



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4102728/2020 (V)

Hearing Held by CVP on 3rd December 2020

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Employment Judge McFatridge

Allan Fraser

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**Claimant
Represented by
Mr McParland -
Solicitor**

Maersk Offshore Crew Management Limited

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**Respondents
Represented by
Ms Walker -
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The claimant was disabled in terms of s6 of the Equality Act 2010 from 13 November 2019 onwards.

REASONS

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1. The claimant submitted a claim to the Tribunal in which he claimed that he had been unfairly dismissed and unlawfully discriminated against on grounds of disability by the respondents. The respondents lodged a response in which they denied the claim. They did not accept that the claimant was disabled at the relevant time. A Preliminary Hearing was fixed in order to determine the single issue of whether or not the claimant was a disabled person. At the Hearing the claimant gave evidence on his own behalf. Carolyn Cosgrave, an HR and Location Manager for the respondents gave

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evidence on behalf of the respondents. Both parties lodged a joint bundle together with a further supplementary bundle of productions. I have referred to these in the Judgment below by page number. On the basis of the evidence and the productions I found the following facts relevant to the matter which require to be determined to be proved or agreed.

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2. The claimant commenced employment with the respondents in or about January 2013. He worked as an “engine room responsible”. This job involves a considerable amount of manual labour. The claimant worked in the engine room dealing with lifeline services for the rig. As well as the job intrinsically involving heavy labour the job situation on an offshore oil rig also required the claimant to maintain a certain level of fitness. Prior to working as an engine room responsible the claimant had worked as a rig mechanic which involved even heavier manual labour.

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3. The claimant had carried out both these heavy jobs without a problem apart from a single incident in 2015 where he had short term back pain. He linked this at the time to a sports injury he had suffered from some years previously. In 2015 he had attended a doctor under the BUPA insurance scheme provided by the respondents. He had received a steroid injection into his spine. This injection was successful in entirely removing his symptoms of back pain.

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4. On or about 30th April 2019 the claimant was working offshore for the respondents when he slipped when entering the engine control room. As a result of this fall he developed lower back pain. He saw a medic on the rig and continued to work however his lower back pain did not improve. In addition the claimant was, at that time, suffering from symptoms relating to an unrelated injury to his right hamstring. Due to the fact the claimant was in pain he was medically evacuated from the rig on a routine helicopter flight on or about 1st May.

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5. The claimant arranged a doctor’s appointment on 2nd May and thereafter arranged a referral to a private physiotherapist. The claimant initially believed that the pain would go away before his next trip which was planned to start on

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6th June 2019 however it did not. The physiotherapist advised him that since the pain was not going away he should go to a doctor and get a referral to a specialist. In the meantime the respondents had referred the claimant to an Occupational Health specialist on 31 May and on 3 June the claimant met
5 with Dr Asatiani, an Occupational Health physician at the International Medical Management Clinic in Aberdeen. Following this appointment Dr Asatiani produced a report which was lodged (pages 226-227). The claimant related the history of the matter. Dr Asatiani found the claimant medically unfit to return to work at present. He stated:

10 “He needs to see his specialist for further advice on the management plan of his muscular skeletal condition related to lower back. ... in my opinion the disability discrimination provisions of The Equality Act 2010 are unlikely to apply in this case. However this is not a medical
15 decision but ultimately a legal one.

I would suggest a follow up Occupational Health consultation with Mr Fraser in 3-4 weeks provided he sees specialist, gets further treatment and feels better.”.

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6. A few days later the claimant attended a pain clinic at Spires Murrayfield Hospital in Edinburgh for an examination which took place on 6th June. Following this he was referred to a specialist consultant neurosurgeon. The letter of referral dated 6th June 2019 was lodged (pages 99-100). This stated
25 the claimant’s position as being:

“Mr Fraser attended the pain clinic with lower back pain which is typically muscular skeletal in nature affecting the lower lumbar area. He is complaining of a pain which is a deep, dull and stabbing pain in
30 his lower lumbar area. He told me that he has had facet joint injections as local anaesthetic and steroid under x-ray guidance about 4 to 5 years back by Dr Demetriades (Consultant Neurosurgeon). This injection therapy had given him good pain relief for about 4 to 5 years. He works offshore and has had a fall about
35 6 weeks ago on his left side and since then the back pain has

increased. He is off work at the moment. He had buttock pain radiating to his left groin and sometimes into the leg which is a referred pain. He has seen a physiotherapy without much benefit.”

