



## EMPLOYMENT TRIBUNALS

**Mr A Askander**  
Claimant

**Boots Management Services Ltd**  
Respondent

v

### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**Heard at: London Central**

**On: 15, 16, 17, 20, 21 and  
(in chambers) 22, 23 May and  
14 October 2019**

**Before:**

**Employment Judge:  
Mr Paul Stewart**

**Members:**

**Mr Martin Simon and  
Mr Stephen Soskin**

**Appearances**

**For the Claimant:           in person**  
**For the Respondent:       Ms Eilidh Wood, solicitor**

## JUDGMENT

The unanimous conclusion of the Tribunal is that we find the Respondent to have failed to take such steps as it was reasonable to have to take to provide the auxiliary aid and equipment in the period from December 2017 through to August 2018 contrary to section 20(5) of the Equality Act 2010 and we dismiss all the other claims.

## REASONS

### Introduction

1. We heard evidence in this matter over 4 ½ days and submissions at the close of the fifth day. Ms Wood who read her submissions from her laptop has since kindly forwarded those submissions to us which has allowed us to print out her submissions (12 pages) and read them for ourselves. The Claimant provided us with his submissions in writing, a document which helpfully set out what he wished to say in 14 pages.
2. The evidence we heard came from the Claimant and from two witnesses called by the Respondent, Mr Umeir Shaikh and Ms Lucy Miller. The Claimant's witness statement ran to 103 pages, Mr Shaikh's to 9 and Ms Miller's to 8.

3. The Claimant suffers from moderate to profound sensorineural hearing loss in both ears and, to assist him to participate fully in the hearing, had the benefit of two palantypists (sometimes referred to as speech to text reporters), Ms Susie Lithman-Romeo and Ms Katie Ryder. Their efforts permitted the Claimant to read the text version of any utterance made in the course of the hearing, whether by a witness, the Tribunal or Ms Wood for the Respondent.

### **The Claims**

4. By a claim form received by the Employment Tribunal on 18 September 2018, the Claimant complained of discrimination on the ground of disability, of unlawful discrimination in that there was a failure to make reasonable adjustment and then:

Failure to provide flexible working, personal injury, harassment, victimization, vicarious liability, psychiatric injury, injury to my feelings, stress, loss of career and loss of potential earnings.

Harassment by colleagues

5. As a result of a Preliminary Hearing (Case Management) conducted by Employment Judge Wade on 22 January 2019, the issues which fell to be determined by the Tribunal were set out as follows:

#### ***Time limits / Limitation issues***

1. Were all of the Claimant's complaints presented within the time limits set out by sections 123(1)(a) and (b) of the Equality Act 2010 [EqA]?
2. Has the Respondent failed to promote the Claimant? Was the treatment "less favourable treatment", i.e. did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The Claimant relies on the following comparator Mr MS Hussain and/or hypothetical comparators.
3. If so, was this because of the Claimant's disability?

#### ***Reasonable adjustments: EqA, sections 20 and 21***

4. Did the Respondent not know and could not reasonably have been expected to know the Claimant was a disabled person?
5. The reasonable adjustment claim is set out in the Claimant's information provided today and I note that the "failure to provide flexible working" claim is part of the reasonable adjustment claim. The information is not organised in the most "legal" way, but the Respondent understands it. The reason I did not spend more time on this and other issues was that there was no palantypist but by keeping things simple I was able to complete the hearing and ensure that the May hearing date was not lost due to having to adjourn this hearing. The Claimant was not disadvantaged by this approach and the Respondent got what it needed which was clarity on the issues.

#### ***EqA, section 26: harassment related to disability***

6. Did the Respondent engage in conduct as set out in the Claimant's particulars?
7. If so, was that conduct unwanted?
8. If so, did it relate to the protected characteristic?
9. Did the conduct have the purpose or (taking into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

*EqA, section 27: Victimisation*

10. Did the Claimant do a protected act? The Claimant claims victimisation but I explained at the hearing that I think that he did not do a protected act (which is a complaint that he had been discriminated against) and so he cannot claim victimisation, but I leave him to think about this and to provide clarification to the Respondent as soon as he can.
11. Did the Respondent subject the Claimant to any detriment because he did a protected act and / or because the Respondent believed the Claimant had done, or might do, a protected act?

