EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107756/19

Held on 9, 10, 11 and 12 November 2020

Employment Judge N M Hosie
Tribunal Member Mr A H Perriam
Tribunal Member Mr A N Atkinson

Mr B J Osborne	**Claimant Represented by Ms A Neukirch - Solicitor**
Expro North Sea Limited	**Respondent Represented by Mr A Atwell - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that the claim is dismissed.

REASONS

Introduction

1. The claimant, Barry Osborne, brought complaints of unfair dismissal and disability discrimination (discrimination arising from disability, in terms of s.15 of the Equality Act 2010; indirect discrimination in terms of s.19; and a failure to make reasonable adjustments in terms of s.20).

2. The respondent admitted the dismissal but claimed that the reason was capability and that it was fair. So far as the discrimination complaints were concerned, the respondent accepted that the claimant was disabled, in terms of the 2010 Act, but otherwise the complaints were denied in their entirety.

The Evidence

3. On behalf of the respondent we heard evidence from:-

   - David Low, UK Operations Manager, who took the decision to dismiss the claimant

   - Carole Paley, Senior Area Manager, who heard the claimant's appeal against his dismissal

4. We then heard evidence from the claimant.

5. A joint bundle of documentary productions was also submitted ("P").

The Facts

6. Helpfully, the parties had submitted an "Agreed Statement of Facts" (P316) and a "Joint Chronology" (P311- 315), on the basis of which, we were able to make the following findings in fact.

7. The claimant commenced employment with the respondent on 6 October 2003. He was employed as a Wireline Supervisor in the respondent's Well

Intervention Department. His employment was terminated with effect from 28 February 2019, allegedly on the ground of capability.

8. The dates of various events and/or communications relative to: medication certification of fitness to work; surgical interventions and treatments; occupational health consultations; meetings between the claimant and line management and HR; the dismissal meetings and a subsequent appeal meeting are listed in the Joint Chronology (P311-315).

Joint Chronology

9.

Events and/or Communications	Date
Claimant commenced employment with Respondent	06/10/2003
Claimant signed off from work with severe sciatica from 01/08/2016	08/08/2016
Claimant signed off from work with sciatica	29/08/2016
Claimant attends occupational health appointment and Dr Christie writes letter to Respondent	09/09/2016
Claimant signed off from work with sciatica	26/09/2016
Claimant underwent an MRI scan	26/10/2016
Claimant signed off work with sciatica	27/10/2016
Claimant attended occupational health appointment	11/11/2016
Dr James Johnson of Iqarus wrote occupational health report to the Respondent	14/11/2016
Claimant signed off from work with lumbar and other intervertebral disc disorders with radiculopathy	24/11/2016
Claimant had disc surgery	07/01/2017
Claimant signed off work with central disc prolapse	10/01/2017
Claimant signed off work with cervical spinal stenosis and disc surgery	16/02/2017
Claimant signed off work with cervical spinal	30/03/2017

stenosis	
Claimant signed off work with lumbar spinal stenosis	04/05/2017
Claimant attended occupational health appointment	08/05/2017
Dr Johnson of the Respondent's occupational health provider wrote to the Respondent	09/05/2017
Claimant signed off work with lumbar spinal stenosis and cervical spinal stenosis	15/06/2017
Claimant underwent bilateral lumbar medial branch block procedure	01/08/2017
Claimant attend OH appointment	21/08/2017
Dr Johnson of Iqarus wrote occupational health report to the Respondent	23/08/2017
Claimant signed off work with lumbar spinal stenosis	30/08/2017
Letter from Paul Simpson (Senior Operations Manager) to Claimant	06/10/2017
Claimant underwent bilateral lumbar medial branch block procedure	14/10/2017
Meeting between Claimant, Mr Simpson, Ilona Tarvide (HR Adviser), Dawn McIntosh (HR Administrator)	16/10/2017
Claimant underwent SI joint complex denervation procedure	09/12/2017
Claimant signed off work from 30/12/2017 with cervical spinal stenosis	05/01/2018
Claimant signed off work with congenital stenosis of cervical canal from 24/02/2018	28/02/2018
Claimant underwent neck surgery	31/03/2018
Claimant's consultant neurosurgeon, Mr Mahmoud Kamel wrote to Claimant's GP	24/04/2018
Claimant signed off work with cervical spinal stenosis	25/04/2018
Respondent wrote to their occupational health provider, Iqarus, to arrange a further appointment with the Claimant	16/05/2018
Claimant attended occupational health appointment with Dr Shaziah Shah of Iqarus	28/05/2018
Dr Shah wrote to the Respondent	29/05/2018

Claimant signed off work with cervical spinal stenosis	14/06/2018
Letter from Mr Kamel to Dr Johnson of Iqarus	26/06/2018
Dr Johnson of Iqarus issued Respondent with report	05/07/2018
Email exchange between Ms Tarvide of the Respondent and Dr Johnson of Iqarus	20/07/2018
Letter from Respondent to Dr Johnson of Iqarus	20/07/2018
Email exchange between Jill Williamson of the Respondent and Dr Johnson of Iqarus	31/07/2018
Email exchange between the Claimant and Ms Shearer of the Respondent	02/08/2018
Claimant met with Mr Low and Ms Tarvide of the Respondent	09/08/2018
Respondent had email exchange with Dr Johnson	10/08/2018
Claimant signed off work with cervical spinal stenosis	14/09/2018
Letter from Mr Kamel to Dr Shah at Iqarus	20/09/2018
Claimant attended functional capacity evaluation for the role of wireline supervisor	11/10/2018
Invite letter from Respondent to Claimant	23/10/2018
Meeting with Claimant, Mr Low, Ms Tarvide and Naomi Buchan (Assistant HR Coordinator)	25/10/2018
Email exchange between Claimant and Ms Tarvide of the Respondent	25/10/2018
Skills Gap Analysis for Grade 9-10 Senior Operator/Supervisor 2 (Senior Field Engineer 2) role in Cased Hole division undertaken by Claimant	08/11/2018
Invitation letter sent from Respondent to Claimant	21/11/2018
Claimant attended meeting with Mr Low, Ms Tarvide and Ms Buchan	22/11/2018
Claimant certified fit for work with adjustments suffering from with congenital stenosis of cervical canal from 14/11/2018	23/11/2018
Invitation letter from Respondent to Claimant	27/11/2018
Invitation letter from Respondent to Claimant	03/12/2018
Claimant attended meeting with Mr Low,	06/12/2018

Ms Tarvide and Ms Buchan	
Letter from Mr Low to Claimant confirming notice of termination of employment	12/12/2018
Claimant submitted appeal email	20/12/2018
Carole Paley (Senior Area Manager) of the Respondent wrote to invite Claimant to attend meeting	17/01/2019
Claimant attended appeal hearing with Ms Paley of the Respondent, Jill Williamson (HR Supervisor) and Ms Buchan	29/01/2019
Letter from Respondent to Claimant confirming his appeal had not been upheld	21/02/2019
Claimant's employment with the Respondent terminated	28/02/2019

10. Having heard the evidence and considered the documentary productions, we were also able to make the following additional findings in fact. The respondent is a Company within the Expro Group, which is a provider of "well services" in the oil and gas industry. The claimant's role, as Wireline Supervisor, was to supervise and carry out wireline intervention operations on client installations situated offshore. He was required to ensure pressure control equipment and downhole assemblies were able to perform effectively. The role was key to ensuring safe operations and a maximisation of flow rates and production levels. The role necessitated heavy manual work, such as the rigging up/down and storage of treating iron (chiksan), rigging up/down of pressure control equipment, lifting and carrying items on a regular basis and climbing up and down access ladders.

