EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4121845/2018

Held in Glasgow on 24 April 2019

Employment Judge: M Mellish

Mr D Gabel	**Claimant** **In Person**
Chief Inspector of Diving	**Respondent** **Represented by:** **Ms L Cartwright** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the respondent (Chief Inspector of Diving) is not a qualifications body in terms of sections 53 and 54 of the Equality Act 2010. Therefore, the Tribunal does not have jurisdiction to hear the claimant's claim against the respondent; consequently, the claim is dismissed.

REASONS

Introduction

1. The claimant submitted complaints alleging disability discrimination in terms of sections 15, 19, 20, 53 and 54 of the Equality Act 2010 ("EA 2010").
2. The respondent resisted the claim, arguing that it should be dismissed. Reference was made to the claim having been heard before the Employment

Tribunal in case number 4103960/2018, raised by the claimant against (1) Secretary of State for Work and Pensions and (2) Health and Safety Executive. The relevant judgment was issued on 11 October 2018; the claimant's complaints of direct and indirect discrimination were time barred, consequently the Tribunal had no jurisdiction to deal with the claim, which was dismissed. Reference was also made to the claim having originally been raised in the Court of Session in claim A118/17, against the Secretary of State for Work and Pensions. This claim, stated the respondent, was dismissed as the Court found it had no jurisdiction.

3. The respondent's position, as set out in the ET3, was that the respondent is not a qualifications body, therefore section 53 of the EA 2010 does not apply and the claimant is pursuing the wrong respondent. Therefore, they argued, the claim should be dismissed. In addition, the respondent argued that the claim was time barred and also raised the issue of res judicata.

4. A Preliminary Hearing was arranged before the Tribunal on 11 January 2019. A Note was subsequently prepared by the Employment Judge who conducted the hearing, dated 19 January 2019. The Employment Judge decided that the following issue should be determined at a further Preliminary Hearing: Whether, on the application of section 53 and section 54 of the Equality Act 2010, the Employment Tribunal has jurisdiction to hear the claimant's claim against the respondent (Chief Inspector of Diving), that respondent being a qualifications body in terms of sections 53 and 54.

5. The case was listed for a one day hearing in April 2019.

6. The claimant elected not to give evidence. Evidence was led for the respondents from Ms Judith Tetlow (Chief Inspector of Diving for the Health and Safety Executive).

7. An agreed bundle of productions was lodged with the tribunal, numbered pages 1 to 128.

8. Both parties made oral submissions. In addition, written submissions were provided by the claimant and the respondent's representative following an Order made by the Employment Judge at the end of the hearing. The latter submissions were to cover "... the extent of the claimant's claims (as set out in paragraph 6 of the Note of the Preliminary Hearing held on 11 January 2019) and the implications for the preliminary issue before the Tribunal on 24 April 2019". Having considered the written submissions, the Employment Judge made a further direction seeking the respondent's comments on certain matters raised in the claimant's submission concerning sections 49 and 149 EA 2010.

Findings of Fact

9. The Tribunal found the following facts to be admitted or proved:-

(i) The Diving at Work Regulations 1997 ("DWR 1997") govern the regulation of diving in Great Britain; they apply to any diving at work (pages 22 to 33).

(ii) The purpose of the DWR 1997 is to require certain standards for any diving at work to protect the health and safety of those taking part.

(iii) Qualifications are covered by the DWR 1997. "Approved qualification" is defined in regulation 2 (see paragraph 60 below). Essentially, it is a qualification which is approved by the Health and Safety Executive ("HSE") under regulation 14. The latter regulation (again, see paragraph 60 below) covers qualifications the HSE may approve for the purpose of ensuring the adequate competence of divers for the purposes of regulation 12(1)(a). In summary, the latter regulation (once again, see paragraph 60 below) provides that no diver shall dive in a diving project unless he has an approved qualification which is valid for any activity he may reasonably expect to carry out.

(iv) There are a number of Diver Competence Assessment Centres/Organisations in the UK (often known as HSE Dive Schools). These Centres, which are commercial businesses, have been assessed and approved by the HSE; they provide divers with training and competency assessments to a defined criteria. On completion of assessment, the Centres can then recommend to the HSE that they issue the relevant HSE diving qualification.

