



EMPLOYMENT TRIBUNALS

Claimant: Mr B Kungwengwe

Respondent: First MTR South Western Trains Limited

Heard at: London South **On:** 13 December 2019

Before: Employment Judge Fowell

Representation:

Claimant In person

Respondent Mr J Cook, instructed by Kennedys Solicitors

RESERVED JUDGMENT

1. The respondent had no actual or constructive knowledge of the claimant's disability at the material time and so the complaints of harassment and direct discrimination on grounds of disability are dismissed.

REASONS

Introduction

1. The claimant, Mr Kunwengwe, was an agency worker, supplied by a company called STM to carry out work for the respondent. He worked for them for a few days in March 2018 and says that he was bullied by his supervisor. As a result he submitted a claim form on 26 July 2018, alleging that this was disability discrimination. The company, referred to at this hearing as South West Railways, says that neither his supervisor, Mr Akpakly, nor any other member of staff, were aware of any disability at the time.
2. In his claim form Mr Kungwengwe said that his disability comprised severe depression, asthma, diabetes, high blood pressure, sleep apnoea and that he had had operations

on his neck and left elbow. The tribunal ordered him to provide further and better particulars, in which he emphasised that the main difficulty he had was depression, and he added dyslexia to the list.

3. By way of background, the events in question all took place from 14 to 17 March 2018. Mr Kungwengwe was working at Kingston Station on late shifts from 8 pm to midnight each day, supervised by Mr Akpakly.
4. He first raised his concerns in his grievance dated 18 March 2018. According to that document, there were two main incidents. The first was on Friday 16 March. He says that he told a customer that there were no more trains to Waterloo but the customer sneaked in behind him anyway, and this was seen by Mr Akpakly who confronted him about it and berated him in front of customers for letting people in without a ticket. The next day he says that he let three young people out of the station to do some shopping and even looked after their luggage; when they came back he recognised them and let them in without having to show a ticket. This was also observed by Mr Akpakly who thought that he had simply let them all in without paying, and again he took him to task in public. Mr Kungwengwe felt that Mr Akpakly had been spying on him and had acted unfairly. Then, shortly before midnight, at the end of the shift Mr Akpakly asked him if he had swept the floor, to which he said no and that it was not his job to sweep up, but he had cleaned the gate line. He also told Mr Akpakly that he was not happy at the way he had been spoken to in front of customers.
5. It is not disputed that that evening Mr Akpakly emailed his own complaint to his manager about Mr Kungwengwe, and that was the last time he worked a shift at Kingston.
6. Complaints of harassment and of direct discrimination can only succeed if it is shown that the employer, through its staff, knew or ought reasonably to have known of the disability. The word employer is not quite correct on this occasion since Mr Kungwengwe was employed by STM, but they supplied him to South West Railways, who have the same potential liability. Section 41 of the Equality Act 2010 makes a “principal” liable for discriminating against a contract worker, and defines a principal as a person (which includes an organisation) who makes work available for an individual employed by another person (STM) and supplied by that person under a contract. Mr Kungwengwe was employed by STM and there was a contract between them and South West Railways, so they come within the legal definition of a principal. For simplicity however I will use the terms employee or employer from time to time.
7. In addressing these issues I heard evidence from Mr Kungwengwe, and on behalf of the company from Mr Akpakly and Mr Luke Burgess, a Station’s Operation Manager, who investigated his grievance. There was also a witness statement from Ms Monika Hutcheson, a Flagship Station Manager, who was unable to attend as she is on maternity leave. There was also a bundle of about 210 pages. Having considered this evidence and the submissions on each side I make the following findings.