11. The claimant was signed off work from 1 August 2016 due to pain in his lower back and severe sciatica. He did not return to work before his dismissal, with effect from 28 February 2019.

12. As recorded in the "Joint Chronology", the claimant was referred to the respondent's Occupational Health provider and underwent various medical procedures, but he remained unfit to return to work.

Occupational Health

13. On 5 July 2018, the respondent's Occupational Health provider, Iqarus, wrote to Ms Ilona Tarvide, the respondent's HR Supervisor, to advise that a "detailed report" had been received from the claimant's Consultant Neurosurgeon Mr Mahmoud Kamel (P146). He went on in his letter to say this:- *"The report details Mr Osborne's extensive lumbar and cervical spine surgeries and states that he is now recovering satisfactorily. He recommends that, given the degree of degenerative changes, it is important to avoid stress on the spinal discs by heavy physical work which can only exacerbate his symptoms"*

14. He then went on in his letter to advise that he was, *"fit for running tools offshore"* which he specified.

15. David Low, the respondent's Operations Manager, said that he found the terms of the letter, *"very strange"*, as the tools specified were, *"more akin to Cased Hole Logging"* which was different from the claimant's role as a Wireline Supervisor and this concerned him.

16. Mr Low gave his evidence in a measured, consistent and thoroughly convincing manner. Further, he had personal knowledge of the claimant's role as he had worked himself as a Wireline Supervisor before he was promoted. Mr Low presented as entirely credible and reliable.

17. The expectation, at that time, was that if the claimant was to return to work it would be to his existing role as a Wireline Supervisor, but that role was "physically demanding" and that concerned not only Mr Low, but also the claimant.

18. In light of Mr Low's concerns, on 20 July 2018 Ms Tarvide wrote to Dr Johnson, the Consultant Occupational Health Physician at Iqarus, with details of the "tooling" which the claimant would be required to use when he returned

to his Wireline Supervisor position. She also provided details of the weights of these tools and whether they required a single or two person "manual lift" (P151/152).

19. Dr Johnson replied by email on 20 July 2018 as follows (P147):-

> *"Thanks for the information and in particular, the Company's weight policy regarding manual handling. In Mr Osborne's case, the 5 ft Weight stem of 18.14-21 kg should be regarded as a two person manual lift. In view of his long absence from offshore working, an initial offshore hitch of one week to allow "work hardening" is recommended."*

20. Mr Low was of the view that this proposal would be very difficult to arrange as the respondent's clients were "*streamlining and cost cutting significantly*". He did not consider that one week *"work hardening"* was feasible. At one time "ad hoc" helicopters would go out to each rig offshore. However, by then trips offshore were of three week duration or occasionally two weeks and employees were expected to stay for the duration. It would not have been possible, therefore, for the claimant to only go offshore for one week. That would not be acceptable to the respondent's clients.

21. On 2 August 2018, the claimant sent an email to the respondent's HR Manager, Dionne Shearer. He stated that there had been some confusion regarding the advice from Occupational Health as he was not fit to return to his old role as Wireline Supervisor. Instead, he suggested that he be allowed to return to a role in the "Cased Hole Department" where he could "run" the tools offshore as that would remove the risk of rigging up/down heavy equipment (P160). Ms Shearer emailed the claimant to invite him to a meeting on 9 August so that these matters could be discussed with, *"Davie Low (W/L Snr Ops Manager"*) (P159).

Meeting on 9 August 2020

22. Minutes of the meeting which the claimant had with David Low and Ilona Tarvide were produced (P163). Although the claimant did not accept that the Minutes were a "true reflection" of what was discussed, we were satisfied, on the basis of Mr Low's evidence in particular, and the fact that Ms Tarvide took notes during the meeting, that they were reasonably accurate.

23. The purpose of the meeting was to clarify the claimant's position about a return to work. Until then, Mr Low had understood that he wished to return to his existing role as Wireline Supervisor. However, the claimant made it clear at the meeting that he did not want to return to his existing role due to its physical demands. The following are excerpts from the Minutes:-

> *"DL asked if BO would manage to do the Wireline Supervisor work from the physical side. BO replied that no, he could not. BO added that he knows how things are offshore and even if he was told to avoid heavy lifting, a client might approach BO offshore and put pressure on BO to e.g. rig up or down. BO continued that he has been told that he has got 35-45% chance of disc re-lapsing and as BO cannot imagine going through the last two years again, the only way to eliminate is to avoid heavy lifting altogether. DL asked if the Surgeon told BO about the percentage of re-occurrence. BO confirmed that.*
>
> *DL advised that he understood the reasons why BO would not want to go back to his Wireline Supervisor job, as there are numerous tasks that are heavy duty. BO confirmed that by naming a few"* (*P164/165*)*.*

24. The claimant thought he might be able to return to work as a "Cased Hole Engineer" ("CHE"), as opposed to returning to his previous role as a Wireline Supervisor and this was also discussed. However, Mr Low was of the view that, *"there was no real discrepancy in terms of heavy lifting between the two roles as BO would be lifting tools and risers"* (P165). Mr Low was also of the view that, *"a lot of Cased Hole work is one man lift and it would still be putting a strain on BO" (P165).* We were satisfied that that was so.

25. Further, and in any event, there had been a material change in the CHE role since the claimant last worked offshore, some two years previously. At that time, a CHE would be summoned offshore to *assist* the wireline crew; the

CHE would come out for a specific task and prepare his own tools. The role had changed, as a consequence of the downturn in the offshore oil and gas industry. The Cased Hole role had always been a physical one, but previously, when the claimant was at work, the CHE would work with a wireline crew of three. However, this had changed. The CHE role had been integrated into the wireline crew and the CHE only worked with two members of the wireline crew and manual lifting was intrinsic to the role. As Mr Low put it when he gave evidence: *"The CHE is now required to muck in with the wireline crew for rigging up and lifting".* It would be very difficult, therefore, to remove that element from the role, as the effect would be extra lifting for the wireline crew which had been reduced to two. This would have health and safety implications and could impact on the "service delivery" to the client. Mr Low did not consider that to be acceptable.