**Facts**

6. The Claimant started working for the Respondent on 13 August 2007 as a Customer Assistant. Initially, he worked part-time – 20 hours per week – but in June 2011 he became a full-time employee. He remained a Customer Assistant until he was dismissed from his job on the grounds of capability on 11 April 2019. At the time of his dismissal, he had been off work suffering from a back condition since 18 May 2018.
7. Since about 2005, the Claimant has suffered from sensorineural hearing loss which deteriorated markedly after he was unfortunately assaulted and hit on the head by a roof tile in 2014. A letter from the University College London Hospitals Adult Audiology Rehabilitation Centre dated 25 October 2018 refers to the Claimant having been assessed for hearing difficulties and it being found that he has “Moderate to Profound Sensorineural Hearing Loss” in both ears. The Respondent has pleaded: “To the extent that the Claimant asserts a hearing impairment, the Respondent admits that the Claimant was disabled in accordance with section 6 of the Equality Act 2010 at the relevant times”.
8. The Respondent operates a system of Performance Reviews on Customer Assistants. We were shown the documentation that was said to be produced at one such review conducted in respect of the Claimant in April 2018. It bears the title “Performance and Development Plan”. Over three pages, the Claimant was expected to, and did, fill in various boxes replying to the following questions:
  - What do I need to do?
    - What do I commit to do to be at my best for customers and patients?
    - What do I do brilliantly?
    - What could I do better?
  - What are my career aspirations at Boots?
    - What’s next for me?
9. Another box appears under the questions:
  - What feedback do I get from my line manager and others? What do my customers and patients say?
    - What are others seeing?

For reasons that were not apparent to us, the Claimant’s line manager filled in that box answering, in the voice of the Claimant, as follows:

- (x) My manager give me constant feedback about what I am doing and how I am doing and how I can improve.

(xi) Customers give me good feedback on the Shop Floor as well as using the Survey.

10. Other than that entry by the Claimant's line manager on a box designed to be filled in by the employee, there was no space designed on the form wherein the line manager might record whatever thoughts he might have on the employee's performance. There was a rating which the line manager was required to give to the Claimant. We were told that in 2018, there were three ratings which could be used by the line manager – "Non-performing", "Performing" and "Legendary". "Performing" is performance at an acceptable level and "Legendary" means performance that is outstanding.
11. In this review of April 2018, described as a half year review, the Line Manager had written on the top right hand corner of the first page words that look like "Half year rating: - Performing". We were told that in the yearly appraisal completed in November 2017, the Claimant received the rating of "Performing" as he had done in the yearly appraisals conducted in 2012 to 2014 inclusive. However, in 2015 and 2016, these being years worked by the Claimant after he had suffered the assault in 2014, the rating the Claimant received was "Legendary".
12. We note that, in the half yearly review conducted in April 2018, the Claimant began his answer to the question "What do I do brilliantly?" with the statement: "Managing the store operations in the absence of managers", a statement which was explained by his evidence that, on a Sunday morning, he opened up the store and managed it in the absence of either the Store Manager or the Assistant Store Manager, one or other of whom (or both) would arrive at the store at noon. We also note that, in answer to the questions:  

What are my career aspirations at Boots?

What's next for me?

the Claimant wrote:
  - 1) I want to be an Assistant Manager or
  - 2) Either I want to enter into Boots Cyber Security field or PCI Investigation and Forensic investigation work as I've the requisite qualifications.
13. In answer to the question: "How am I going to achieve this?", the Claimant wrote:  

By following Assistant Manager Role Profile of working towards achieving success, skills and knowledge.

and  

By actively applying for any existing vacancies

By following up with the concerned department

By regularly updating my skills.
14. The reference to the "requisite qualifications" was a reference to the Claimant's qualifications attained outside of any training from Boots. He has a number of degrees:
  - a) a BSc degree in Maths Physics and Chemistry from the University of Osmania in India;