Findings of Fact

8. Mr Kungwengwe's employment with STM began on 1 February 2018. The reason for contract staff being provided is to cover a gap between 8 pm and midnight, for historical reasons. When they took over the franchise there was a requirement that the station (or gate line as it seems to be termed) is staffed from 6 am to midnight. The company's staff rotas had been agreed with the RMT and did not cover shifts from 8 pm each evening. They therefore had an agreement with STM to supply customer service assistants on a regular basis. Under the terms of that agreement it was for STM to carry out the recruitment, training, line management and pre-employment medicals of the staff that it supplied. (That is all clear from Ms Hutcheson's statement and the lengthy service level agreement in the bundle.) With new staff, that would often involve an STM supervisor coming to the station to train them. The staff would then work for the supervisor at the station, and at Kingston there is only one supervisor per shift, in this case Mr Akpakly.
9. It is not necessary to resolve the issues of fact between Mr Kungwengwe and Mr Akpakly, but both describe the difference of opinion at the end of the final shift. According to Mr Akpakly, he asked Mr Kungwengwe if he had cleaned up the gate line, which usually involves checking for litter, but might involve getting the broom out if there were cigarette ends or similar on the platform. He says that Mr Kungwengwe refused to do so, even though he had swept up on previous occasions. Mr Akpakly did not argue the point any further but got on with it himself. He emailed Ms Hutcheson shortly afterwards, setting out his point of view, and adding that Mr Kungwengwe was very argumentative and would not listen to advice. She responded by saying that she would raise it to STM as an official complaint, and he was then redeployed.
10. The grievance raised by Mr Kungwengwe on 18 March 2018 made no allegations about disability discrimination and did not refer to his health in any way. It was not therefore clear to the company that disability was an issue. The grievance was passed to Mr Burgess to investigate, and he was at that time the Flagship Station Manager at another station. He held a fact-finding meeting with Mr Akpakly on 12 May 2018 and asked him about the allegations that he had treated Mr Kungwengwe unfairly. Those notes record that he asked Mr Akpakly about the dispute over whose responsibility was to sweep up at the end of the last shift. He asked in particular whether Mr Kungwengwe had ever made him aware of any reason he may not be able to do the cleaning, to which he replied that Mr Kungwengwe had told him that he had a problem with his back and that he could not do lots of sweeping or heavy lifting. That is therefore the only health-related point that emerged in the investigation.
11. Mr Burgess then had a meeting with Mr Kungwengwe on 24 May 2018. The notes of that meeting are no longer available as the laptop in question has been replaced but Mr Kungwengwe sent a lengthy follow-up email the next day which show that he did raise health concerns at that meeting, the same conditions referred to in the claim form. He did not however suggest in that email or at that meeting that he had ever told Mr Akpakly

or others about them.

12. Mr Burgess contacted STM to request any paperwork or information relating to this grievance and they provided his contractual paperwork but nothing else. During this period Mr Kungwengwe was still working for South West Railways through STM but had been moved to a different station which was closer to his home address. He carried on working there until August 2018 and there is nothing to show that he ever raised his health conditions with the management there or that any reasonable adjustments were asked for. Indeed, in his evidence at this hearing, Mr Kungwengwe said that he could not remember ever telling anyone at South West Railways about any health problems.
13. In the course of these proceedings, when Mr Kungwengwe was ordered to provide further information to the tribunal, he says that before he started with South West Railways he had a meeting on 21 February 2018 with STM's health and safety manager, together with their human resources adviser and a scheduling manager, in which he told them about his depression, anxiety and other long-term illnesses. The scheduling manager then told them all that Ms Hutcheson at South West Railways has been advised about his disability. He was also asked by STM provide medical evidence to the HR Department, which he did. It was, he says, as a result of that meeting that he was assigned to Kingston station where there were four managers on a rota so that there will always be support for his condition, especially at weekends when train passengers could be particularly rowdy.
14. Ms Hutcheson is Mr Akpakly's line manager, and according to her statement she never had any such information from STM even though she was in regular contact with them about the need for staff. If they had, she says, she would have asked them to put it in writing so that she could consider whether any reasonable adjustments were required and she would also ask STM to refer the individual to their own occupational health provider. She also disputes that he would be able to rely on the support of the supervisor that Kingston because they have their own duties to deal with.

Applicable Law

15. I was referred to the case of **Gallup v Newport City Council** [2014] IRLR 211, which decided that for an employer to be liable they have to know (a) that the employee has a physical or mental impairment (b) that it has a substantial and long-term adverse effect (c) on normal day-to-day activities. They do not need to know that it amounts in law to disability. Further guidance was given more recently in the case of **A Ltd v Z** [2019] IRLR 952, which again confirmed that the employer did not need to know the employee's diagnosis but had to show that it was unreasonable for it to be expected to know these three elements. Reference was also made in that case to the Code of Practice on Employment provided by the Equality and Human Rights Commission at paragraph 5.15 to the effect that an employer must do all they can reasonably be expected to do to find out if a worker has disability, and the question of what is reasonable will depend on all the circumstances.