Offshore Work

26. We were satisfied that Mr Low and Ms Tarvide wished to do all they could to retain the claimant's knowledge and experience within the respondent's organisation. However, the claimant had made it clear at the meeting on 9 August that he was only interested in working offshore. He was not prepared to consider a position onshore. The following is an excerpt from the Minutes (P166/167):-

> *"DL asked if it would only be offshore work that BO would consider. BO replied it was definitely only offshore work he wanted. BO explained that he had given Dr Kamel (Consultant Neurosurgeon) a rough idea of what his work involved such as rigging up and down and Dr Kamel advised BO that he could not do such work. IT asked if Dr Kamel had advised BO on weight limits that BO is allowed to lift. BO replied that he had not. IT stated that she felt that it would be useful if Dr Kamel provided a list of any limitations and restrictions not limited to just weight limits but also any other relevant restrictions such as bending that BO already mentioned and anything else for example climbing stairs. BO advised that Dr Kamel had said that (continuous) climbing many stairs was a 'no-no'. BO added that it would not be an issue if it was a Cased hole role. DL stated that when working on a scaffold, Cased hole person does have manual handling responsibilities due to them being part of a multi skilling crew, and that it is not always black and white.*

IT advised that Iqarus suggested a week of work hardening. IT stated that it would not be practically possible to send BO offshore for a week, however BO could be placed in the Wireline workshop for a week instead but firstly IT would need to hear the surgeon's advice on restrictions. BO acknowledged that.

……..

IT asked if there was anything else BO wished to add. BO stated that he had thrown in Cased hole only as a suggestion as he needed to take as much strain as possible off his lower back. IT advised that this meeting was to find facts surrounding the medical report not look at any alternative positions. BO acknowledged that and added that he was aware that he would need training for Cased hole role. DL confirmed that the last person that got transferred into a Cased hole vacancy required six months to a year of training despite having worked with the equipment and explosives as part of his workshop role".

27. On 10 August 2018, Ms Tarvide sent an email to Dr Johnson, the Iqarus Occupational Health adviser, to inform him that the claimant had advised that he did not consider that he was fit for his duties as Wireline Supervisor and that they were all concerned about the risk of reoccurrence of his back injury. (P169). She requested his advice on the work the claimant was fit to do and clarification *"on the range of movements and other limitations*". She gave as an example of the requirements of working offshore that the claimant would have to obtain an *"escape chute certificate"* as part of his *"survival certificate".* There was a concern that, *"the restrictions would prevent Barry from using escape chute safely in case of emergency".*

" Functional Capacity Evaluation"

28. Dr Johnson replied later that day (P169). He advised that the claimant was "*currently unfit for the role of Wireline Supervisor".* He confirmed that he would seek further advice from the claimant's surgeon and suggested that: *"An option is to have a Functional Capacity Evaluation carried out by an ergonomic assessor and we use a provider called IPRS. This Evaluation involves each element of a detailed job description for Mr Osborne being analysed in relation to his ability to perform it. For example, ability to lift weights, climb ladders and negotiate confined spaces".* Ms Tarvide instructed Dr Johnson to proceed with the Functional Capacity Assessment with IPRS and an appointment was arranged for 11 October.

29. In the meantime, on 24 September 2018 Mr Kamel, the claimant's Consultant Neurosurgeon, sent an email to Iqarus concerning the claimant's ability to return to work (P176). The following are excerpts:-

> "*Although it is very difficult to know the risk of recurrence in cases like Mr Osborne's, the average figures that we quote to patients of recurrence of disc prolapse is in and around 5-10%.*
>
> *Mr Osborne's spinal movements are limited due to his ongoing degenerative changes causing muscle spasms. I would generally advise patients against movements that involve lifting, bending and twisting for long periods of time, particularly carrying heavy objects for long periods of time as this can easily flare up their symptoms. As for your comment regarding escape down a chute, generally speaking, being in confined places in an awkward position can exacerbate patients's symptoms but does not cause harm.*
>
> *Mr Osborne clarified that the chute is not enclosed, it is a net and he has done this before with no difficulty. It has different compartments and he goes through about 5 ft at a time pushing on a net to get through to each compartment with both feet. Consequently, I am content that he can use the chute".*

Functional Capacity Evaluation Report

30. The Report, which was conducted by IPRS, was sent to the respondent on 19 October 2018 (P177-183). The following are excerpts:-

> *"**Restrictions Recommended** (Details below) **Yes***
>
> *Based on this assessment, it is in the assessor's opinion that Mr Osborne may not have the physical capacity to return to his current role job in the near future. The frequency and duration of heavy lifting that is required as a Wireline Supervisor makes a lifting restriction prohibitive. The following restrictions are recommended:*
>
> - ***Occasional heavy lifting** – one man lifts limited to a maximum of 20 kilograms (kg) and 40 kilograms (kg) for two-man lifts. This may improve following a period of work hardening and may be retested if required at 3-4 weeks.*
> - *Mr Osborne has deconditioned while absent from work. Additional time should be allowed to accommodate rest breaks, especially if stairs are involved.*
>
> ……....
>
> ***Are there any negative health beliefs potentially affecting the employee's fitness for work? No***
>
> *Mr Osborne completed an Orebro short form questionnaire, which research has shown to be valid in identifying a potential risk of pain-related disability and long-term work absence due to psycho socio factors. Mr Osborne scored 40/100, which identified a reduced risk of a poor return to work outcome. Within this questionnaire, identified barriers that may affect prognosis for returning to work were attributed to the questions relating to fear avoidance particularly with relation to the Wireline Supervisor role. When asked to complete these questions with the context of work requiring less frequent manual handling ("Cased Holed Engineer" for example), Mr Osborne scored favourably for a successful return to work outcome.*
>
> *Mr Osborne reported that he perceived that he was not fit to return to normal working duties in the near future due to frequency, duration and intensity of the work required.*
>
> ***Functional Summary***
>
> *Below waist lift – 25 kilograms – Mr Osborne reported 20 kg was the company policy limit and that he would be reluctant to repeat the test due to back related anxiety – job match – partial.*
> *Above shoulder lift – 20 kg – Mr Osborne was limited to 20 kg due to the increasing pain levels in the upper thorax – job match – partial.*

……

Other comments

The assessor discussed the findings of this assessment with the patient following the evaluation.

IPRS Health recommend the following support to assist their recovery process:

- *Mr Osborne should complete a course of functional Physiotherapy to improve his confidence and function.*
- *Mr Osborne is presently capable of offshore employment in a less physically demanding role.*
- *It is recommended that Mr Osborne and his employer arrange a meeting as part of the return to work plan to review the work tasks that may exceed his current perceived capability and discuss possibilities to modify the frequency/weight that is required to complete".*

31. As the role of the CHE had changed it meant that both the Wireline Supervisor and CHE roles were physically demanding as each of the roles required "rigging up/down". In any event, the claimant had made it clear that he did not wish to return to the Wireline Supervisor role as he felt it would put him at risk of a relapse. Although the Consultant Surgeon had estimated the recurrence of disc prolapse at around 5-10% and previously the claimant had understood that the risk would be of the order of 35%-45%, he still did not wish to return to his Wireline Supervisor role.

