so it is now not possible to measure the noise levels of which the Claimant complained;
- b. The Claimant's iPhone recording is insufficiently reliable; and
- c. It would be disproportionate for the Respondent to be expected to analyse or provide for analysis hundreds of audiograms of its Drivers over time when the age discrimination complaint was an ancillary part of the Claimant's case. (The Claimant agreed that the age discrimination complaint is an ancillary part of his case, the main thrust of it being protected disclosure detriment.)

6. The Tribunal found:

- a. As regards the first complaint, that of indirect age discrimination:
 - i. Regardless of how this came about or who is responsible, there is now no prospect of evidence being taken of the noise levels of the trains that the Claimant complained about. A complaint of indirect discrimination cannot succeed without the Claimant being able to make a *prima facie* case of discrimination, and the Claimant would need to establish a *prima facie* case of particular disadvantage for his age group and himself;
 - ii. The iPhone recording has no reasonable prospect of being sufficiently reliable evidence to establish the group or individual disadvantage required for a complaint of indirect discrimination. While the Claimant said that he took the recording by holding his phone to ear level and rotated his head and phone around to simulate the movement of a Driver's head while driving, this form of evidence seems highly doubtful in its reliability; and
 - iii. As for the audiograms, considerably detailed analysis would be needed to establish whether there were other factors that could affect an individual Driver's hearing – that is simply not proportionate and is so highly unlikely to produce evidence of anywhere sufficient reliability to enable the Claimant to establish group disadvantage that we consider this complaint has no reasonable prospect of success.

7. The Tribunal was not satisfied that the second of these complaints, that the Claimant suffered detriment arising from his exercise of the statutory right to take adoption leave, has no reasonable prospect of success. The Tribunal declined to strike-out that complaint.

8. The Claimant's remaining complaints brought in this case are not affected by this judgment.

Case Number: 2301939/2021

Employment Judge Ramsden
Date: 26 July 2024

Sent to the parties on
Date: 29 July 2024