5 The letter goes on to record the medication the claimant was on. At that time he was on naproxen and co-codamol. These are analgesics. The claimant is recorded as saying that he wanted to have his back pain under control as soon as possible so that he could get back to work in the future. The letter goes on to relate the
10 management plan which involved use of a TENS machine, physiotherapy, weight loss and the option of further steroid injections into the spine. The letter mentions the risks associated with this but goes on to note that the claimant was happy to proceed with the injection therapy and that this had been booked on an urgent basis.

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7. At that point the claimant was optimistic that if he had injections then they would work in the same way they had in 2015 and provide sufficient relief from his symptoms so as to enable him to go back to work. He had had these injections in 2015 and thereafter worked in a fairly heavy job for 4 years
20 without a problem until his fall in 2019. He understood from his discussions that although the injections had worked very well in the past the prospects were variable. The pain relief could work for a week or a day for 10 years or not at all. There was no way to tell how long in advance. There was also a risk of being paralysed and getting infections or abscesses on the spinal cord. At that time the claimant described himself as in continual pain at level 2 or
25 level 3 on a scale of 10. Occasionally he would have projections of pain into his left groin area that took his breath away.

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8. Following this consultation the claimant spoke to the respondents' HR Department and enquired about the possibility of returning to work on light duties. The respondents were able to find the claimant light duties working on an oil rig called the "Gallant" which was based alongside in Dundee. Prior to starting work on the Gallant rig the claimant attended an Occupational

Health examination on 17th June 2019 when he was found medically fit to return to work doing administrative duties on the Gallant.

- 5 9. His job was purely administrative and involved carrying out paperwork. There was no manual labour involved at all. The claimant did require to climb substantial flights of stairs in order to get to and from his place of work on the oil rig each day. Initially the claimant returned on a phased return working restricted hours. He did 4 hours per day for 3 days and thereafter did 6 hours per day until around 16th August. On 16th August he worked an entire week's rotation staying in the accommodation on the rig. After that he worked on a normal leave rotation. When he started work on the Gallant he asked a colleague to help him rearrange the office to make the printer nearer him to avoid him having to get up and down so much and he had an electrically movable desk which he moved several times a day in order to help with his back pain.
- 10 10. The claimant duly had the steroid injection on 25th June. The procedure was carried out in Murrayfield Spire Hospital. The claimant was taken to the operating theatre and given an epidural and then the injections were given into the facets between the vertebrae. The claimant then attended a follow up meeting with Dr Asatiani. Following this Dr Asatiani wrote a letter to the claimant's GP which was typed on 14th August 2019. The letter was lodged (pages 95-96). The claimant is recorded as stating that he had 70% pain relief following the injections but that unfortunately it only lasted for a total of 3 weeks. He is recorded as saying his groin pain had completely disappeared and his functionality and mobility had improved significantly. The claimant discussed with Dr Asatiani the possibility of a more invasive procedure which involved essentially going into the site of the facet injections and burning the nerve ends off. Paragraph 3 of the letter from Dr Asatiani is an accurate record of what was discussed. The claimant wished to go ahead with this, more invasive procedure which is referred to as bilateral radiofrequency ablation or rhizolysis.
11. The claimant attended and received the rhizolysis treatment on 21st August. The surgeon was only able to do 5 of the 6 nerves. There was a problem

with one of them in that the surgeon felt the nerve was too close to the bone so he felt there was too much of a risk in proceeding with the whole procedure to the end.

5 12. While undergoing the procedure the claimant had met again with the respondents' Occupational Health advisor on 5th August 2019.