- b) a Post-Graduate Diploma in Computer Systems Management obtained from National Institute of Information Technology in Hyderabad;
  - c) a master's degree from Westminster University in Computer Forensics, a course he completed over the years 2007 to 2009 and in which he obtained a Distinction; and
  - d) online certificates obtained in the last few years from the University of Leiden in the Netherlands.
15. However, these qualifications, while admirable, did nothing to advance his aspiration of becoming an Assistant Store Manager. As his entry on the Performance and Development Plan indicated, he knew the route to becoming an Assistant Store Manager lay in "following Assistant Manager Role Profile of working towards achieving success, skills and knowledge".
16. We were shown the role profiles for both Customer Assistant and Assistant Manager. At the bottom of the first page for Customer Assistant, there appeared under the heading "KPIs [*Key performance indicators*] and measures for success", four bullet points:
- Store Scorecards
  - Store and Pharmacy Scorecards; Performance Plans; Audits
  - Learning Plan
  - Feedback from customers, peers, and colleagues regarding customer care skills. Feedback from other stakeholders.
17. We note that the Performance and Development Plan for the Claimant that was prepared in April 2018 does not, in its design or in its content, demonstrate that any of the above bullet points were referred to in the review then conducted of the Claimant's work.
18. The Claimant had entertained a desire to be promoted long before he expressed that aspiration in April 2018. But, on 15 May 2018, the Claimant learned that Mr Shafqat Hussain had been promoted. Mr Hussain was known to the Claimant as being a Customer Assistant who worked at another store but who was regularly offered extra duties at the store in which the Claimant worked. Ms Miller in her statement signed on 22 April 2019 made the point that Mr Hussain had still not finished the training for the role: he was not actually performing in the role. So, it is perhaps more accurate to say that, in May 2018, the Claimant learned that Mr Hussain had been selected for the training which, if completed in a satisfactory manner, would lead to working in the role of Assistant Manager.
19. The news that Mr Hussain had been selected for the training that was a first step to promotion came as a bitter blow to the Claimant given his aspiration to be so selected. As he saw it, Mr Hussain did not have the qualifications that he had, had nothing like the 11 or so years of experience working for the Respondent and, furthermore, had restrictions placed by his immigration visa on the amount of work he could do. Added to which was the fact that, as the Claimant put it:

Mr Shafqat informed me that in order to get promoted:

- (i) I must have a close relationship with the Store Managers and Area Manager as they are the ultimate decision makers.

- (ii) Mr Shafgat also informed me that my disability will be an issue and this will have a considerable impact when the managers or decision makers consider me for promotion or career growth opportunities.
- (iii) And that my disability is a barrier towards my career growth as I cannot fulfil some of the tasks on certain occasions due to my disability of hearing such as communicating over the telephone or in person, etc.

20. Mr Shafqat Hussain may have only been expressing an opinion but his words caused the Claimant

... to evaluate the ongoing circumstances, the present and the past events and after careful evaluation I noted that the series of treatment meted out to me is a clear indication of direct discrimination arising because of my disability of hearing and in light of what Mr Shafqat Hussein informed me on 15 May 2018.

21. Part of his review caused him to reflect on what he had been told by a team leader in 2010, a year in which the Claimant had been expecting to be selected for promotion. The team leader had said that, because the Claimant was then on a part-time contract and because he had not completed the Healthcare Advisor course, it was not possible for him to be promoted to the role of Assistant Manager. Later the Claimant came to learn that both these points were incorrect. Not only was Mr Shafqat Hussain part-time and without the Healthcare Advisor training but Mr Saravan Shanmugam, the Assistant Manager in the store the Claimant worked in on the Tottenham Court Road, did not possess the Healthcare qualification, nor was he a full-time employee.

22. The Claimant reflected on this and various other incidents before, on 15 June 2018, submitting a grievance to Ms Miller, the Area Manager for the Central London area in which his store was located. In short, he alleged that he had been discriminated against on the grounds of his disability in being denied promotion. In addition, he alleged that the Respondent had failed to make reasonable adjustment for his disability and to provide flexible working. In the course of his lengthy grievance (6 ½ pages long) he made the assertion that an oral grievance made in 2015 about not being promoted had resulted in him being “rightly evaluated as offering legendary performance in the next year” and that his store manager at the time, Mr Neil Macauley, had nominated him for an Assistant Manager’s role when ...

... a large number of vacancies were created in our area and each and every store was asked to nominate a person for Assistant Manager’s role by the then Area Manager Mr Soul Malik. But unfortunately, at that time as well, I was not considered for the role and later I came to know that the only reason why I was not considered for the role was because of my disability and lack of performance of my store manager Mr Neil Macauley.

23. The grievance in relation to the alleged failure of the Respondent to make reasonable adjustment in respect of his disability proceeded along the following lines (and we should mention that, for his grievance, the Claimant had compressed the full story of his attempts to obtain reasonable adjustment because, in his witness statement, his account extended over 10 pages):

- a) Over the years of his employment and despite the fact that his store managers and his line managers knew of his disability, none of them ever thought of making reasonable adjustment for him.
- b) On 30 March 2015, the Claimant contacted Access to Work (AtW) which he correctly described as a government initiative to help disabled people to

remain in work and to remove barriers. He sought AtW' support. On 8 March 2016, after some correspondence between it and the Claimant, AtW closed the application on what the Claimant described as "flimsy grounds".

