



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Ball  
**First Respondent:** Arriva Rail North Limited  
**Second Respondent:** Northern Recruitment Group Limited

**Heard at:** Sheffield                      **On:** 19 to 20 June 2017  
**Before:** Employment Judge Rogerson  
**Members:** Mr D Fell  
Mrs S Robinson

## Representation

**Claimant:** Mr D Johnson a lay representative  
**First Respondent:** Miss C Wilson, Solicitor  
**Second Respondent:** Mr P Scope, Solicitor

# JUDGMENT

1. The complaints made against the Second Respondent, in claim number 1801955/2016 of direct disability discrimination, discrimination arising from disability and indirect sex discrimination were withdrawn on 19 June 2016 and are dismissed.
2. The complaints made against the First Respondent, in claim number 2501135/2016 of direct disability discrimination, discrimination arising from disability and indirect sex discrimination fail and are dismissed.

# REASONS

## Issues

1. The Claimant was engaged as an agency worker by the Second Respondent, Northern Recruitment Group (NRG) supplied to work as a train presentation operative (TPO) to clean trains for the First Respondent (Arriva)) from 22 December 2014 until April 2016.
2. The Claimant's status during this period was agreed to be that of an agency contract worker with NRG. He withdrew his complaints against NRG on the first day of the hearing.

3. That then left the Claimant with his complaints against the First Respondent which were made by the Claimant as an 'applicant' for employment pursuant to section 39 of the Equality Act 2010 ('EA 2010').
4. Prior to this hearing the Respondent has accepted that the Claimant was a disabled person as defined by section 6 of 'EA 2010' by reason of a physical impairment of a heart condition (atrial fibrillation). The issues to be determined against the First Respondent were identified at an earlier case management hearing and were agreed to be as follows.

**Direct Disability Discrimination**

1. Was the less favourable treatment of withdrawing a conditional job offer done because of the Claimant's disability?

**Discrimination Arising from Disability**

2. Was the unfavourable treatment of withdrawing the job offer done because the First Respondent perceived that the Claimant would be likely to have a bad sickness record and/or require reasonable adjustments?
3. If so did those perceptions arise in consequence of the Claimant's disability?
4. If there was such unfavourable treatment which arose in consequence of the Claimant's disability can the First Respondent show that withdrawing the job offer was a proportionate means of achieving a legitimate aim?

**Indirect Sex Discrimination**

5. Did the First Respondent apply the provision criterion or practice (PCP) requiring employees who were train presentation officers to be in possession of a personal track safety certificate which in itself included a requirement not to be colour blind?
  6. If so did the application of that provision put male job applicants at a particular disadvantage when compared to female job applicants because statistically colour blindness is prevalently predominated amongst men? It was accepted that colour blindness predominantly prevalent amongst men.
  7. Was the Claimant himself put at the disadvantage in so far as his colour blindness led to the withdrawal of a provisional job offer with the First Respondent?
  8. If so can the First Respondent show (withdrawing the job offer) was a proportionate means of achieving a legitimate aim – the legitimate aim of ensuring safety at work and the availability of a flexible train presentation team?
5. The Claimant in his witness statement describes how his heart condition is controlled by medication as a result of which he is able to carry out a normal and active life and he had not made the First Respondent aware until a medical assessment in June 2017 that he had this condition. As a consequence Occupational Health sought further medical information from the Claimant's GP which was provided in July 2017 which was when the First Respondent had knowledge of disability.

6. The Claimant accepted in cross-examination that he had had no absences at all during the period he had worked for the First Respondent as an agency worker and that no reasonable adjustments were ever sought as a result of his disability.
7. We also accepted the evidence of Mr Davies the manager who made the decision to offer the Claimant a TPO role, that he had no knowledge of the Claimant's disability and had never perceived the claimant as someone who was likely to be absent from work or require reasonable adjustments.
8. The alleged less favourable/ unfavourable treatment is the withdrawal of the job offer which it was alleged was withdrawn either because of the Claimant's disability or a perception that it was likely to have a bad sickness record or require reasonable adjustments as a consequence of his disability. It was accepted that the job offer was withdrawn. The key issue in this case was why was the job offer withdrawn by Mr Davies? Was Mr Davies motivated unconsciously or consciously by the Claimant's disability or by a reason connected with the Claimant's disability? The Respondent asserts that the reason why the job offer was withdrawn had nothing whatsoever to do with disability and everything to do with the Claimant's colour blindness.
9. It was not disputed that during the medical assessment on 21 June 2016 the Claimant had failed the colour blindness test and was rated 'unsatisfactory' in that medical assessment. Our findings of fact on the 'reason why' question are as follows:
10. The Claimant applied for a job with Arriva which was a permanent post at Sheffield in May 2016.
11. He was at that time working at Doncaster on days as a TPO temporary agency worker supplied by the Second Respondent NRG to the First Respondent, Arriva.
12. The job description for the permanent role the Claimant applied for does not say it is a safety critical post. Mr Davies said that safety critical posts are those like conductors or drivers who have specific safety responsibility duties identified in their roles.
13. The job description does say that a 'Personal Track Safety (PTS) certificate is required if appropriate', as part of the knowledge qualifications and training requirements of the role.
14. Mr Davies was the 'Out Station Team Leader' at Doncaster station. He explained that a 'PTS' certificate is required before anybody is allowed to work within 1.25 metres of a running line. Basically if they work on or near a line or there is a need to cross the line a PTS certificate is required.
15. He explained that when cleaning trains at Doncaster 'on days' there was no requirement to hold a PTS certificate because the worker would be just entering/exiting the train to clean it. That is why the Claimant was able to perform that role as an agency worker without a PTS certificate. Whether or not there was a requirement for a PTS certificate was dependent on the location of the job and the specific requirements of the role for example the shift time (day or night) to decide whether you were working on or near a line or needed to cross a line.