(v) If the HSE is to issue a qualification, it is based on a diver having been assessed in a range of different competencies. The HSE does not define exactly how the training is delivered; certificates are issued on the basis of competency. The HSE defines certain criteria, conditions and ways in which the Dive Schools must deliver assessment.

(vi) The HSE has produced a Protocol with which the Diver Competence Assessment Organisations have to comply (pages 76 to 128).

(vii) The Protocol covers such matters as applying for recognition, selecting candidates, course staffing levels and the design of assessment courses.

(viii) The “Course staffing levels” section of the Protocol deals with (amongst other matters) the minimum qualifications for Assessors/Instructors, Supervisors and standby divers (page 91). The “Assessor” is the person who formally assesses the competency of the student diver. The “Supervisor” is the person who acts as diving supervisor for the particular project. The “standby diver” is the person who acts as the safety or emergency diver for the diving project. The Protocol provides that Supervisors should (amongst other requirements) “have an HSE approved qualification of at least the level of the Unit or equivalent which the assessment course is intending to achieve”. A similar requirement applies in the case of Assessors/Instructors and standby divers.

The requirement for minimum qualifications is to ensure that the said staff are themselves qualified in the techniques they are assessing, supervising or for which they are acting as standby diver.

(ix) In terms of the role of the Chief Inspector of Diving, there is a document entitled “Authorisation to perform functions of the Health and Safety Executive under the Diving at Work Regulations 1997” (page 34). It is dated 21 December 2001 and is signed by the Head of Offshore Division. It states “I hereby authorise the holder for the time being of the post of Chief Inspector of Diving in the Offshore Division to perform on behalf of the Health and Safety Executive its functions under Regulations 6(4), 14(1) and 16(1) of the Diving at Work Regulations 1997”.

(x) A document entitled “HSE Delegated Authority” and dated 18 July 2018 appears at pages 35 to 43 in the bundle. On the first page, it states “HSE’s CEO issued a general authorisation on 4 December 2009 which authorised all members of HSE staff (SCS and below) to perform all of its functions. This general authorisation relates to functions discharged by HSE staff on behalf of HSE rather than functions discharged by warranted inspectors under powers granted in ...” At the top of the second page of the document it states “This delegated authority for the following Regulations, modifies the general authorisation so that specified functions may only be performed by persons with the appropriate competence, expertise and seniority”. The document contains two tables, the first of which is headed “Lists the respective legislation and the respective person(s) deemed appropriate to discharge the functions”. Towards the end of Table 1, the DWR 1997 are specified and in particular regulations 6(4), 14(1), 15(1, 3, 4, 6) and 16(1). Under the column next to the DWR 1997, under the heading “Delegated Authority”, the Head of ED6 (Band 1) and the Chief

Inspector of Diving are both listed as the appropriate persons to discharge the functions.

(xi) A document entitled "HSE List of Approved Diving Qualifications" and dated 25 January 2017 appears at pages 44 to 71 in the bundle. This is a list of all of the diving qualifications approved by the HSE. On page 50 in the bundle, there is what might be described as the approval document; it is dated 25 January 2017 and bears the name of the current Chief Inspector of Diving. Paragraph 1 states "On behalf of the Health and Safety Executive I hereby approve under regulation 14 of the Diving at Work Regulations 1997 ("DWR") the diving qualifications specified in Schedules 1 to 9 of this document, for the purpose of ensuring the adequate competence of divers for the purposes of regulation 12(1)(a) of DWR". Paragraph 2 revokes the previous list. This list contains those qualifications not specifically issued by HSE but approved by HSE as acceptable under the DWR 1997.

(xii) A document entitled "HSE criteria for approval of non UK diving qualifications" and dated 9 July 2018 appears at pages 72 to 75 in the bundle. This document describes the process HSE goes through in order to approve non UK diving qualifications for the above list.

Claimant's submissions

10. The claimant made submissions, as summarised below.

11. The HSE is a non-speaking body which can be considered as a qualifications body under the EA. Due to using regulation 14 DWR 1997 to issue certificates for individuals to work as divers, which are considered as approved qualifications under current UK legislation, the HSE has authorised the Chief Inspector of Diving to act on their behalf; which includes speaking, especially for matters dealing with regulation 14.