Capability Meeting on 25 October 2018

32. Minutes of this meeting were produced (P185-194). We were satisfied that the Minutes were reasonably accurate, although the claimant had made some minor handwritten amendments. The claimant made it clear, yet again, that he did not wish to return to his Wireline Supervisor role. Mr Low discussed with the claimant possible adjustments which could be made which might allow him to return, in safety but none were identified. One of the major difficulties was that the Wireline Supervisor role required active participation with the team to do heavy lifting. The role also required, *"bending, twisting and turning"*, which was an added concern as the medical advice was that this might exacerbate his symptoms. Mr Low spoke with the claimant's Manager and he confirmed the requirements of the role. As Mr Low put it when he gave evidence, *"the general consensus was that it is a physically demanding job and you couldn't reduce the lifting responsibilities to make it less labour intensive. The role required constant rigging up and rigging down".*

33. The claimant suggested going out once to the rig but Mr Low explained that was not practicable due to, *"the attitude of the client and the cost of helicopter flights".*

Cased Hole Engineer Role

34. The claimant explained that he thought the CHE role might be suitable as he believed it was less physically demanding. However, the physical demands of the role had increased since the claimant last worked offshore in August 2016**.** Mr Low explained to the claimant that the Wireline department was using a, *"multi-skilling model"*, which involved working with a smaller team and all crew members were required to be able to "rig-up" and do all elements of the job. The following is an excerpt from the Minutes (P189):-

> "*DL advised BO that the model the department is currently using is multi-skilling, which involves not putting so many people onto the job, and removing the assistant. BO asked if the electrical engineer would be the third man on the multi-skilled approach. DL confirmed.*

DL stated this new approach was driven by Expro as well as the clients to reduce costs during downturn, and is seeing more clients requesting this service now not only because of costs but also POB (Personnel On Board). BO asked if being the third man on the job he could do lighter duties and utilise crane or mechanical lifts etc. DL advised yes, however this approach is promoting integrated task and everyone needs to be contributing due to less people on the job.

BO did not understand as he stated he knew he could do lots within the job. DL advised that the role before was not as physical as it is now. The new multi-skilled crew approach means that everyone needs to rig-up, and do all elements of the job. BO stated that for years he worked with just an Operator. DL acknowledged this however the full multi-skilled approach requires all team members to work together.

BO stated that he probably would not be able to do this role. DL advised that what BO thought the job was, it has now changed and now has more needs. BO explained different aspects of the job he could do. DL advised that this then put onus onto other members of the crew, and he would need to be part of the team as much as anyone else on the team.

IT advised that the previous role was lighter but the role has now changed and merged. BO questioned if the previous job description has changed. DL stated that the previous job description has changed as it is now an integrated team, therefore everyone goes to the job at the same time to do the job together.

BO asked if there could be any adjustments made for this, as he knew he could do some elements of the job. IT advised that there are risk factors to be considered which are now different to before as there is now more pressure on Wireline crew including Cased Hole Engineer".

35. Mr Low, a credible and reliable witness, was asked at the Tribunal Hearing how he thought the respondent's clients would react if they were told that one of the team could not do heavy lifting. He said this: *"They'd ask why he was being sent offshore when they were paying for someone to perform the service fully".*

36. Further, the claimant did not at that time possess all the necessary skills to perform the Cased Hole role and it would have taken some *"3-5 years"* for

him to complete the necessary training. Also, there was no vacancy for a CHE at the time and none was anticipated (P191).

Onshore work

37. The claimant also made it clear that he did not want to work onshore. He was only interested in a position offshore. He said that he was, *"an offshore person and always would be".*

38. Ms Tarvide then advised the claimant at the "capability meeting", on 25 October 2018, as follows (P192): "*They were trying to keep him employed with the company. As it was established that BO could not return to his role as a Wireline Supervisor, the next step for the company to look at alternatives (sic). IT highlighted the difficulties of this situation and reiterated that the company's position is to try and keep BO employed. IT stated that should none of these actions or alternatives be possible the Company may still have to consider dismissing BO on grounds of ill health capability".*

39. Ms Tarvide also advised the claimant to look online at the respondent's "Job Portal" to see if there were any suitable vacancies. She further advised that there were currently no vacancies for CHEs. Mr Low asked the claimant if he would consider a role in the workshop but the claimant said he would not as he wanted to work offshore.

Redeployment/Possible Alternative Roles

40. After the capability meeting, the claimant sent an email to Ms Tarvide to advise that he was interested in redeployment opportunities in *"Subsea, Meters, Sampling, Wireless Well Solutions and Cased Hole"* (P195)

41. Ms Tarvide discussed this with Mr Low and it was agreed that they would approach the Managers of the various Departments to see if there were any

vacancies. This was done either “face to face” with the various Managers, or by telephone or email.

“Wireless Well Solutions”

42. On 1 November 2018 at 10:22 Karen Ross, the respondent’s Senior HR Advisor, sent an email to Adrian Stoate concerning possible vacancies at “Wireless Wells Solutions”, another Division within the respondent (P208/209).

43. Mr Stoate replied by email the same day at 10:44. There were not any vacancies at that time and there was an expectation that employees would require to stay within a reasonable distance of the office at Ringwood, Hampshire, as they would require to go into the office from time to time.

“Fluids”

44. On 8 November 2018 at 15:55 Ms Tarvide sent an email to Adrian Turner in the “Fluids Department” to enquire if there were any vacancies P210). Mr Turner replied by email on 8 November 2018 at 16:03 to advise that there were none (P210).

“Subsea”

45. On 8 November 2018 at 11:18, Ms Tarvide sent an email to Martyn Duncan, Subsea Operations Manager, to enquire if he had any vacancies (P211). Mr Duncan replied by email the same day at 11:51 as follows (P211):-

> “*What are the minimum requirements for the position? Experience? Specific skills? Training? -* ***For an operator 3 position, we require a candidate to have knowledge of subsea offshore applications and the purpose of the Expro Subsea landing tooling. They would need to have worked offshore previously or have knowledge and experience working on SS tooling onshore.***

How long would it take to train someone to the level you require for the vacancy? – ***This will vary depending on experience levels. If they have come from an onshore position working on Expro SS tooling, training would usually take 6 months before the individual can be deemed competent in the role. For candidates who do not have knowledge of the Expro SS tooling, training can take about a year before they are competent in the role. This will involve spending large periods of time in the SS workshop stripping and rebuilding the SS tools, setting up and assisting with SIT's and attending various SS training courses which are both classroom and workshop based.***

What size crew goes out at one time? – ***Crew sizes vary depending on the type of job. The majority of crews for North Sea jobs are 2 man (1 on day shift and 1 on nights). There may be occasions that an operator is on the rig on his own either at the start or end of a job.***

What the role entails in terms of heavy duty work? How much of the role is heavy duty? – ***During initial training there will be large periods of workshop based work which will involve a degree of physical labour. When offshore the candidates need to have the ability to install and remove test fixtures, move jumper hoses around the rig and over deck beams, move tool/hoses from workshop container to drill floor, install and remove liner protection and latch braces from the SS assembly, climbing in and out of shipping baskets and containers to install/remove ratchet straps for shipping.***

Can more physically demanding work be avoided/delegated? – ***Physical work cannot be avoided or delegated in the position as a subsea operator. Often the individual will be on shift on their own or the only crew member on the rig and will have to have the ability to perform all of the above tasks."***

46. On 12 November at 14:49, Ms Tarvide sent a further email concerning a vacancy in the "Subsea Product Line" (P254). Ms Tarvide received a reply from "Davie Stewart" the same day at 15:29. He advised that they were looking for someone with, *"a minimum of 5 years' experience in maintenance and operational deployment of subsea landing strings; a minimum of 4 years offshore, on-the-job experience running Subsea landing strings, plus various classroom based training during that period; a significant amount of manual labour is required; physically demanding work could not be avoided or delegated as all members of the crew are expected to get involved with rig up/rig down as this is the most labour intensive period of the job".*

47. It was clear that this was not a suitable alternative position for the claimant.

"Cased Hole Engineer"

48. A "Skills Gap Analysis" was carried out to assess the claimant's suitability for such a role. This included a "Grandfathering Assessment" (P213-253).