- c) On 27 May 2016, the Claimant made a fresh application for support to AtW. He had a meeting with his store manager, Mr Macauley, requesting his assistance to make reasonable adjustment.
  - d) AtW arranged for a work place assessment to be conducted in conjunction with the Royal British Legion Industries [*RBLI*] on 16 December 2016. They also obtained a letter from a treating hospital on the Claimant's condition. Within several days, RBLI sent a report recommending reasonable adjustment in the form of the provision of certain aids and equipment in order to support the Claimant at work.
  - e) The aids and equipment recommended included advance types of hearing aids, appropriate telephone and other devices to overcome workplace barriers.
  - f) At that time (December 2016), Mr Macauley was replaced as store manager by Mr Kamal Patel.
  - g) The equipment did not materialise and, in mid-September 2017, the Claimant spoke directly to the Director of Customer Experience, Mr Neil Brough, who had paid the Claimant's store a visit. Mr Brough promised to look into the matter.
  - h) However, nothing happened and, on 28 March 2018, the Claimant wrote a formal letter to Mr Patel. This led Mr Patel into informing the Claimant that a female HR officer had determined that a fresh assessment needed to be done.
  - i) Thus, 18 months on from an assessment that established aids and equipment that would assist the Claimant to overcome workplace barriers, no such equipment had been provided.
24. We should add a footnote to this recitation of facts on which the Claimant based his grievance that the AtW proposal provided for the cost of the equipment to be split between the Respondent and the Claimant with the Claimant paying for two sevenths of the cost to reflect the fact that the equipment would benefit him on days when he was not working.
25. As a consequence of the evaluation that the Claimant had conducted resulting from assimilating the views of Mr Hussain, he decided in January 2018 to cut his working hours and become a part-time employee. He reached agreement with his store manager, Mr Kamal Patel, that from 1 April 2018, he would become a part-time worker. Then a colleague resigned unexpectedly in March and thus management postponed the start date of the Claimant's new hours. At the time of writing his grievance, the Claimant had made a written application for flexible working on 3 April 2018 but had been told that it might take three months to obtain approval.
26. The failure on the part of the Respondent to process his application for flexible working formed a further part of his grievance.

27. Ms Miller referred the grievance to Mr Umeir Shaikh, the Manager of the Respondent's store at Aldgate High Street. Mr Shaikh met with the Claimant to obtain a better understanding of the Claimant's concerns.
28. In respect of the failure to obtain promotion, the Claimant appears to have relied on the fact he had the external qualifications set out above and also on the fact that he had been doing the job for over 10 years. As Mr Shaikh explained at the time to the Claimant and to us at the Hearing, you do not get nominated for promotion to Assistant Store Manager purely on qualifications or time worked for the company. He said:
  7. To be entrusted to step up to a managerial position, someone must be given time to show the skills, behaviours and responsibilities to step up. Once it is seen that someone has potential through their behaviours and results, the store manager nominates the employee for the step up training programme. During the programme, you go for external training and receive on-the-job training. Throughout this programme, you, again, have to show that you are capable enough to complete this training by meeting all the expectations of the training. This training does not guarantee promotion.
  8. You are not nominated for promotion purely on qualifications or time worked in the company. You should have the passion, behaviours and reputation. For the Assistant Manager programme, you don't need any specific qualification or educational background. It is just based on behaviours and skills.
29. As part of his investigation, Mr Sheikh looked at the performance and development plan that was prepared in April 2018. He asserted that there were areas identified by the Claimant's manager in that plan where the Claimant was expected to improve his performance.
30. Mr Sheikh spoke to Mr Kamal Patel who was then the Claimant's store manager. Mr Patel's view was that the Claimant was doing a good job on certain areas but not in all areas. He did not have the skills and behaviours nor was he showing progress in those areas that would have him nominated for the assistant manager programme.
31. In his conversation with the Claimant, Mr Sheikh had ascertained that the Claimant compared himself with three colleagues. One appears to have been Mr Hussain although Mr Sheikh asserted that the Claimant did not identify his comparator. However, the Claimant gave details that this colleague was a part-time employee on a student visa (made necessary by the fact that he was not a British national) who had worked for the Respondent for 3 years.
32. Mr Sheikh did not investigate the comparator because he was not given the name. Neither did he investigate a second comparator, a man the Claimant said had been promoted from being a driver to Assistant Manager by the Area Manager at that time to avoid redundancy. Again, the reason for not investigating was that he was not given the name.
33. The third colleague mentioned by the Claimant was a woman whom he asserted had been given a Legendary rating after 8 months and then had been promoted to the position of Assistant Manager in a flagship store. Mr Sheikh did investigate the position of this comparator and found there to have been no promotion, merely the transfer of a Customer Assistant from one store to the other.
34. The Claimant had mentioned in his grievance that Mr Macauley had seen fit to nominate him and the nomination had been blocked by Mr Soul Malik. Mr Sheikh



investigated with Mr Kamal Patel whether he understood that to be the case. Mr Patel told Mr Sheikh that, when Mr Macauley handed over the management of the store to Mr Patel, there was no mention of the Claimant being nominated, Furthermore, examination of the Claimant's file had revealed no record of the same.