12. The claimant believes it is in the public interest to protect the qualifications of many individuals who gained diver qualifications in his employment at an HSE approved Dive School and the case should continue to full hearing.

13. Delegated Authority is the transference of a legal authority or power given from one party to another, granting the receiving party the power to represent the giver and freely utilise the authority or power given.

14. According to the Delegated Authority list (Document 5), the HSE has relinquished its authority or power on certain regulations under the DWR 1997 to the Chief Inspector of Diving (page 40), the only person with the appropriate competence, expertise and seniority to perform those functions (page 36). The Chief Inspector of Diving has freely utilised that authority or power, which is detailed under the Health and Safety at Work etc Act 1974 ("HSWA 1974") in section 11 (Functions of the Executive) and section 13 (Powers of the Executive). [*At this point in his submissions, the claimant set out in full the provisions of sections 11, 12 and 13 of the HSWA 1974. It is unnecessary to do so in this Judgment. The claimant's associated arguments are, however, set out below*].

15. A management policy is a set of basic principles and associated guidelines, formulated and enforced by the governing body of an organisation, to direct or limit its action in pursuit of long term goals. The Chief Inspector of Diving has acted under section 11(1) HSWA 1974 by creating the Protocol for Diver Competence Assessment Organisations (Document 8), which deals with the management of how and by whom they consider diver candidates should be trained and assessed for the purposes of Regulation 12 DWR 1997.

16. Since the Protocol is not published on the HSE website, it appears to be created and used as an internal document by the HSE Diving Directorate. It is believed that section 11(3) HSWA 1974 may not have been performed with

regard to this document; therefore, it cannot be seen as an appropriate document for regulation under DWR 1997.

17. The List of Approved Diving Qualifications (Document 6), which is signed by the Chief Inspector of Diving, appears to fulfil section 11(2)(a) and (b) and section 11(5)(a) HSWA 1974 as it deals with agreements made with 17 other countries diver qualification bodies; and approved under section 12(1) HSWA 1974 by the Secretary of State.

18. Due to the fact that Diving Contractors at approved Dive Schools are employers, section 11(2)(c)(iii) HSWA 1974 has been utilised by the Chief Inspector of Diving.

19. The claimant was never, at any point during his employment, informed of the Protocol by his employer or the Diving Directorate, during the yearly audits performed by them. It was on 15 March 2012, over 15 months after his employment ended that the claimant was made aware of this document. It can be said that the Chief Inspector of Diving (or representative) has failed to consider section 11(2)(c)(iv) HSWA 1974 prior to or during the claimant's employment.

20. It is believed that sections 11 and 13 HSWA 1974 had been utilised during the development of the Diver Competence Theory Assessment System ("DCTAS"). It is believed that section 13 is being utilised to continue maintaining DCTAS's updated databank of questions to provide theory examinations and marking guides for use by all approved diver training organisations for the purposes of Regulation 14 DWR 1997.

21. The preferred employment option, not a "requirement", of "have an HSE approved qualification ... intending to achieve" is listed for all major training/assessment staff at an approved Dive School (paragraphs 37 and 38 on page 91). Prior to employing the claimant, the approved Diver Training Organisation's Diving Contractor had satisfied himself, as required, that the

claimant was suitably qualified and competent to perform in the major training/assessment staff roles under DWR 1997 and approved codes of practice. The HSE Diving Directorate has no records making a reference to the claimant's employment, even regarding the note contained in the said paragraph 37.

22. In March 2012 the claimant was informed by the Diving Directorate that he could not fulfil the role of diving supervisor at HSE approved Dive Schools due to the fact that he cannot work as a diver in UK waters. In August 2012, the claimant was informed by the Chief Inspector of Diving that he did "not meet all of the requirements of the Protocol to act as an Assessor or a Supervisor at a Diver Competence Assessment Organisation". If this is true, the training/qualification process must be considered as invalid due to unqualified staff participating without prior written authorisation for the claimant to perform those duties and responsibilities of employment and the numerous individuals who obtained such a certificate during his employment would be considered unqualified to work as a diver.