49. On 12 November 2018 at 16:00, Andrew Gray, "L&D Cased Hole Specialist" sent an email to Ms Tarvide and Mr Low to advise that he had, "*come to the following conclusion: the candidate is not (sic) a competent level for a Cased Hole Engineer position, in my opinion it would take a minimum of 36 months to reach minimum competence required"* (P255).

50. Further, on 14 November 2018 at 12:56 Mr Gray sent an email to Ms Tarvide with the claimant's results (P256). He advised that: "*For an averaged number of questions of 100 the number of correct answer (sic) is 12.5, much lower than the 80% pass mark which I would be expecting for a Cased Hole Engineer, Supervisor level 2".*

51. Mr Low was not surprised at these results as in his view the transition from Wireline to Cased hole is not easy as the Cased Hole is, *"quite specialist as it includes electrical components".* Mr Low was of the view that training the claimant for 3 years for this role was not a reasonable adjustment. In any event, there was not a vacancy in the Cased Hole Department.

"Meters"

52. On 14 November 2018 at 15:38, Ms Tarvide sent an email (P257) to Colin More, Operations Manager, Meters, to enquire if there were any, "*current or potential vacancies coming up in your Meters in the foreseeable future*". Mr More replied by email the same day at 15:41 to advise that there were no vacancies in his Department and, "*we don't have any additional operational head count planned for next year at this time".*

53. In the meantime, Mr Low had *"revisited"* the Wireline Supervisor position to see if any adjustments could be made which would enable the claimant to return. Further, although the claimant had not suggested it, Mr Low also considered whether the claimant would be suitable for a *"Well Services role".* As Mr Low put it, this role was *"a step up"* from the claimant's Wireline Supervisor role which was a grade 12. *"Field Supervisor"* is the next grade at 13 and *"Well Services"* is next at grade 14. The Well Services role is less physically demanding than the Wireline Supervisor role, as it involves overseeing the whole operation of well intervention, but the claimant would first of all have had to go back into his original role as Wireline Supervisor before he could progress from grade 12 to grade 13 and finally to grade 14. That was not possible and, in any event, the claimant did not want to return to that role.

54. Mr Low sent an email to Ms Tarvide on 20 November 2018 at 11:39, to advise her of his deliberations (P258):-

> *"After reviewing the skill gap assessment that was conducted and assessed by Expro's Group (L&D) it is evident that Barry does not possess the skill set to allow him to transition to our Cased Hole department with minimal adjustment.*
>
> *Due to this confirmation I have revisited the Wireline supervisor position to see if there is any way we can ensure he would be able to carry out that duty in a slightly reduced capacity.*
>
> *Unfortunately this role and the ever evolving industry (multi skilling approach) doesn't permit such changes and I/Expro can't ensure Barry wouldn't be put in a position where he'd be relied upon to perform the expected/full capacity role.*
>
> *If we did supply any personnel that couldn't fulfil or meet our client's expectations/requirements it could potentially affect our service quality, service delivery and subsequently reputation.*
>
> *Although there are no positions available in this department at the moment I have also reviewed the Well Services role as a potential option. However looking at Barry's competency at his current grade 12 I feel there would be more than minimal adjustment required in*

order to transition to Well Services. The only way to gain the knowledge and further experience would be to remain in the Wireline Supervisor position and progress.

We do have an onshore position available within our Wireline workshop however Barry has confirmed he is not interested in working onshore and has turned down the opportunity when advised of the vacancy.

Unfortunately there are no other avenues for me to explore within Well Intervention and I propose we get together to discuss Barry's future career with Expro".

55. Accordingly, on 21 November 2018 Mr Low wrote to the claimant to invite him to attend a meeting, "*to discuss your performance and capability in your role of Supervisor 2"* (P259).

Meeting on 22 November 2018

56. Minutes of this meeting were produced (P260-270). Although the claimant had made some minor handwritten adjustments and the Minutes were not signed, the Tribunal was satisfied that they were reasonably accurate.

57. Mr Low explained to the claimant that, having made enquiries, there were either no vacancies within the departments he had suggested and, if there were, his skills and experience did not fit the role.

58. The following are excerpts from the Minutes: -

"Cased Hole Department"

DL advised that from the skill gap analysis and the L&D trainer assessment there would not be a reasonable adjustment for BO in that role, as he could only be able to work at a trainee level and there was no such role. To close the gap, it would require at least 36 months training before he would be able to go out on the job and it was not a possibility at the moment (P261).

"Subsea"

DL said that he looked into Subsea department and they had vacancies for an Operator 3, however the role required knowledge of the Subsea

department and the tools and with no previous experience it would require a minimum of one year labour intensive workshop training before possibly going offshore. However, the offshore role also requires a lot of physical labour. BO asked DL to expand on physical labour. DL explained that the role would require a lot of heavy lifting, climbing in and out of containers and in terms of its physical demand, it would be very similar to his current Wireline Supervisor role (P261/262).

"Sampling/Wireless Wells"

DL stated that he would like to go through everything that BO mentioned from the previous meeting on email. DL advised no jobs in Sampling were currently available however operational roles within the sampling department usually required a degree qualification in subjects such as Chemistry. BO agreed as he had seen that these roles required degrees. DL also advised that the Wireless Wells positions require the employee to be someone local to the job in Ringwood. BO asked why the person needed to be local. DL advised that due to the office based workload when onshore it was essential the person lived close. BO advised he could not relocate (P263).

"Wireline Workshop Role"

DL stated that himself and IT have explored every avenue to find an alternative role for BO within the company. DL stated that they have not identified a suitable offshore role, however, there was a workshop role available. DL stated that BO's experience, knowledge and 15 years of service would be highly valued within a workshop position and BO could pass on this knowledge to ("the younger lads in the workshop" – claimant's revisal not accepted by the respondent) to others coming through grade. BO advised that he did not want a workshop position as he wants to go offshore ("and I see there was a job in Cased Hole workshop on Portal but it has gone now" – claimant's adjustment accepted by the respondent).

IT advised that she understands BO has got some reservations about working in the workshop and asked if it would help if she arranged a meeting for BO with the Workshop Manager to discuss the position and clear those reservations. BO advised he did not want this meeting as he does not want a workshop position. BO advised the only reason he would possibly accept a workshop position would be if he were in the Cased Hole workshop and he was promised that within 18 months to 2 years he would have an offshore Cased Hole position. DL advised that the company does not have vacancies in the Cased Hole workshop and even if they did, they could never promise that in a specific time period BO would be transferred offshore as it depends on offshore requirements at the time. DL stated that BO could still evolve in the Wireline workshop role and advised it would be a shame to lose BO as an employee due to declining the workshop role the company has, should nothing else become available" (P264/265).