35. Mr Sheikh did not pursue the matter further and, in particular, did not check whether Mr Macauley was able to corroborate the version of events that Mr Patel had provided. He did accept that the way promotion to Assistant Manager from the position of Customer Assistant comes about is by the store manager nominating the Customer Assistant and the nomination being endorsed by the Area Manager. In the event of a store manager's nomination not being endorsed by the Area Manager, he would expect the Customer Assistant to have received feedback most likely through the Store Manager as to the reasons why the Area Manager refused to endorse the nomination. He also indicated that the absence of any record in the personnel file could be explained by the very fact of the Area Manager not concurring in the nomination.

36. In his witness statement, Mr Sheikh asserted that when he saw the Claimant's ...

... performance rating sheet, I could see that there were areas where he was not performing well, such as customer service and being proactive at selling. He seems to be hesitant when facing customers and when handling customer queries. But, on the other hand, his operational task performance was satisfactory. He was not however ticking all the boxes of a legendary Customer Assistant.

37. We were never shown this performance rating sheet.

38. When Mr Sheikh interviewed Mr Patel as part of his investigation of the Claimant's grievance, he obtained some information about the Claimant's dealings with AtW. Mr Patel understood the Claimant to have attended Boots Hearing Care in December 2016 in order to get an internal assessment of his hearing loss. The AtW report was sent only to the Claimant because of issues of confidentiality. Mr Patel believed that the Claimant had missed a deadline of returning a declaration to AtW. Mr Sheikh's evidence was:

24. At the time, Kamal [Patel] was trying to get the costs approved by Boots HR. This was the first time Kamal was dealing with this issue and so he was coordinating with different departments to try and raise a purchase order for the hearing aids.

25. Then in August 2017, the Claimant spoke to Kamal and indicated his intention to resign from Boots and apply somewhere he could use his qualifications. This was at the same time he was applying for IT jobs in Boots. At that time, Kamal spoke to him and said that if his intention was to resign then we wouldn't be able to proceed with the adjustment if the Claimant was leaving the company. Kamal told him that when he was confident he had the intention to stay, we could reconsider the process again.

26. In January 2018, the Claimant had not had any response from external or internal job applications and so he decided to remain with Boots. By that time all the tests had been done a year ago and we had to do the test again.

27. A Posturite assessment was provisionally arranged in April 2018. This is where an assessor comes in to the store to see what difficulties you are having and what adjustments can be made. Kamal told the Claimant that Boots would pay for the assessment. However, this assessment was never carried out because the Claimant went off sick.

39. Mr Sheikh went on in his evidence to acknowledge that, in his grievance outcome letter sent to the Claimant on 20 July 2018, he had expressed the view that “the process could have been dealt with in a more reasonable and timely manner”.
40. In the outcome letter, Mr Sheikh rejected the grievance relating to the failure to be promoted and the failure to make reasonable adjustments. He upheld the grievance relating to flexible working on the basis that the request for a reduction of hours was not dealt with within the required period of three months. He understood from conversations with the Claimant that the Claimant now had retracted from wanting to work part time hours and now wanted to continue with full time hours. He suggested the matter could be confirmed on the Claimant’s return to work, the Claimant having been, at that stage, off work since 18 May 2018 with pain in his lower back.
41. In rejecting the grievance relating to the Claimant’s failure to obtain promotion, Mr Sheikh said this in his letter:

When I asked you about your assistant manager step up nomination, you told me that the store manager Neil McCulley [*Maccauley*] did not confirm your nomination with you and that your promotion was affected as the manager was not performing well. You also believe that your disability was the key reason for not supporting a nomination on the programme. I can find no evidence to support this allegation.

You showed your interest in the step up to Assistant Manager programme and were advised to review the role profile to gain an understanding of the role and you were also keen to work in Boots Cyber Security, a role which is more relevant to your qualification.

My findings are that your half yearly performance rating in April this year was rated as Performing. It has been identified that your area of excellence is delivering an effective and smooth running of all store operational activities. You were provided with areas of improvement including; driving customer loyalty by Boots Advantage Card signups, improving sales of No 7, Boots Own Brand and Boots Exclusive Brand; and participate in store and promotional activities. Kamal has also shared with me that your hearing impairment does not have an adverse effect on your performance at work.