16. The Respondent has 'medical fitness criteria' which a job applicant has to pass for the job offer to be confirmed. The criteria required medical assessment of colour vision hearing and general fitness.
17. 'Guidance for Railway Undertakings on Track Safety' A.3.2 (page 59) states "normal colour vision is not required for certification of PTS but it is a requirement of certain tasks undertaken on or near the line to which other job specific requirements apply".
18. At page 132 of the bundle we saw the 'Railway Group Standard Fitness' criteria drawn up by the Respondent's Safety Group to be applied by the Respondent and by Occupational Health Advisors to ensure safety standards were met nationally. That identifies the roles where Personal Track Safety is a requirement which includes "all train presentation operatives" and a requirement for normal colour vision **where the role required recognition of signal colours**. That guidance and criteria were applied to the Claimant.
19. The Claimant had a successful interview with Mr Davies in June 2016 and was offered the TPO position at Sheffield subject to him passing medical assessments and references being obtained. The reference was not a concern for Mr Davies who describes the Claimant as "hard working, good at his job, no absence record". Someone who had a lot of people (including Mr Davies) 'championing' the Claimant to get the job.
20. Unlike other candidates for the job, Mr Davies had the advantage of having prior knowledge of the Claimant's work and first hand experience. There were no issues relating to the Claimant's heart condition and nothing was ever raised with or of concern to Mr Davies. Everything he knew about the Claimant was positive.
21. We found Mr Davies to be a very impressive and credible witness who answered all of the questions honestly and openly. He saw the report from Occupational Health dated 21 June on 4 July 2017 and he noted that the report had said that Mr Davies had an 'unsatisfactory' colour vision test result and the comment that "Mr Ball has defective colour vision. He should not be employed where the role requires recognition of signal colour or accurate colour perception". He was also aware that the report refers to 'an underlying medical condition' and "that further information was required from the GP before a fitness decision can be made" after which an update could be provided. In the interim Occupational Health conclude the Claimant was "Temporarily Unfit" as at 21 June 2016.
22. We accepted that Mr Davies had no knowledge of the actual condition the Claimant had at that time which was consistent with the report. He was being advised by Occupational Health that the Claimant was 'temporarily unfit' until further information from the GP and further advice from Occupational Health was obtained. That was the reason why Mr Davies advised the NRG that the Claimant could not be on site and continue working after 4 July 2017.
23. The Claimant was at that time still working as an agency worker at Doncaster. Mr Davies made the decision because the Claimant could not be in a position where he was at risk to himself or the business because he was assessed as temporarily medically unfit to work. Unfortunately the

consequence of this to the Claimant was that as an agency worker he could not work and could not be paid.