13. Following this the Occupational Health physician produced a report which was lodged (page 230). The Occupational Health physician notes that the
10 claimant was awaiting the further procedure. He noted that the claimant was "still experiencing functional limitations related to the prolonged periods of walking and manual handling". He went on to say:

15 "From my assessment Mr Fraser remains symptomatic and continues to have functional limitations. Therefore he is medically unfit to work in an offshore environment. Mr Fraser is fit to continue working in same amended duties on the Gallant provided it remains in Dundee Harbour. I suggest that Mr Fraser increases his working hours to 7 hours per day. He felt confident to be able to do this. I
20 suggested the above working hours are maintained for one week and provided Mr Fraser does not have any problems working hours could increase further to 8 hours per day. I suggest that there is no further increase in working hours until Mr Fraser has the scheduled procedure. As mentioned above he will require time off work
25 approximately for 2 to 3 weeks after the procedure. ...".

14. Following this appointment the claimant attended an informal meeting with Ms Cosgrove of the respondents' HR Department which took place in Aberdeen. The purpose of the meeting was essentially so that the
30 respondents could understand where he was with his treatment and get a status update. Until then all contact had been with Louise Taylor of the respondents' HR Department who was managing the claimant's absence and had arranged for him to do light duties on the Gallant. The respondents were

aware that the Gallant was going through a 5 yearly survey and that the claimant's role was only likely to be required there for a short time.

15. The claimant drove up to the meeting from his home which is a journey of
5 around an hour and 15 minutes. He presented as fit and able on arrival. He
then sat for the meeting which lasted around 45 to 60 minutes. He discussed
his treatment. He had just gone through the further rhizolysis treatment. He
said that the effect would only be known over time. He expressed some
frustration that he was still not completely fit again to go back offshore. The
10 discussion proceeded on the basis that the claimant would be going back
offshore as soon as he was fit to do so. The claimant did say he was in pain
and taking medication for it. He said he was able to work and do more hours
as had been suggested by the occupational health report. He said working
more hours helped with his pain management as it gave him something to
15 think about it. Ms Cosgrove noted the claimant appeared to be mobile and
did not appear to be struggling in any way. The tone of the meeting was that
the claimant would be continuing with his treatment and would in due course
be returning to full fitness.

20 16. The claimant attended a follow up examination after his rhizolysis. This took
place on 5th September. Following this Dr Asatiani wrote to the claimant's
GP. The letter was lodged (page 93). Essentially the letter sets out exactly
what took place at the Rhizolysis and stated that the claimant would be
followed up in due course. In the meantime he was to remain engaged with
25 the physiotherapist and gentle exercises. It was noted that he did not feel
ready for offshore duties as yet due to his back pain. It was noted that he
experienced more pain with increased physical activity. At this meeting the
claimant discussed with Dr Asatiani the possibility of trying the rhizolysis
again or other treatments. In the event the claimant did not have further
30 rhizolysis although he did have further steroid injections.

17. At around this time the claimant was experiencing difficulties in his personal
life which eventually led him to break up with his wife. He eventually moved
out of the matrimonial home.

18. The claimant again met with the respondents' Occupational Health advisor on or about 6th September 2019. A report was produced following this examination dated 9th September 2019 which was lodged (pages 231-233).
5 The Occupational Health advisor again set out the history of the matter and advised that the claimant was still not fit to return to work offshore however he was fit for office based/administrative duties onshore. He confirmed that the claimant was currently working 7 hours per day and this could be increased to 8 hours per day after 1 to 2 weeks if the claimant felt he was
10 coping well. He stated the claimant should not do heavy lifting and should have frequent shorter breaks and for allowances to change posture. He advised that he would be able to advise further on the claimant's fitness for working offshore following a review and reports from the GP and specialist within the next 4 to 6 weeks. He stated:

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"I will revert back with more specific details on his fitness to work offshore the prognosis in the short, medium and long term based on the outcome from the specialist and after his review at the pain clinic.

20 19. The claimant's work on the Maersk Gallant situated onshore at Dundee continued. As noted above the claimant started to work a normal rotation staying on the rig 24/7 and working full-time hours until 30th October 2019.