Conclusions

16. As is clear from the case of **A Ltd v Z** it is for the respondent to show that it was unreasonable for them to know about Mr Kungwengwe's disability (assuming for present purposes that he is disabled). There is no question that Mr Akpakly actually knew about his disability. He is clear that he did not and that evidence is supported by that of Mr Burgess and also Ms Hutcheson. Mr Kungwengwe on the other hand could not remember telling him and there was no mention of it in his initial grievance, so the balance of evidence is firmly against any such conclusion. The only health matter mentioned was his bad back, and that is not in fact one of the medical conditions relied on. Nor does it appear from his medical records to be one of the current conditions from which he is suffering.
17. Turning to whether they ought to have known, the first element is whether they knew that he had a physical or mental impairment. Usually such an impairment is quite apparent, and if it causes difficulty at work the employee will mention it. The individual might not regard it as a disability but the essence of a disability is that it has a substantial adverse effect on normal day-to-day activities. It will therefore be a rare case in which someone has a condition which is not apparent to those they work with and which is not mentioned by them. Examples of such a situation could be given, such as where a person is receiving medication for a mental impairment which addresses their symptoms and so causes no real difficulty at work. That would still meet the definition of disability. Here, Mr Kungwengwe is relying mainly on his depression which would not necessarily be obvious to others. Is this one such rare case?
18. There is medical evidence in the form of two letters from a psychiatrist, to whom he was referred in March 2017 and again in July 2018. Each time his Doctor recorded that he had mild-to-moderate depressive symptoms. They would not necessarily be apparent, and again, he does not say that he told any of the individuals at South West Railways directly that he had such an impairment. So there is nothing here to suggest that they would have had any cause to enquire further.
19. His claim therefore depends on the meeting in February 2018 and the information being passed on by a manager at STM to Ms Hutcheson. I did not have the opportunity to hear evidence directly from Ms Hutcheson although I accept that she is on maternity leave. Most of her statement dealt with organisational matters and she was not a witness to any of the events in question. Those background matters are not contested, and I therefore give some weight to her statement. I give some little weight too to her statement that she knew nothing about any such disability or other health concern since it was not necessarily at odds with that of Mr Kungwengwe. He does not say that he told her anything, simply that he was told that she had been told, and she denies this.
20. It is possible therefore that the message simply did not get through to her, and if so the respondent cannot be liable. If there was nothing about Mr Kungwengwe's work performance or demeanour to indicate any mental health problem, and no one at South

West Railways was advised that he had depression, it cannot be said that they ought to have known about it. To repeat, the first element is that they knew that he had an impairment.

21. Mr Kungwengwe says that this meeting took place and that he knows and named each of the people who took part. Ms Hutcheson accepts that she knows them too. However there is a lack of the normal paperwork which one would expect to see. He was not referred by STM to occupational health. Mr Kungwengwe says that he was asked to provide medical evidence to STM but there was no evidence of any such request. He makes the point that South West Railways could have followed up matters more vigorously with STM and obtained confirmation from them that there was such a meeting, and that they are much better placed than him to do so. Nevertheless, he was their employee. He ought to have been able to request from his manager or supervisor there some confirmation that STM at least were aware of his health problems. He would be entitled to ask for his personnel file. But nothing has been produced.
22. There is no reason either to suppose that STM would not act themselves on this information. It is a large organisation with an HR department, responsible for providing suitably trained staff, having appropriate health and safety arrangements in place and carrying out pre-employment checks. It would therefore be their obligation in the first instance to investigate any disability issue and pass on that information to South West Railways.
23. Ultimately, such issues have to be decided on the evidence available, and here there is no documentation to support the view that STM (or South West Railways) were aware at any time of any health concern at all, apart perhaps from him having a bad back. I therefore conclude that they were not aware that he had a physical or mental impairment, and hence it cannot be said that they ought to have known of his disability.
24. If that conclusion is wrong for any reason, the next question is whether they knew that his impairment had a substantial adverse effect on his ability to carry out normal day-to-day activities, and again there is no evidence to suggest that they did. At the risk of labouring the point, Mr Kungwengwe does not suggest that he told them directly, and I can see no circumstances here that would put them on any enquiry to explore things further. He did not say that he had any difficulties in carrying out his work, and carried on doing that work for several further months at a different station. He was also an agency worker, so the first responsibility was with STM to investigate and inform them, Lastly he was only working with Mr Akpakly for a handful of shifts, each of four hours. That therefore reinforces my view that the respondent did not have the required degree of knowledge.
25. It is a comparatively rare case in which an issue of this sort can be decided at a preliminary hearing, but the period of work in question was a short one, the allegations are all against one individual, Mr Akpakly, and it is clear that no mention was made at the time or in his grievance about disability or health issues. Standing back from the

competing arguments, it seems to me that there is no realistic prospect of Mr Kungwengwe being able to satisfy a tribunal at a longer hearing that my conclusions about knowledge are wrong.

26. It follows that the complaints presented must be dismissed. The further information provided by Mr Kungwengwe included some suggestion that he was intending to pursue a complaint based on a failure to make reasonable adjustments, discrimination arising from a disability and victimisation. He has not however made an application to amend his claim to include those different legal complaints, and in any event the first two of them require the same degree of knowledge. The third, victimisation, requires there to have been a protected act, such as a statement by him to the respondent that they had breached the Equality Act. Again, there was no evidence of any such complaint at the time or that he regarded himself as a victim of discrimination.
27. I accept that Mr Kungwengwe does a range of physical and mental health problems, but it is not now necessary to go into whether they amount to a disability. I have had to focus instead on what the respondent knew about it, and it is no reflection on him that I have had to conclude that they simply did not know and had no reason to know about his difficulties.
28. Accordingly, the claim must be dismissed.

Employment Judge Fowell

Date 13 December 2019