24. Shortly after this date all agency work came to an end at Doncaster. That position was confirmed by NRG because they were instructed not to supply any workers to Arriva after this date.
25. Whilst the underlying medical condition was being investigated, Mr Davies had to follow Occupational Health Advice. There is an argument to say that maybe the Claimant should have been told he had failed the medical assessment because he was colour blind and have the job offer withdrawn then. However Mr Davies did not do. He was a relatively new manager and waited for Occupational Health to obtain further information and made some enquiries with the senior management team to check the position. It was reasonable for him to do so rather than to withdraw the offer on 4 July 2017.
26. The problem is that the Claimant has perceived the delay as evidence that Mr Davies had discriminated against him because of his heart condition but that was not the case because Mr Davies did not know about the heart condition at that time.
27. On 4<sup>th</sup> July Mr Davies emailed other managers for advice to see if the Claimant could still work at Sheffield as “a potential new starter who was colour blind”.
28. Mr Kennedy a ‘technical advisor’ emailed Mr Davies at 10.09 on 4 July 2016 indicating his view that he saw no problem with it provided it was documented on the PTS certificate.
29. At 11.06 that day, the Claimant is informed that Gary Tremble, ‘Head of Engineering’ had confirmed the position was this that with colour blindness the potential new could not take up position and that Mr Kennedy was wrong to say otherwise. That position was consistent with all of the safety guidance and documentation we saw. That advice was provided to Mr Davies before Occupational Health had updated the Respondent about the position regarding the heart condition. Mr Tremble could not have known about the disability and it could not have had any bearing in relation to the advice he gave to Mr Davies.
11. Mr Davies waited for the Occupational Health update which was provided on 18 July 2016 (page 196). In that update the GPs report was considered and an assessment was made by Occupational Health that the Claimant was fit to take up the post but would have to be reviewed again in three months time. That was the advice about the heart condition (it did not prevent the Claimant taking up the post). However that still left the colour blindness and the advice that he “should not be employed where the role requires recognition of signal colour or accurate colour perception”.
12. On 25 July 2016, the Claimant was informed that the offer of employment was withdrawn and the reason given to him at the time was that it was “due to him being colour blind”. That was the reason the Claimant was given by the First Respondent and that was the reason he conveyed to the Second Respondent.
13. We found that was the reason the offer was withdrawn. It had nothing whatsoever to do with the Claimant’s heart condition, his disability, and was

not for any reason connected with his disability ie a perception Mr Davies held that the Claimant would be absent or would need reasonable adjustments to be made in the future. Occupational health had declared him fit to take up the post with his disability and there was no evidence that Mr Davies had formed any such perception. The Claimant had not been absent whilst working as an agency worker and no adjustments had been requested or made.

14. The Claimant had not on his own account provided any evidence to support an argument that Mr Davies had that perception and had not provided any facts from which we could conclude (prima facie case) discrimination arising from disability, One other piece of evidence Mr Davies gave was that another potential starter that had he had offered the job to subject to medical assessments, had also been assessed as 'colour blind' and had their offer withdrawn. That person was not disabled but had been treated in the same way (offer withdrawn). Therefore it was clear that there was no less favourable treatment because of disability because a comparator in similar circumstances without a disability was treated in the same way. Those complaints therefore fail and are dismissed
15. For the indirect discrimination complaint we found that the PCP applied was that set out in the Respondent's policy at page 59. It was that " normal colour vision is a requirement of certain tasks undertaken on or near the line to which other job specific requirements apply"
16. It is a requirement to have normal colour vision if the job (role/location/shift) puts you at potential risk without normal colour vision. The evidence we heard was supported by the fact that when the Claimant performed the TPO role in Doncaster as a temporary worker, normal colour vision was not a requirement because he was working the day shift and was not required to be on/near/cross the line.
17. It was accepted that more men than women statistically are colour blind based on national statistics.
18. Was the claimant placed at a disadvantage by the PCP? He was because as a colour blind man, his job offer was withdrawn. The issue falls to be decided on justification. Can the First Respondent show it to be a proportionate means of achieving a legitimate aim?
19. Two legitimate reasons were advanced by the Respondent – safety and flexibility within the train presentation team so that they are able to work at other depots where they may have to carry out tanking duties or cross the track.
20. The Claimant accepted that 'safety' was a legitimate aim and we agreed. Safety was the main reason in Mr Davies mind at the time he made his decision because there was a risk to the Claimant's safety if he was to perform the role at Sheffield. The question was whether it was proportionate for Mr Davies to withdraw the job offer in the circumstances relied upon. Looking at the safety considerations Mr Davies refers to the need to be able to identify signal colour in order to safely cross the track, be on or near the track. The Claimant accepted in cross-examination that it would be dangerous to employ him in a role at Sheffield because it could be dangerous if he was asked to cross the track. He accepted he could be

required to cross the lines at Sheffield to carry out his role and would need to be able to identify signal colour in order to safely cross the track. That presented a real and sufficient safety consideration for the Respondent to decide that it was appropriate and necessary to withdraw the job offer in those particular circumstances. It wasn't just a theoretical risk it was a real risk. As a TPO in Sheffield there was a safety risk to the Claimant and to the business if the Claimant was unable to recognise signals to cross the track safely because he was colour blind. We did not address the second legitimate aim advanced of flexibility given our conclusions on safety. In those circumstances the indirect discrimination complaint also fails and is dismissed.

**Employment Judge Rogerson**

Date: 7 July 2017