You shared with me that the main reason you should be promoted to assistant manager is due to your tenure in Boots and your degree qualifications. Career progression and promotion is based on skills, competencies and behaviours and this is reviewed and discussed during performance reviews and is not determined by external qualification or length of service.

You were concerned that managers do not disclose or share performance ratings and bonus details of other colleagues and is therefore not transparent. Individual performance is confidential and therefore it would not be appropriate for this to be shared with other colleagues by the management team. I can assure you that Boots follows a calibration review of performance ratings within their areas, regions and division to ensure consistency of measures and ratings.

42. In respect of the failure to provide reasonable adjustment, Mr Sheikh summarised the position he had set out in the outcome letter as follows:

My findings are that following hearing assessments you have been recommended a hearing aid that is not available from the NHS and that you requested financial support. Access to Work did conduct a workplace assessment and it appears that the deadline for acknowledging this may have been late. Following this assessment, the company were unclear whether you would be remaining as an employee and therefore there was a temporary hold on the decision for long-term adjustments. Once you confirmed your intention regarding your employment an assessment was arranged with Posturite however this was not authorised at the time due to the request for an interpreter and difficulty obtaining the adjustments recommended.

It does not appear that your hearing impairment affects your ability to fulfil your role, however, to enable me to fully understand the difference between your current hearing aid and the

recommended hearing aid by Access to Work I have arranged an independent workplace assessment to be conducted. We will then be able to review the workplace implications and this will be arranged by your manager on your return from your sick leave.

Although it is clear that there are reasons for the delays regarding any reasonable adjustments to be considered and full assessments concluded I do believe that this could have been dealt with in a more reasonable and timely manner. My findings also show that Kamal kept you informed of the situation before leaving the store. Based on your performance I do not believe that reasonable adjustments were required, however this will be further reviewed following an Independent Posturite assessment.

43. The response of the Claimant to this letter was to submit a further 8-page letter to Ms Miller which she treated as an appeal against the Grievance Outcome. A number of assertions were made about the competence with which Mr Sheikh had approached his investigation of the Claimant's grievance. However, several points stand out. First, the Claimant asserted that he had identified Mr Shafqat Hussain as being his first comparator. Second, he focused on the discriminatory action of Mr Malik in not considering the nomination of the Claimant that Mr Macauley had made. Third, he denied that he had ever stated that because of his tenure in Boots and his qualifications, he should have been promoted. Rather, he had asked what the criteria were for becoming an Assistant Manager and, when Mr Sheikh had asserted what they were, the Claimant had asked why, given he fulfilled those criteria, he was not promoted. The reply had had received from Mr Sheikh was to the effect that, as he had not worked with the Claimant and he was seeing him for the first time and had not seen his personnel file, he could not say why the Claimant had not been promoted.
44. The next point of note was the rather indignant and pained response of the Claimant to Mr Patel's assertion to Mr Sheikh that the Claimant's hearing impairment does not have an adverse effect on his performance at work. The Claimant put it thus:

In the light of the medical reports, Access to Work Assessment and ongoing treatment at the leading hospitals and consultants' opinions, it is a blunt lie on part of Mr Kamal or Mr Umeir or someone else to say that my hearing impairment does not have an adverse effect of my performance.

Examples

1. Customer abuses for not hearing to their call talk – Adverse affect on my performance
2. Colleagues ringing the bell calling me for help which I can't hear– Adverse affect on my performance
3. Unable to use and attend to telephone calls at work– Adverse affect on my performance

And despite all these difficulties, still I have been competing with normal colleagues and excelled in each and every area which the company and respective managers failed to recognise and accept them.

45. The Claimant challenged the assertion that the delay that Mr Sheikh had asserted had occurred in the return of documentation to Access to Work had been his, as opposed to the Respondent's, responsibility.
46. The Claimant finished his letter of appeal with a list of 5 questions which Ms Miller, when she prepared herself for a meeting which came to be held on 4 October 2018, summarised the key points.

47. These points provided the agenda for the meeting. Ms Miller found the Claimant on the first issue, that of his non-promotion, kept referring to his qualifications. She said:

14. ... I kept trying to explain to him that having qualifications doesn't necessarily mean a person is qualified to become an Assistant Manager. He actually said at one point he was more qualified than I am. That doesn't make you a leader. I would say that for any role you have to have the right behaviours, capability and potential. No one has ever said the Claimant didn't work hard but being a hard worker doesn't necessarily make you a leader.