25 20. The claimant was then invited to a further Occupational Health examination which took place on or about 13th November 2019. A report was issued following this which was lodged (pages 234-238). It is a comprehensive report which is referred to for its terms. The claimant is noted as having low back pain predominantly on the left side with occasional numbness and a feeling of cold, left sided groin and thigh pain. The intensity of the lower back pain, left groin pain and left thigh pain ranges from 4 to 7 out of 10, 3 to 10
30 out of 10 and 2 out of 10 respectively. The claimant had full movement of his spine and lower limbs but was slow and the range of movements was slightly restricted. The Occupational Health physician noted that the claimant was

very keen to continue with modified duties with a full 24 hour shift on the Maersk Gallant.

21. The doctor then sets out his opinion that the claimant was unfit for manual
5 handling, heavy manual duties including offshore work at present. He said
the claimant was not fit to return to his role as engine room responsible
offshore. In response to the question as to the estimated time required for
recovery to full fitness the doctor indicates that he believes that surgical
treatment should be explored. He suggested that a neurosurgeon be
10 consulted since the claimant had exhausted using other treatment options. It
was decided that if the surgical option was available then, in general,
individuals who require manual handling duties could achieve a full recovery
3 to 4 months after successful surgery and rehabilitation. He confirmed the
claimant would have difficulty travelling offshore and difficulty in an
15 emergency evacuation. It was noted he might well have an acute onset of his
symptoms and on the whole it was best to avoid a return to an offshore role.
He confirmed the claimant was fit to work onshore in an office based non-
manual handling environment. He stated that “the restriction should be any
role which requires manual handling, lifting a weight of more than 10 kilos
20 including repeatability of tasks, awkward postures and in tight spaces, safety
critical and climbing vertical ladders. The doctor was asked a question
regarding the long term considerations needed for the claimant’s injuries. His
response was:

25 “It is important to consider that Mr Fraser has been having these
symptoms on and off since 2008 and more regularly since May/June
2019. At present it is not only his physical symptoms but also
symptoms related to mental health. He has moderate depressive
and severe anxiety symptoms at present. It is now affecting his day
to day life however he has been trying to work on Maersk Gallant
30 despite his symptoms and managing with the use of TENS and
painkillers. But he remains unfit for his role as engine room
responsible either offshore or onshore. It is not only his employment
with Maersk Drilling but I am generally concerned about his

employability in general. I would therefore suggest that all the remaining treatment options be explored including surgical before a decision is reached regarding his fitness for work in the next 6-12 months.”.

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22. The occupational health report indicated at page 238 that it was likely that The Equality Act applied.

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23. Following the receipt of this report the respondents arranged for the claimant to attend a meeting with their HR Department in Aberdeen. The meeting took place on 28th November. It was attended by the claimant and Ms Cosgrove. The discussion at this meeting was different from the previous meeting in August. Ms Cosgrove believed there had been a step change in that the new Occupational Health report appeared to indicate the claimant might need surgery before he was in a position to return offshore. The claimant advised that he had already spoken to BUPA and arranged for a referral to a neurosurgeon as suggested by the Occupational Health doctor. He confirmed to Ms Cosgrove that if the neurosurgeon recommended surgery then the claimant would go ahead with this.

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24. During the case management process the claimant provided answers to a number of questions including relating to the effect of his lower back pain on his ability to carry out day to day activities. These are listed on page 40, 41, 42, 43 and 44 of the joint bundle. I considered these to be an accurate note of the effect the claimant's impairment had on his ability to carry out day to day activities albeit that it was unclear when these effects had commenced. It was also clear that to some extent the effects would vary. Initially the claimant had been living with his wife and since his wife usually did shopping, cleaning and other household tasks there was no real difference to the claimant's day to day activities as a result of his impairment. He would not have been carrying out these tasks himself in any event. I did accept on the basis of the evidence that the claimant now has some minor difficulty in dressing in that he has difficulty putting his socks on and that doing up laces are a problem which he circumvents by buying slip on shoes. I accepted the

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claimant's evidence that he is in pain all of the time and that this has an adverse effect on him.