59. It would have been possible to minimise the physical requirements of the Wireline workshop role due to the numbers working there. The claimant could have worked with *"lighter tooling"* and there would have been personnel on hand to assist with lifting. However, the claimant made it clear that he did not want a workshop position. He wanted to work offshore. He said he was, *"an offshore person".* This disappointed Mr Low greatly, as in his view, *"he would have been fantastic in the Wireline workshop given his experience and knowledge of the tools".*

60. In the course of the meeting, the claimant referred to a vacancy in the Cased Hole workshop (P264). There had been such a role but it had been filled. In any event, the claimant had made it abundantly clear that he wanted to work offshore, the respondent could not guarantee him offshore work and, *"the skills gap analysis established that he did not have the necessary skills set".*

61. Although the claimant had no recollection of this being said, we were satisfied, primarily on the basis of the evidence which we heard from Mr Low, that the following excerpts from the Minutes were accurate (P268/269):-

> "*IT advised BO to be aware that if no other alternatives were identified by next week and BO did not accept the workshop position, the company would have to consider dismissing BO on the grounds of ill health capability. BO advised IT and DL that he would not be accepting the workshop position at the next meeting."*

62. Mr Low and Ms Tarvide both advised the claimant that they wanted to keep him employed. The following is an excerpt from the Minutes (P269):-

> "*BO asked if his employment would be terminated next week with 3 months' notice, however if a position did come up within his notice period he could be considered for that role. IT advised that the company wants to keep BO employed at Expro so if something suitable came the company would absolutely consider BO for that role. DO also confirmed to BO that if a suitable position were to come up that BO had the potential to fill, then he would be considered for that role.*

IT advised BO that if BO thought of any alternatives that have not been discussed so far or if he changed his mind regarding meeting the Workshop Manager, to get in contact with IT before the meeting".

Dismissal

Meeting on 6 December 2018

63. Minutes of this meeting were produced (P273-279). We were satisfied that they were reasonably accurate.

64. The claimant advised Mr Low that he had not seen any suitable positions on the "Portal" since the previous meetings. Mr Low explained that there were roles due to come up in the Well Test Department but that these were highly labour intensive. The claimant advised that there was no point discussing these as he knew he could not do them. Mr Low also discussed a "Subsea Senior Workshop Technician" position, but this was not seen as suitable due to requiring extensive Subsea Experience (P275).

65. Mr Low also discussed the Cased Hole Engineering role. The following is an excerpt from the Minutes (P275): *"BO stated that he wanted a position in Cased Hole as that would eliminate risk to him. DL advised this would had (sic) been the case with the historical Cased Hole role, however as the department has to take a multiskilling approach now which was discussed in previous meetings, the position would not be suitable for BO".*

66. So far as the Wireline Workshop position was concerned, the claimant again made it clear he did not want the position unless there was, "*a guarantee of going offshore".* However, Ms Tarvide advised him that the respondent, *"would never be able to guarantee this to anyone"* (P275). The claimant, *"stated that he has spent the last 18 years working offshore and he was not interested in working onshore unless it was a stepping stone to go offshore"* (P277).

67. Mr Low again mentioned that part of the capability process was to consider adjustments to the claimant's current role. The claimant confirmed that he could not think of any adjustments that could be made and neither could Iqarus (the Occupational Health advisers).

68. Mr Low adjourned the meeting. When the meeting was reconvened, later the same day, Mr Low advised the claimant that he and Ms Tarvide had decided they had no alternative other than to terminate his employment. The following is an excerpt from the Minutes (P277):-

> *"DL advised that himself and IT had a discussion and unfortunately neither Expro nor BO could not* (sic) *find a reasonable adjustment within his role. DL advised that they explored all possible alternative positions. DL informed BO that with regret they had no choice but to confirm BO's dismissal on the grounds of ill health capability today.*
>
> *IT stated that herself and DL have taken time to explore every avenue to look for alternatives and unfortunately the only position that they found suitable for BO was the workshop position which BO did not want to consider."*

69. On 12 December 2018, Mr Low wrote to the claimant to confirm his dismissal. He advised that the claimant was not required to work his 12 weeks' notice and that his employment would end on 28 February 2019. He was also advised of his right to appeal (P280).

Appeal

70. On 20 December 2018, the claimant intimated that he wished to appeal against his dismissal (P281). The appeal was conducted by Carole Paley, Senior Area Manager. Ms Paley was next in seniority to Mr Low and reported to the respondent's Vice President. She had not been involved in the case previously. Like Mr Low, Ms Paley gave her evidence in a measured, consistent and wholly convincing manner and presented as credible and reliable.

Appeal Meeting on 29 January 2019

71. The claimant submitted "Appeal Discussion Points" (P283). These were used by Ms Paley to structure the appeal meeting. Prior to the appeal meeting, Ms Paley also carried out research and read all the relevant documents.

72. Minutes of the appeal meeting, with the claimant's handwritten revisals, were produced (P292-299). We were satisfied they were reasonably accurate.

Meeting with David Low on 30 January 2019

73. On the day after the appeal meeting, Ms Paley met David Low to explore further with him the points which the claimant had raised, particularly regarding what had been done by way of looking for alternative roles for him. Minutes of that meeting were produced (P300/301). We were satisfied that they were reasonably accurate. Mr Low explained, to Ms Paley's satisfaction, what he and Ms Tarvide had done to explore alternative roles.

Refusal of the Appeal

74. Ms Paley wrote to the claimant, on 21 February 2019, to advise that she had decided to refuse his appeal and uphold the decision to dismiss, *"by reason of ill health"* (P302-307).

75. She addressed each of the appeal points which the claimant had raised (P283) under headings in bold type: -

"You feel you were treated unfairly due to the fact that you hurt yourself offshore"

76. The Tribunal accepted Ms Paley's evidence that the respondent has many long serving employees and takes *"very seriously",* maintaining their employment. Ms Paley said this in her letter: *"I consider that the Company has acted more than fairly in your case, in terms of keeping your job open since August 2016, exploring whether adjustments could be made to your role to enable you to return, and carrying out an extensive search for suitable redeployment opportunities"*.

"You feel that you were not supported in terms of exploring how you could return to work"

77. Ms Paley took the view that the level of support provided was satisfactory and that every avenue had been explored to get a position that would suit his physical and technical capabilities. However, the claimant had advised "*in clear terms*" that he would not be able to return to his existing post of Wireline Supervisor.

78. Ms Paley recognised that there had been *"some confusion"* at first in the medical reports which had been obtained so far as the tools the claimant was required to use. However, when it was established that the tools referred to in the initial report from Iqarus, the Occupational Health advisers, had been for the Cased Hole role (P146), Ms Tarvide provided details of the tools which the claimant would require to use in his existing role as Wireline Supervisor (P151/152).

79. Ms Paley viewed the letter of 24 September 2018 from Mr Kamel, the Consultant Neurosurgeon, *"with some concern"* (P176). However, she was aware that the majority of offshore positions require, *"lifting, bending and twisting"* and that was not challenged by the claimant.