23. It has been shown that, after being given authority by the HSE to represent and act on its behalf for Regulation 14 DWR 1997, the Chief Inspector of Diving has freely utilised those functions and powers under the HSWA 1974. Therefore, the Chief Inspector of Diving can be considered the sole representative of a qualifications body as mentioned in section 53 and 54 EA 2010.

24. The Court of Session ruled that they do not have jurisdiction to hear the facts of this action and that it must be heard in an Employment Tribunal. The injustices of breaching the EA 2010 then, as now, include Chapter 2 "Prohibited Conduct". If the decision is that the Chief Inspector of Diving is not the legal representative of the HSE under section 53, it is believed that the claimant would have stand alone rights to claim under the "prohibited conduct" sections of the EA 2010 due to the reasons below.

25. Even though the failure to make reasonable adjustments is being addressed under section 53, section 49 of the EA 2010 could also have been mentioned for that reason. Section 49(2)(a) defines personal appointments as “an office or post to which a person is appointed to discharge a function personally under the direction of another person”. Section 49(10) states “For the purposes of subsection (2)(a), a person is to be regarded as discharging functions personally under the direction of another person if that other person is entitled to direct the person as to when and where to discharge the functions”.

26. A Diving Supervisor is given a Letter of Appointment to personally fulfil functions for a Diving Contractor under DWR 1997. This letter would contain the individual’s name, types/dates/place of the diving operation to be undertaken; which fulfils the above mentioned points.

27. Sections 49(6) to 49(8) state that a person who is a relevant person in relation to a personal office must not discriminate, harass or victimise a person. Section 49(9)(b) states that a duty to make reasonable adjustments applies to a relevant person in relation to a personal office.

28. Section 52(6) EA 2010 states “Relevant person”, in relation to an office, means the person who, in relation to a matter specified in the first column of the table, is specified in the second column (but a reference to a relevant person does not in any case include ... or the Scottish Parliament). The “Matter” in the first column states “Access to an opportunity” and the second column states “Relevant person” as “The person who has the power to afford access to the opportunity”.

29. All training/assessment staff at approved Dive Schools must be named via written submissions prior to the individual being employed. The Chief Inspector of Diving can be viewed as a relevant person with regard to access to the opportunity of employment at HSE approved Dive Schools. According to the Parliamentary and Health Service Ombudsman, the Chief Inspector of

Diving had utilised “Relevant person” when an approved Dive School’s Diving Contractor was told that the claimant cannot be employed/appointed as a diving supervisor.

30. The “Prohibited Conduct” sections can be heard under section 149 EA 2010. Under section 149(1), a public authority must have due regard to the need to (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act, (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it and (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it. [*The claimant went on to conclude his submission by citing the provisions of section 149(3), (4) and (6).*]

Submissions on behalf of the respondent

31. Authorities referred to:

- King v Health Professions Council [2013] ICR 39
- Pemberton v Inwood [2018] EWCA Civ 564
- Kulkarni v NHS Education Scotland UKEATS/0031/12

32. Submissions were made on behalf of the respondent, as summarised below.

33. The claimant raised a claim under section 53 EA 2010. The latter deals with arrangements made by qualifications bodies in relation to conferring relevant qualifications and the rule that they must not discriminate in relation to those arrangements. The definition of a qualifications body is set out in section 54 EA 2010.

34. The respondent’s position is that the qualifications body in this case is the HSE. The claimant wants to work as a diving supervisor in an Assessment Organisation (known colloquially as an HSE Dive School). The relevant

qualifications are covered by the DWR 1997 (Document 3). Regulation 12(1)(a) needs to be read alongside Regulation 14(1). The Regulations [i.e. 2(1)] are clear as to what “Executive” means. Therefore, the HSE approve whatever qualification they consider suitable under Regulation 14.

35. The HSE does not issue diving supervisor qualifications. In order to work as a diving supervisor in an Assessment Organisation, a person must hold the HSE approved qualification of at least the level which the assessment course is intending to achieve. The rule is found in the Protocol (page 91, paragraph 38, bullet 1).