- 5 25. The claimant left the respondents' employment in or about February 2020 when he took up another post as an Assistant Shift Team Leader at an energy from waste plant in Dundee. He works in the control room and there is absolutely no manual handling at all involved in the job. During evidence the claimant confirmed that he would not be able to carry out any role which involved any manual handling whatsoever. The claimant used his TENS
10 machine on a regular basis for pain management however he required to discontinue that towards the end of 2019 because it was causing blisters to his skin.
- 15 26. The claimant remains on pain medication. He is taking co-codamol and also amitriptylene for nerve pain. If it were not for these painkillers the enervating effects of his pain would be more severe. As noted above the claimant moved out of the matrimonial home. He deliberately purchased a house on the ground floor where he can drive close to the door and then walk on the level from his car to the house. The claimant took up cycling for a time in
20 early 2020 mainly as a way of finding something to do with his young children. He has now discontinued this.
- 25 27. The claimant attended a consultation in October 2020 with Robert Clayton, a consultant surgeon who is a specialist in orthopaedics and trauma . This was with a view to providing evidence for a personal injury claim being pursued by the claimant against the respondents. Mr Clayton's report is referred to for
30 its terms. I considered that the information provided by the claimant to Mr Clayton was accurate insofar as it related to the effects of his back pain in October 2020. The claimant suffered some sleep disturbance. He now takes ectocorbin painkiller rather than co-codamol. He has some discomfort getting in and out of the bath. He has no restrictions on feeding and cooking. He is able to walk a maximum of 30 minutes before the back pain stops him. The claimant is able to manage his shopping without restriction but requires painkillers to do so. He is able to drive but experiences some discomfort in

doing so. He finds that using the electric seats in his car assist with his back pain.

Observations on the Evidence

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28. I found the claimant to be a truthful witness who gave his answers without elaboration and was prepared to make appropriate concessions. I also found Ms Cosgrove to be a truthful witness.

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29. The claimant's evidence regarding the effect of his condition on his ability to carry out day to day activities was somewhat sparse. However I accepted that on the basis of what he said he does experience some minor difficulty with routine tasks. What he did say was that pain is a constant feature of his day and that he is in pain virtually all the time. I accepted his evidence to the effect that if he did not take the various painkillers which he has been prescribed from time to time, (naproxen, co-codamol, amitriptyline, ectocorbin) then his pain would be worse. The claimant has some difficulty in dressing but is able to dress himself for work every day. Sometimes these tasks take him a little longer. He is also able to drive and indeed has been working full time in his new role. The claimant's position in evidence was that he would not be able to carry out a role which involved any manual handling at all. The respondents' representative asked me to take a note of this since her understanding was that this differed from the claimant's position in his pleaded case where he states that he could have obtained a role as a logistics controller. I understood the respondents' position to be that this role involved some manual handling. As the exchange continued it became clear that the claimant's understanding of the role differed from that of the respondents in that the claimant understood the role did not involve any manual handling whatsoever. I accepted Ms Cosgrove's evidence to the effect that there was a step change in the claimant's position regarding returning offshore as between the meeting in August 2019 and the meeting in November 2019. I accepted her evidence that in August the meeting was all about the claimant trying to regain his fitness to go back to his old job offshore. The claimant was frustrated that this was taking longer than he had

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anticipated. He had indicated that in the past his back pain had cleared up immediately after he had steroid injections. He was disappointed this had not happened this time. He was however hopeful that the nerve burning treatment which he was due to undertake would resolve matters and he would be back working offshore within a fairly short timescale. I accepted her evidence that by November things had changed and at that time it was clear that if the claimant was to return offshore that was at best going to be several months away and that he might require surgery first.

10 Discussion and Decision

30. Both parties made full legal submissions. They were in agreement as to the statutory basis on which I was required to base my decision. The claimant referred to the well-known approach set out in the case of ***Goodwin v The Patent Office*** 1999 ICR 309. They also referred to the case of ***J v DLA Piper*** and that it is possible to deduce the existence of an impairment from its effect. They also referred to the case of ***College of Ripon and York St John v Hobbs*** [2002] IRLR 185 as support for this view. Their position was that it was clear from the medical evidence that the claimant was suffering from a physical impairment since April/May 2019. He was treated with medications and injections. His medical advisors would not have suggested such if he was not suffering from some kind of physical impairment. They pointed out that paragraph 3 of the guidance issued by the Secretary of State under Regulation 6(5) of The Equality Act made specific reference to “general work related activities”. It was noted that the claimant had returned to work since essentially he had to work to pay his bills. He had problems taking socks off and putting them on. He had adopted a way of sliding himself out of bed that minimised further pain to his back. It was the claimant’s position that these effects were more than minor or trivial and that in terms of section B4 of the guidance it was incumbent on the Tribunal to take into account the cumulative effect of impairment. With regard to long term it was their position that the assessment required to be carried out at the time of the discrimination which in their view extended from August 2019 to February 2020. It was their view that the claimant suffered from the substantial effects