80. Further, the respondent had obtained a "Functional Capacity Evaluation Report" for the claimant for his existing Wireline Supervisor role (P177-181). The "Restrictions Recommended" included *"occasional heavy lifting"* which

meant that the claimant was not fit to return to his existing role. In any event, it was clear that the claimant was not confident going back to that role and didn't want to as, *"he didn't want to undo what he'd gone through with his absences and didn't want that to recur".*

81. It was also evident to Ms Paley that the claimant wanted to return to an offshore position and that, "*his mind was closed to an onshore position. He wanted to return to a job offshore that would accommodate his physical restrictions".*

82. Ms Paley understood why the client thought that the Cased Hole role would be suitable for him. However, a "Skills Gap Analysis" had been arranged and it was clear that such a position was not suitable. This was confirmed by Andrew Gray the Cased Hole L&D Specialist in his email of 14 November 2018 (256). It would also have taken *"36 months +"* to train the claimant into such a role.

83. Ms Paley was also satisfied that the respondent had looked in sufficient detail for alternative roles and the claimant had been encouraged to look at the respondent's "Portal" which contains details of all vacancies. However, the downturn in the oil and gas industry had meant that there were few vacancies. Also, the claimant had made clear the types of role he was looking for and that he was not prepared to work onshore, which further reduced the opportunities. Ms Paley said that: *"The claimant had a closed mind to alternative positions onshore. He made that very clear"*.

84. Ms Paley was also clear that if an employee took up an onshore role in the workshop it would not be possible to "guarantee" offshore work later.

85. Further, the Cased Hole offshore team is a small one and there is little turnover of staff. The respondent also had to consider the claimant's physical limitations if he was going to work offshore. The claimant was looking for a

"guarantee" that he would be offered work offshore in 12 to 18 months if he took up a position onshore in the workshop. However, even if was physically able to do the job, it was clear to Ms Paley that it would take much longer than that for him to gain the necessary skills. Mr Gray had advised that it would take at least 36 months for him to be trained.

"The Company only looked for roles since 16 October 2018 and dismissed you on 6 December 2018. Five weeks is not an adequate search for alternative employment, and shows the haste to confirm dismissal" (P306)

86. Ms Paley considered this appeal point in some detail and said this in her letter:-

> *"The possibility of your dismissal by reason of ill health was raised with you in October 2017. The Company was only able to look at the possibility of redeployment once it was confirmed in October 2018 that you would not be able to return to your old role as Wireline Supervisor. The evidence points towards the Company going to great lengths to find redeployment which match your physical capabilities and skill set. I am also alive to the extent to which the Company looked to gain input from its Occupational Health advisor and other specialists prior to October 2018. I see that the Company also agreed not to pay you in lieu of notice so that you could remain in employment during your notice period in case a suitable redeployment opportunity arose before your termination date. Given these matters and that your sickness absence commenced during August 2016, I cannot support the allegation that the Company has rushed to dismiss you".*

"You feel that you had no ongoing contact or support from the Company at all despite hurting yourself at work, other than to request sick lines. No communication was made to you regarding the loss of the Shell contract.

87. Ms Paley also considered this further following the appeal meeting and in light of the claimant's representations. The claimant had been signed off work due to ill health for a long period and there had been many changes in the Company. So far as the loss of the Shell contract was concerned, Ms Paley was aware that it is not Company policy to issue a formal communication of matters such as that. The loss of a significant contract is normally communicated by word of mouth at meetings. Ms Paley conceded that this information was provided to employees but not to the claimant and perhaps it should have been. However, "lack of communication" was not relevant to the claimant's dismissal. Ms Paley said this by way of response to this appeal point in her letter:-

> "*I recognise that there have been a number of changes across both your department and the Company during the 27 months that you were absent and I appreciate that although some of these have been communicated to you in an informal way (via messages from colleagues) I do accept that the Company should have agreed a more formal approach at the outset.*
>
> *As I explained at the meeting, I feel there is a fine line when it comes to keeping in touch with an employee when they are absent from work with ill health. I suspect this issue could have been avoided if it had been agreed at the start of your absence what level of communication you would like to maintain and I acknowledge that this is something we should put in place for all ill-health cases in the future.*
>
> *I can advise that it is not department practice to send a card/flowers when an employee is absent on sick leave, however I take on board your comment that this is something which would have been appreciated by yourself.*
>
> *While these are learning points for the Company, I do not consider that they impact on the fairness of your dismissal".*

"You feel that the Company has consistently swept your injury at work under the carpet. Despite you notifying the Company of how the injury occurred at work in July 2016 and submitting a statement of events, the Company has consistently failed to acknowledge this and deliberately excluded it (and any

information which could be seen as negative towards the Company) from minutes of the meeting"

88. Ms Paley was adamant that the respondent, *"would never work that way 'sweeping it under the carpet', especially with a safety matter".* She checked the Minutes of the various meetings and could not detect anything significant being omitted.

89. Ms Paley responded to this point in her letter as follows:-

> "*At the hearing we discussed the way in which the Company came to learn about the problem with your back and that you did not formally report any injury at the time. While I do not consider that this issue is pertinent to your appeal against dismissal, I have not seen evidence which supports your allegation that the injury had been 'swept under the carpet'. I understand that you may want acknowledgement that your injury was sustained at work but for the reasons discussed above this is outside the scope of the appeal process.*
>
> *As you know the majority of the meetings you have attended have been minuted by Naomi Buchan, her role at the meeting is solely to take notes and subsequently type them into the standard minute format. These minutes are not verbatim but are intended to be a true and accurate reflection of the meeting. Having spoken to Davie, Ilona and Naomi about the matters discussed at the meetings, and having compared Naomi's written notes against the typed version I find no evidence to support your complaint".*

"The Company failed to extend enhanced Company sick pay despite the injury being because of your absence from work, and failed to extend private health insurance. This despite you being ready to come back in July 2018"

90. When this was investigated by Ms Paley she discovered that there had already been a grievance process and that the Company had followed the process. In any event, in her view it had no relevance to fairness of the dismissal. She responded in her letter, therefore, as follows (P307):-

> *"I note that the issue of your pay and benefits has already been dealt with by the Company as part of a grievance process in March 2018.*

While I do not intend to revisit these matters as part of this appeal, I do not consider that they impact on the fairness of the decision to dismiss you for ill health".

Conclusion

91. Finally, Ms Paley said this in her letter by way of conclusion (P307):-

"I acknowledge that there are things that the Company could have done better in terms of maintain (sic) communication with you during your sickness absence.

However, having taken all your points into consideration, I genuinely believe that the Company has explored all potential avenues in terms of you returning to work before coming to the decision to dismiss. At the forefront of its considerations, the Company had to make sure that any offshore roles which you were interested in applying for were within your capabilities both technically and physically.

Whilst it saddens me that we have lost an employee with extensive Wireline experience, I find no evidence to support your claim that you have been unfairly dismissed. As a result I wish to advise you that the decision to dismiss you on the grounds of ill health remains valid.

You have now exercised your right of appeal and this decision is final. Minutes of the meeting on 29 January will follow under separate cover".