15. Every colleague within Boots will have a performance review, looking at behaviours. They are also informally reviewed on a quarterly basis, with a half year and end year formal review. The Claimant, throughout his performance reviews, had shown that he was a good performing Customer Assistant. There were no issues with his performance and he never fell below the standard of performing. Sometimes he even out-performed.

16. From a leadership point of view, when looking at whether someone can step up with training, we generally look at behaviours, at how someone works with their colleagues and at general leadership behaviours. If it is considered that someone should be offered the step up to Assistant Manager training, this has to get signed off by the leadership in store, as well as the Area Manager.

17. Even to get on training course does not necessarily mean however that that person will automatically get a promotion. You have to go through the training process and then get signed off. My understanding is that, in respect of the Claimant, there was never a point at which this was discussed.

18. From having conversations with the Claimant's Store Manager at the time, I did not see the Claimant's behaviours as being one of a leader. I had never interacted with him in store but during the appeal meeting with the Claimant, he acted as if he was overqualified for the role. To me, he didn't show the behaviours of a leader that I would want in one of my stores.

48. Ms Miller then explored the allegation of the Respondent's failure to make reasonable adjustments with regard to hearing aids. She accepted that the process had appeared to go on for quite a long time. She said:

21. ... my understanding is that there was an issue with trying to raise a purchase order for a Posturite assessment. Posturite is our internal assessment process and I understand we wanted to understand whether the cost being quoted in the Access to Work report was correct. The hearing aids recommended in the Access to Work report were a top of the range model and whilst it may have advanced his life out of work, it felt like the Claimant's current hearing aid sufficiently assisted him in the role that he was in. That is why Posturite was offered, in order for us to really understand what the Claimant needed in store to assist him in the role he was doing.

22. At the same time, the Claimant was sharing that he was actively looking for other jobs. His store manager, Kamal Patel, was clear with him that if he was looking for another job, we wouldn't support the purchase of these items.

23. At the point that I got involved in the Claimant's appeal, the Claimant had not been back in the business since going off sick for us to offer the assessment.

24. The Claimant also claimed that there would be times at work when the bell was ringing from the tills and he wouldn't hear it and that he felt people would get frustrated. However, there had been no complaints from store leadership. I considered this was a personal feeling of the Claimant.

25. I did notice that the Claimant spoke very loudly in the appeal meeting. He was almost shouting at me and I did think that if a colleague was speaking like that in store, then that would be a problem. However, I spoke to Kamal Patel, the Claimant's line manager at the time, who told me that the Claimant had never spoken like that while working. There had also been no customer complaints about his hearing.

26. I found that there had been no failure to make reasonable adjustments. We needed the Posturite assessment to understand what the Claimant needed. This was offered again during the appeal meeting and my outcome letter.

49. Ms Miller rejected the appeal and provided her reasons for doing so in her letter of 22 October 2018. It is clear that she did not accept that, even if the Claimant had identified Mr Shafqat Hussain as being the first comparator, that there was anything in the comparison that showed the Claimant to have been treated differently.

## **Discussion**

50. The Claimant complains of a failure on the part of the Respondent to promote him and concentrates on the fact that Mr Macauley, then his line manager, nominated the Claimant to go on the Step Up programme, thereby obtaining the training which, if completed satisfactorily, would lead to appointment as an Assistant Manager. Mr Macauley's nomination was blocked by Mr Soul Malik.
51. No explanation was provided to the Claimant at the time as to why Mr Macauley's nomination of him was blocked. What the Claimant knew was that in the year appraisals ending in November 2015 and 2016, he had achieved the rating of "Legendary". He also knew that he had been entrusted with acting up in place of the Store Manager or Assistant Store Manager on at least 2 occasions when the store was being opened up on a Sunday morning. And he knew that Mr Macauley had nominated him.
52. We find that the Claimant had an accurate picture of those facts. We consider that these are facts, when placed beside the fact that the Claimant was known to be disabled, from which we could decide, in the absence of any other explanation, that the Respondent had directly discriminated against the Claimant on the grounds of disability. In effect, we considered that the facts justify the reversal of the burden of proof per section 136 of the Equality Act 2010 and the Respondent was obliged to provide an explanation of their failure to implement the nomination of their manager.
53. What we heard from the Respondent by way of explanation was wholly inadequate. We were not told why it was that Mr Malik, the Area Manager, blocked the nomination from Mr Macauley, the Store Manager. We were told that Mr Sheikh interviewed Mr Patel as to whether Mr Macauley passed onto Mr Patel any information about the Claimant being nominated. By this means, Mr Sheikh understood from Mr Patel that Mr Macauley said nothing about the Claimant being nominated. However, no enquiry was made by the Respondent of Mr Macauley or Mr Malik. We also have confirmation that such a block emanated from Mr Malik in the response the Claimant obtained from Mr Macauley. As to the thought processes which led Mr Malik to block the nomination, Mr Macauley was not in a position to say.
54. Given the absence of any satisfactory explanation, we conclude that the claim of direct discrimination is made out.