on his ability to carry out day to day activities during the whole of this period. It was their view that this effect was long term. The claimant was still affected by pain and may have to live with the pain for the rest of his life. They considered that in this case it was important to refer to section B12 of the guidance which makes it clear that any treatment or coping mechanisms have to be disregarded in assessing the impact of the impairment.

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31. The respondents also referred to the guidance. He accepted that the claimant did have a physical impairment. They indicated this was not disputed. It was their view however that the claimant's evidence showed that his impairment had become progressively worse. In their view it was important to look at what his actual impairment was at different times and that in this case it was important to consider when, if at all, the claimant became disabled. They indicated that if the claimant was in fact disabled now that did not mean he would have qualified as disabled at an earlier point. They pointed out that the claimant was able to carry out normal day to day activities during the whole of the period where he alleges discrimination took place albeit the claimant indicated that he was in pain whilst doing this. They accepted he was taking painkillers for the pain. During this period he spent an extensive period of time living on the rig doing 12 hour shifts. There was no real evidence as to what the impact would have been had he not been taking his medications. The respondents did not doubt the veracity of the claimant's account but pointed out that there was no opinion from a pain specialist and no medical opinion as to what the impact would have been had the claimant not been on medications.

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32. Whilst they accepted that some normal work activities are included within the definition of day to day activities heavy manual labour is not normal work activity. The claimant was able to carry out normal work activities and had been throughout. Most importantly the respondents referred to section 21 of Schedule 1 which provides a definition for the words "long term" in the definition of disability. In order to qualify as a disability the effects must have either lasted for 12 months or be likely to last 12 months. In the respondents' view this was a matter which required to be considered based on the

information available at the time. In their view the effects had not lasted 12 months until at least April 2020. The question was whether prior to this the effects were expected to last more than 12 months. It was the respondents' view that on the evidence it was quite clear that up until some point in, at the earliest, November 2019 the effects of the claimant's impairment were not expected to last 12 months.

33. Initially the claimant had believed that if he had another steroid injection it would work in the same way it had in 2015 and his symptoms would be relieved to the extent that he could go back to working offshore in his heavy manual job. Alas it transpired that this was not the case. However even when the claimant met with the respondents in August his view was very much that he would be fit enough to go back offshore within a relatively short period of weeks. In the respondents' view it was not until November at the earliest when it became clear that the rhizolysis had failed and that it could be said that the effects were likely to last 12 months. The respondents referred to section B19 of the guidance which makes it clear that it is the medical prognosis at the time which is relevant. Up until November the medical prognosis was that the claimant would likely recover within a fairly short period of time and be able to go back offshore. By November this was no longer the case.

Discussion and Decision

34. The sole issue which I was required to determine was whether or not the claimant was disabled. During the course of the Hearing it became clear that in making this decision I would also require to give a conclusion as to the date on which the claimant was to be regarded as becoming disabled. There was a clear difference of opinion between the parties regarding this.

35. Section 6 of The Equality Act states that a person P has a disability if (a) P has a physical or mental impairment and (b) the impairment has a substantial and long term adverse effect on P's ability to carry out normal day to day activities.