36. The Protocol arises because of the way the HSE organises the running of training courses, which result in approved qualifications. They do not run courses themselves using HSE staff. Instead, it is done by commercial organisations who are approved and regulated by HSE. The latter regulate those commercial organisations via the Protocol. The Protocol sets out applying for recognition, the use of equipment and requirements for staff. HSE have to make sure under Regulation 14 DWR 1997 that qualifications are suitable for the purpose of ensuring the adequate competence of divers.

37. If they are not training divers themselves, the HSE have to regulate the commercial organisations they rely upon. If a person is trained in an unapproved organisation, the HSE would not issue a qualification.

38. The Protocol is part and parcel of the HSE satisfying itself that qualifications are suitable. Those who attend courses at approved organisations will come out with HSE approved qualifications.

39. In terms of performing HSE functions under Regulation 14 DWR 1997, the Chief Inspector of Diving is authorised to perform functions on behalf of the HSE. Refer to page 34 for the authorisation from 2001. The most up to date version of that authorisation is at page 35. On page 40, in relation to the DWR

1997, two persons are authorised; the Head of ED6 (Band 1) and the Chief Inspector of Diving.

40. When performing functions under Regulation 14 DWR 1997, the Chief Inspector of Diving is acting on behalf of the HSE. Therefore, the qualifications body which is pertinent to this claim is the HSE and not the Chief Inspector of Diving.

41. The Chief Inspector of Diving cannot confer qualifications (on such as the claimant) other than on behalf of the HSE. Whatever the Chief Inspector of Diving does, she does it on behalf of the HSE. The DWR 1997 are very clear about that. The Chief Inspector of Diving performs a function on behalf of the HSE and therefore that makes them the qualifications body under section 53 EA 2010. Under Regulation 14 DWR 1997, the Executive can approve qualifications; they do it through the Chief Inspector of Diving but the latter is not the qualifications body, that is the HSE.

42. The case has been raised against the wrong respondent and should be dismissed. During the course of the hearing, the claimant conceded the HSE is the qualifications body. The claimant's concession is correct; the qualifications body is the HSE and not the Chief Inspector of Diving.

43. The claimant's claim relates to "Work" i.e. his ability to work as a diving supervisor. All the different types of "work" which are covered by the Equality Act are set out at Part 5, sections 39 to 83. In amongst that are the provisions of sections 53 and 54 which relate to "Qualifications bodies". From the various different types of "Work" claims that may be made, the claimant relies on sections 53 and 54; in terms of the "Work" context in which he alleges the unlawful discrimination has taken place, which relates to the requirement that he has an HSE approved diving qualification to work as a diver in order to be able to work as a diving supervisor at an Assessment Organisation.

44. Within Part 9 of the EA 2010, which deals with “Enforcement”, it is provided that Employment Tribunals have jurisdiction to hear a claim relating to a contravention of Part 5 (Work). This is by virtue of section 120(1)(a) of the EA 2010.

45. So, the Employment Tribunal is being asked, by virtue of the jurisdiction that it has under section 120, to deal with the claimant's assertion that the respondent has discriminated against him by subjecting him to prohibited conduct (being the conduct set out in sections 15, 19 and 20 of the EA 2010) in the context of "Work" as it arises under sections 53 and 54. The claimant does not have a stand-alone right to make a claim about "prohibited conduct" unless it relates to a contravention by virtue of which the Employment Tribunal has jurisdiction under section 120. In this case, a contravention covered by Part 5 of the Act; the applicable parts of Part 5 being sections 53 and 54.

46. If the respondent is not a "qualifications body", as interpreted in section 54, then the context in which the claimant can make a claim against the respondent does not apply and the Tribunal does not have jurisdiction under section 120. In that event, the whole claim must be dismissed as the Employment Tribunal has no jurisdiction.

47. Nowhere in the ET1 or in the Preliminary Hearing Agenda did the Claimant claim to be the holder of a "personal office" under section 49 EA 2010. His ET1 clearly states at Question 4 that the claim is in relation to discrimination by a qualification body, and lists the subsections of the Equality Act which relate to qualifications bodies (section 53) and section 19.2. He does not mention section 49.