As regards the allegation that the Respondent failed to make reasonable adjustments, we find that there was a failure on the part of the Respondent to process the recommendations of AtW and obtain for the Claimant the aids and equipment that the RBLI had determined would assist the Claimant. The delay between December 2016 and September 2017 was unexplained other than, in August

2017, the Claimant had announced to Mr Patel that he was looking for a job outside of the Respondent's organisation. It was a reasonable response for Mr Patel to indicate that, given the Claimant might be leaving, the Respondent was going to save its money. However, that does not explain the previous eight months' delay. The Respondent's own hearing department had supplied a quotation on 10 January 2017 and two other providers of hearing aids and equipment had supplied quotations around the same time. The Respondent had the advantage of having had expert identification of what was needed for the Claimant and failed to action it. We therefore consider they failed to make reasonable adjustments.

55. We were not impressed with the claim for flexible working. As we understand it, the Claimant did not seek to work part-time for any reason relating to his hearing disability. It is not entirely clear precisely what was the catalyst for his request but it would appear to have been a combination of reasons: the Claimant wanting to spend more time with his family and also the Claimant was beginning to suffer from the effects of a sore back, a physical impairment which he has not advanced as amounting to a disability. His request to work part time had nothing to do with the disability we are concerned with. In due course, the Claimant changed his mind and wanted to remain full time but, by that stage, the issue had been overtaken by the Claimant starting a period of absence because of his back condition on 18 May 2018 from which he never returned.
56. The Claimant asserted in his ET1 that, throughout the duration of his service with the Respondent, he had experienced bullying, social media harassment and verbal abuse. The only incident he cited in his pleadings was an occasion on 8 May 2018 when a colleague shouted at him for not hearing a customer's call. He also asserted that he had been nicknamed "Manager" by his colleagues. We were not satisfied on the evidence we heard that necessarily the colleague was shouting as opposed to attempting to speak loudly so that the Claimant would hear.
57. Neither were we satisfied that the nickname "Manager" had any connection to the Claimant's disability. While the Claimant may not have wanted his colleagues to call him "Manager" and thus such name-calling might have been unwanted conduct, we were not persuaded such unwanted conduct related to the relevant protected characteristic of disability.
58. For these reasons, we do not uphold the claim of harassment. Turning to victimisation, having had the advantage of hearing the evidence, we share the doubts expressed by Employment Judge Wade concerning as to whether there had been a protected act. The bringing of these proceedings and other events after the presentation of the claim might be a protected act in respect of a further claim that there the Claimant was subjected to a detriment but that would need either a further application to be made or an amendment to this ET1. Neither of these have been done in this case. Thus, the claim of victimisation fails.
59. Finally, we turn to time limits. The ET1 was presented to the Tribunal on 18 September 2018. ACAS was seized of the matter for Early Conciliation for one month. Therefore, events which occurred before 18 May 2018 are out of time.
60. This means that the claims of direct discrimination and harassment are both out of time. The claim of failing to make reasonable adjustments is not out of time as

the failure to react to the recommendations for aids and equipment persisted beyond 18 May 2018.

1. The Claimant has not presented us with evidence upon which we could conclude that it is just and equitable to extend time. In this exercise, we remind ourselves of the guidance given by Auld LJ In **Robertson v Bexley Community Centre** [2003] IRLR 434 (CA):

25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule. It is of a piece with those general propositions that an Appeal Tribunal may not allow an appeal against a tribunal's refusal to consider an application out of time in the exercise of its discretion merely because the Appeal Tribunal, if it were deciding the issue at first instance, would have formed a different view. As I have already indicated, such an appeal should only succeed where the Appeal Tribunal can identify an error of law or principle, making the decision of the tribunal below plainly wrong in this respect.

61. We therefore consider ourselves not to have jurisdiction in respect of the acts complained of that occurred before 18 May 2018.
62. Our unanimous conclusion is therefore that we find the Respondent to have failed to make reasonable adjustments in the period from December 2017 through to August 2018 and we dismiss all the other claims. We will leave the parties to attempt to agree the remedy that flows from this decision. In default of obtaining agreement, the parties have permission to apply to the Tribunal for a remedy hearing to be listed.

Employment Judge Stewart  
17 October 2019

Sent to the parties on:

30/10/2019

For the Tribunal:

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