36. In this case I accepted that the claimant had a physical impairment. As noted above this was not disputed by the respondents. The main question I had to determine was whether the impairment had a substantial and long term adverse effect on the claimant's ability to carry out normal day to day activities. I note that the case of ***Aderemi v London and South Eastern Railway Limited*** (2013) EQLR 198 the EAT enjoins me to take a broad approach looking at the policy behind The Equality Act. I also consider that the approach set out in the case of ***Goodwin v The Patent Office*** [1999] IRLR 4 EAT is the correct one. Having accepted that the claimant had a physical impairment I required to determine 3 questions, first of all did it effect his ability to carry out day to day activities, (2) was the effect substantial, (3) was it long term.
37. In this case I accepted the claimant's evidence that he was in pain every day and that this did have an effect on his ability to carry out day to day activities.
38. With regard to whether these effects were substantial or not I must confess that I found the evidence to be much thinner than I had anticipated. At the end of the day the claimant is able to carry out all day to day activities albeit he is in pain when doing so. That having been said I did consider that his impairment certainly had some effect on his ability to carry out day to day activities.
39. On the question of whether or not these effects were substantial I note that the way substantial is used is in the sense of meaning something other than trivial. I also note that I am required to take into account the cumulative effects of his impairment and that the impairment is to be treated as having a substantial adverse effect if but for the treatment or correction the impairment is likely to have that effect. In that context I note that the guidance states that likely means "could well happen".
40. I did note the respondents' point that the claimant had not provided any expert medical evidence as to what the position would be were he not taking painkillers. That having been said I considered that it was possible for me to

take the view that if the claimant was not taking painkillers then it could well happen that the pain would be worse and he would be less able to carry out day to day activities. As noted above I consider the evidence of the effect on day to day activities to be somewhat thin but at the end of the day it did appear to me that in approaching the matter in terms of the guidance I should make a finding that if the claimant were not taking painkillers then the effects of his impairment on his ability to carry out day to day activities would be substantial as in being more than minor or trivial.

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10 41. As noted above there was a dispute between the parties in relation to the question of when the claimant became disabled. I agreed with the respondents' position that the claimant suffered from his impairment from April/May 2019 onwards. I could not make a finding that he was disabled as a result of this until such point as either the claimant had suffered from the impairment for 12 months (given that I have already accepted that the effects of the impairment on his ability to carry out day to day activities was substantial or alternatively when the medical diagnosis became such that it was likely to last 12 months).

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20 42. The claimant's representative made the point that this was conflating knowledge of disability with the issue of disability itself. I do not accept this. The question is one which goes to the heart of whether the claimant is disabled or not. A person may suffer a broken leg and be non-weight bearing for a period of months. During this time his broken leg will have a serious effect on his ability to carry out day to day activities. In general however he will not be disabled as a result of this since the expectation and indeed medical diagnosis is that his leg will heal and he will no longer suffer these effects after a comparatively short period of months. In my view that was essentially the case here. The claimant suffered a back injury. Initially his expectation was that this would heal with physiotherapy and painkillers. He attended his physiotherapist and it was only when his physiotherapist indicated that things were not improving that he went to his doctor. His belief and the belief of his medical advisors was that he may need a repeat of the steroid injections which had been extremely successful in clearing up a
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similar condition in 2015. He then had the steroid injection but it did not work. Even at that stage however he discussed and agreed further treatments (nerve ablation/Rhizolysis) and at that stage both the claimant and his medical advisors expected that following this he would be pain free and indeed have recovered sufficient fitness to enable him to carry out a heavy manual job offshore. In my view this did not change until 13 November 2019 when the claimant attended the Occupational Health advisor. At that point the claimant was advised that things would not happen the same as they did in 2015. Recovery might be a long process and surgery might be required. It was at that stage that for the first time it became clear that there was not going to be any real likelihood of the claimant being able to return to work offshore in his old job within the foreseeable future. It is my view therefore that the claimant became disabled on 13th November 2019. He was not disabled prior to this.

43. It should be noted that I have chosen the date of 13th November because this was when the medical prognosis changed. It may well, of course, be that the respondents were not aware of the claimant's disability until some time after this. It may be that they were not aware until they received the Occupational Health report or until they met with the claimant on 28th November or indeed some later date. That is however not the question which I am required to answer today. The question that I am required to answer is whether or not the claimant was disabled. I find that the claimant was disabled from 13th November 2019 onwards.

Employment Judge	Ian McFatridge
Date of Judgement	5 January 2021
Date sent to parties	5 January 2021