48. The Note Following Upon a Preliminary Hearing held on 11 January 2019 states that: "*The Claimant's stated position at the PH was….. That his claim is brought in terms of sections 15, 19, 20, 53 and 54 of the Equality Act 2010*”.

49. The purpose of the Preliminary Hearing was, according to the Employment Tribunal's Notice of Preliminary Hearing dated 2 February 2019, to determine: *"Whether, on the application of Section 53 and Section 54 of the Equality Act 2010, the Employment Tribunal has jurisdiction to hear the Claimant's claim against the Respondent (Chief Inspector of Diving), that respondent being a qualifications body in terms of Sections 53 and 54."*

50. The Preliminary Hearing was not fixed to determine whether or not the Claimant was the holder of a personal office under section 49. He has never claimed to be such until he sent his written submission to the Employment Tribunal. He should not be permitted to change the basis of his claim at this juncture. He has not sought to amend his claim and, as the claim presently stands, he has not claimed to be the holder of a personal office who has been subjected to discrimination under section 49 of the EA 2010.

51. The Employment Tribunal must follow the authority in Chandhok v Tirkey [2015] ICR 527, in which the EAT considered the basis of a claim and an attempt to later amend it to include a new type of claim. In that case, at paragraph 16, LJ Langstaff stated:- "*The claim as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely on their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made - meaning, under the Employment Tribunal Rules of Procedure 2013 (SI 2013/1237), the claim as set out in the ET1.*"

52. Then at paragraph 18, he stated:- "*In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it…..That is why there is a system of claim and response, and why an employment tribunal*

should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings."

53. On that basis, the Claimant's submission that section 49 of the EA 2010 applies should be rejected. That is not the claim that he made in his ET1 and it is not the claim which the Respondent has responded to, nor the claim which was advanced prior to the Preliminary Hearing now being determined.

54. Section 149 of the EA 2010 is contained in Part 11 Chapter 1 of the EA 2010.

55. Enforcement of a duty imposed by section 149 is covered by section 156 of the EA 2010.

56. Section 156 states *"A failure in respect of a performance of a duty imposed by or under this Chapter does not confer a cause of action at private law."*

57. Therefore, any alleged failure under section 149 (which is denied, in any event) does not confer a cause of action on the Claimant which the Claimant can enforce under private law within the Employment Tribunal.

58. Reference to section 149(2) of the EA 2010, in the context of the Claimant's claim, is not competent.

Relevant Law

59. *Sections 53 and 54 Equality Act 2010*

53 Qualifications bodies

(1) A qualifications body (A) must not discriminate against a person (B)—

(a) in the arrangements A makes for deciding upon whom to confer a relevant qualification;

(b) as to the terms on which it is prepared to confer a relevant qualification on B;

(c) by not conferring a relevant qualification on B.

(2) A qualifications body (A) must not discriminate against a person (B) upon whom A has conferred a relevant qualification—

(a) by withdrawing the qualification from B;

(b) by varying the terms on which B holds the qualification;

(c) by subjecting B to any other detriment.

(3) A qualifications body must not, in relation to conferment by it of a relevant qualification, harass—

(a) a person who holds the qualification, or

(b) a person who applies for it.

(4) A qualifications body (A) must not victimise a person (B)—

(a) in the arrangements A makes for deciding upon whom to confer a relevant qualification;

(b) as to the terms on which it is prepared to confer a relevant qualification on B;

(c) by not conferring a relevant qualification on B.

(5) A qualifications body (A) must not victimise a person (B) upon whom A has conferred a relevant qualification—

(a) by withdrawing the qualification from B;

(b) by varying the terms on which B holds the qualification;

(c) by subjecting B to any other detriment.

(6) A duty to make reasonable adjustments applies to a qualifications body.

(7) The application by a qualifications body of a competence standard to a disabled person is not disability discrimination unless it is discrimination by virtue of section 19.

54 Interpretation

(1) This section applies for the purposes of section 53.

(2) A qualifications body is an authority or body which can confer a relevant qualification.

(3) A relevant qualification is an authorisation, qualification, recognition, registration, enrolment, approval or certification which is needed for, or facilitates engagement in, a particular trade or profession.

(4) An authority or body is not a qualifications body in so far as—

(a) it can confer a qualification to which section 96 applies,

(b) it is the responsible body of a school to which section 85 applies,

(c) it is the governing body of an institution to which section 91 applies,

(d) it exercises functions under the Education Acts, or

(e) it exercises functions under the Education (Scotland) Act 1980.

(5) A reference to conferring a relevant qualification includes a reference to renewing or extending the conferment of a relevant qualification.

(6) A competence standard is an academic, medical or other standard applied for the purpose of determining whether or not a person has a particular level of competence or ability.

60. *The Diving at Work Regulations 1997*

Interpretation

2.— (1) In these Regulations:

"approved qualification" means such qualification as is approved by the Executive under regulation 14 ...

"Executive" means the Health and Safety Executive ...

Duties of and restrictions on divers

12.—(1) No diver shall dive in a diving project unless he—

(a) has, subject to paragraph (2), an approved qualification which is valid for any activity he may reasonably expect to carry out while taking part in the diving project; and

(b) has a valid certificate of medical fitness to dive.

Approved qualifications

14.—(1) The Executive may approve in writing such qualification as it considers suitable for the purpose of ensuring the adequate competence of divers for the purposes of regulation 12(1)(a).

Discussion and decision

61. The preliminary issue for the Tribunal to decide was as set out in paragraph 4 above.

62. The claimant had submitted complaints alleging disability discrimination in terms of sections 15, 19, 20, 53 and 54 of the EA 2010. It seems that the claimant wanted to work as a diving supervisor in a Diver Competence Assessment Organisation (or HSE Dive School). However, those Assessment Organisations are covered by the Protocol and, as explained above (in paragraph 9 (viii)) there are set out, in effect, minimum qualifications for supervisors. The claimant cannot obtain an HSE approved qualification. The substantive claim arises from this (the claimant clearly challenges the respondent's position) but those arguments are not a matter for this Tribunal, which is tasked to consider the preliminary issue.

63. However, before considering the preliminary issue, it would be appropriate to deal first with matters which were raised by the claimant in his written submissions; which were filed following the oral hearing. In summary, the claimant said that if he could not rely on sections 53/54, then section 49 and/or section 149 EA 2010 would apply to support his claim against the respondent.

64. Section 149 of the EA 2010 sets out the "Public sector equality duty". As pointed out by the respondents in their further submissions, section 156 states "A failure in respect of a performance of a duty imposed by or under this Chapter does not confer a cause of action at private law." The Tribunal would therefore agree with the respondent's submission that any alleged failure

under section 149 does not confer a cause of action which the claimant can enforce under private law within the Tribunal. The claimant's argument fails on that basis; even if it did not it could be dealt with alongside section 49 below.

65. The claimant did not claim to be the holder of a "personal office" under section 49 EA 2010 either in his ET1, or during the course of the oral hearing before the Tribunal. Further, the Note prepared by the Employment Judge following the earlier Preliminary Hearing which took place on 11 January 2019, clearly records that the claimant's stated position at that hearing was "that his claim is brought in terms of sections 15, 19, 20, 53 and 54 of the Equality Act 2010".

66. As the respondents have pointed out, the Preliminary Hearing was not fixed to determine whether or not the claimant was the holder of a personal office under section 49 EA 2010. The respondents rightly point out that the claimant did not claim to be such until he sent his written submission to the Tribunal. The respondents argue that the claimant should not be permitted to change the basis of his claim at this juncture, also pointing out that he has not sought to amend his claim.

67. The respondents referred the Tribunal to the case of Chandhok v Tirkey [2015] ICR 527, quoting relevant extracts from the judgment of the EAT (see paragraphs 51 and 52 above). The respondents go on to say that, on that basis, the claimant's submission that section 49 of the EA 2010 applies should be rejected. The respondents point out that it is not the claim the claimant made in his ET1, it is not the claim which the respondent has responded to, nor is it the claim which was advanced prior to the Preliminary Hearing now being determined.

68. Taking into account its duty under the overriding objective (as set out in rule 2 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013) to deal with cases fairly and justly, the Tribunal entirely agreed with the respondents submissions in relation to this matter. The claimant's attempt to change the basis of his claim at this late stage in the

proceedings is rejected. He did not make the argument relating to section 49 in his original claim; he did not raise it at the Preliminary Hearing in January 2019 or during the oral hearing in April 2019. It was only raised (along with the argument relating to section 149) in written submissions filed some time after the conclusion of the oral hearing.

69. Further to the above, the respondent pointed out that the claimant has not sought to amend his claim. That is correct but of course the claimant is unrepresented in these proceedings. If he had been represented then he might have been advised to make an application to amend to seek to make an argument not set out in the ET1. However, even if that had been done, the Tribunal would not have been persuaded to grant the amendment. The Tribunal would have taken into account the overriding objective in rule 2 and the principles set out in the cases of Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650 and Selkent Bus Company Ltd (trading as Stagecoach Selkent) v Moore [1996} IRLR 661. The Tribunal would take into account all of the relevant circumstances and whether allowing or refusing the amendment would result in any injustice or hardship.

70. In this case, the nature of the amendment would have been such as to change the basis of the claim faced by the respondent; they responded to an argument that the Chief Inspector of Diving was a qualifications body for the purposes of the EA 2010. An argument based on section 49 would be an entirely different proposition and not one which had been foreshadowed earlier in the proceedings. The respondents would undoubtedly have raised the issue of the applicability of time limits, as they did in relation to the claim based on section 53/54 EA 2010. Finally, in considering the timing and manner of any application to amend it was, as already discussed above, obviously very late in the proceedings to raise such an issue and it was done without any explanation as to why it had not been done previously. In these circumstances, the Tribunal would have taken the view that an application for an amendment should be refused; it would be unjust to allow it.

71. Moving on to consider the preliminary issue, the claimant raised a claim relying on section 53 EA 2010; the latter section deals with arrangements made by qualifications bodies in relation to conferring relevant qualifications and clearly such bodies must not discriminate in relation to those arrangements. "Qualifications body" is defined in section 54.

72. As mentioned above, the claimant wanted to work in a Diver Competence Assessment Organisation as a diving supervisor.

73. The relevant regulations are found in the DWR 1997. Regulation 14 (1) provides that the Executive may approve such qualifications as it considers suitable for the purpose of ensuring the adequate competence of divers for the purposes of regulation 12 (1)(a). The latter regulation provides that no diver shall dive in a diving project unless he has an approved qualification which is valid for any activity he may reasonably expect to carry out. "Executive" is defined in regulation 2 as the HSE.

74. The HSE does not issue diving supervisor qualifications as such but in order to work as a supervisor in an Assessment Organisation, a person must hold an HSE approved qualification in accordance with the Protocol (as explained in paragraph 9(viii) above).

75. The Chief Inspector of Diving is authorised to perform certain functions on behalf of the HSE. The detail of the authorisations is set out above at paragraphs 9(ix) and (x). The first authorisation dates from 2001, whilst the more recent document is dated 18 July 2018; however, both refer to regulation 14(1) of the DWR 1997.

76. The Tribunal accepted the submission made on behalf of the respondent that, when performing functions under regulation 14 DWR 1997, the Chief Inspector of Diving is acting on behalf of the HSE. The "qualifications body" which is relevant to this claim is the HSE and not the Chief Inspector of Diving. It is clear that the Chief Inspector of Diving cannot confer qualifications other

than on behalf of the HSE. Under regulation 14, the HSE may approve qualifications. Although they do that through the Chief Inspector of Diving, who has the necessary delegated authority, the latter is not the qualifications body, that is the HSE.

77. In conclusion, the Tribunal finds that it does not have jurisdiction to hear the claimant's claim against the respondent (Chief Inspector of Diving). The latter is not a qualifications body in terms of sections 53 and 54 EA 2010. The claim is therefore dismissed.

78. Finally, and for the avoidance of doubt, the Tribunal accepts the respondent's submissions with regard to the structure of the EA 2010 as set out in paragraphs 43 to 46 above. In short, as the respondent is not a "qualifications body", the Tribunal does not have jurisdiction under section 120 EA 2010 and in that event the whole claim falls to be dismissed.

Employment Judge:	M Mellish
Date of Judgement:	28 July 2019
Entered in Register,	
Copied to Parties:	30 July 2019