Respondent's Submissions

92. The respondent's solicitor spoke to "Skeleton Written Submissions". These are referred to for their terms.

93. In support of his submissions he referred to the following cases:-

NCH Scotland v McHugh UKEATS/0010/06

Shook v London Borough of Ealing *[1986] IRLR 46*

Merseyside and North Wales Electricity Board v Taylor [1975] ICR 185

BS v Dundee City Council [2013] CSIH 91

DB Schenker Rail (UK) Ltd v Doolan [2010] UKEAT/0053/09

94. Under the heading, "*Focus on the pleadings*", he invited the Tribunal, "*to consider and determine only those complaints set out in the claimant's ET1. In particular:*

- *The claimant in his original pleadings set out a ("non-exhaustive") list of reasonable adjustments the respondent should have made during his employment (P18).*

- *The respondent was ordered by the Tribunal (in a note dated 31 October 2019) to confirm whether the list of reasonable adjustments set out in his claim form was exhaustive. The claimant's agent by email on 13 November 2019 subsequently set out two more reasonable adjustments the respondent should have implemented (P21)). During the course of the Hearing, the claimant described yet another reasonable adjustment that should have been implemented, namely that any given client could have been asked by the respondent to wait until such time as a Wireline Assistant became available to help with any heavy lifting. The respondent asserts that this is a step which should not be considered as part of any determination regarding a proposed failure to consider reasonable adjustments. It was not set out in the claimant's pleadings as amended.*

- *Similarly, the claimant during the Hearing made broad statements of the adjustments which were allegedly put in place by the respondent in respect of an injury suffered by the claimant several years ago. Neither the injury, nor the alleged adjustments are set out in the claimant's pleadings and the respondent invites the Tribunal not to consider them as part of its determination as to whether there has been a failure to make reasonable adjustments".*

95. The respondent's solicitor then went on in his submissions to summarise the respondent's case: -

"*a. The claimant was disabled for the purposes of the Equality Act 2010.*

b. With regard to the claim for failure to make reasonable adjustments, the adjustments suggested by the claimant were not reasonable and therefore there was no breach of this duty on the part of the respondent.

c. With regard to the indirect discrimination claim – the PCP of being required to carry out all elements of the role including the heavy lifting element was objectively justified as a means of achieving the following legitimate aims:

i. satisfying client need and operational integrity; and

ii. protecting the health and safety of the claimant and his colleagues.

The claimant was therefore not subjected to indirect discrimination as alleged.

d. With regard to the claim for discrimination arising from disability – the unfavourable treatment (being the decision to dismiss the claimant) can be objectively justified as a proportionate means of achieving those legitimate aims of:

i. satisfying client need and operational integrity; and

ii. protecting the health and safety of the claimant and his colleagues.

The claimant was therefore not subjected to discrimination arising from disability.

e. With regard to the claim for unfair dismissal – the respondent asserts that it gave full and careful consideration as to whether his existing role as Wireline Supervisor could be adapted and decided that it could not. In addition, extensive consideration was given to alternative employment before the claimant was dismissed.

f. The claims for reasonable adjustments, indirect discrimination, discrimination arising from disability and unfair dismissal all involve separate legal tests but involves similar facts and

consideration. The unspoken question underlying all the different claims is this: did the respondent do enough to try to retain the claimant in its employment before it dismissed? The respondent invites the Tribunal to find that it did."

96. The respondent's solicitor then addressed, in some detail, "*the evidence before the Tribunal".*

97. He then went on in his submissions to address "the legal issues".

Reasonable Adjustments

98. The respondent's solicitor referred to the terms of s.20 of the Equality Act 2010 ("the 2010 Act"); the burden of proof provisions therein; and the Equality and Human Rights Commission: Code of Practice on Employment (2011) (the "EHRC Code"). He submitted that:-

"*The duty to make reasonable adjustments begins as soon as the employer can take reasonable steps to avoid the relevant disadvantage. In the EAT case of* ***NCH Scotland*** *it was held that for employees off on long term sick it was not reasonable for the employer to pursue reasonable adjustments until there was at least some sign on the horizon that the employee would be returning.*

The duty to implement reasonable adjustments requires a degree of positive action from employers to alleviate the effects of PCPs which may disadvantage a disabled employee. This can require employers to treat employees more favourably, particularly regarding redeployment. However, this does not mean an employer is obliged to place an employee in a job beyond their qualifications or experience.

The claimant claims that at the point when he was dismissed personnel were being used by the respondent across a variety of clients and that this widened the opportunity to make reasonable adjustments to his Wireline Supervisor role. The respondent's defence of the claim for reasonable adjustments is based on the assertion that none of the adjustments suggested by the claimant were reasonable. The claimant's estimation of what steps were reasonable at the point of his dismissal was influenced by his knowledge of working conditions when he was off sick in 2016. The claimant by his own admission had been out of the workplace for

27 months. It is the respondent's position that working practices had changed markedly since that time".

99. The respondent's solicitor then went on the submissions to address each of the adjustments which the claimant maintained should have been made (P18 and 21).

"The claimant argues he could have been sent on jobs where 3 man crews were required and that this would have avoided the need for him to carry out heavy lifting parts of the job".

100. In response to that allegation, the respondent's solicitor referred, in particular, to the evidence of David Low that due to the downturn in the oil industry the respondent's clients had been driving the respondent to make cuts to costs of up to 30%; that the clients' expectations were that the respondent would cut costs and manpower as much as possible; that there had been a focus on small, multi-skilled crews as a consequence; and that it was very rare to have a three-man Wireline crew. This meant that if the claimant was not able to do heavy lifting it would impact upon the other team members. Also, members of the Wireline team are required, from time to time, to work independently. Clients would not look favourably upon employees whose work was limited and could only be used on specific projects.

"The claimant argues he could have been sent on jobs where the rig up/heavy lifting had already been completed".

101. The respondent's solicitor made the following submissions in this regard:-

"Mr Low told the Tribunal that since the downturn, the number of flights offshore has come right down from where it was before. He said that the respondent was not in a position to dictate to clients when it wanted to swap people in and out of the work site. The respondent could not afford to be prescriptive in ordering bespoke flights for operational reasons where those flights cost anything up to £15,000. Ad hoc flights can only be ordered for the respondent in a medevac emergency or a bereavement".

"The claimant argues he could have been deployed on annulus top up jobs, which is an activity not needing heavy lifting, required by every operating client as part of their well integrity procedures"

102. The respondent's solicitor referred once again to Mr Low's evidence that this line of work for the respondent had gone and that this work was being done in conjunction with "slickline interventions" which was *"part and parcel of the work claimant was seeking to avoid".*

"The claimant argues he could have been deployed on pumping jobs where acids/fluids are pumped into wells and heavy lifting is not required"

103. The respondent's solicitor referred to the evidence of Mr Low that the respondent is not a pumping Company and that in any event pumping work is scarce.

"The claimant argues he could have been deployed on panel watching/performing authority activities for operations where other service Companies were carrying out well intervention activities but where there remained a need for the Company to provide Wireline Supervisors"

104. The respondent's solicitor replied as follows:-

> *"Mr Low told the Tribunal that it was very rare for a Wireline Supervisor to do this work. Additionally, the respondent works in tandem with service companies on this type of work and cannot pick and choose when the service company will be there. So far this year there has only been one opportunity for the respondent to do this type of work.*
>
> *Mr Low did not see these suggestions as reasonable adjustments, either together or singularly. In his opinion even if these types of work*

were aggregated, Mr Low estimated that the claimant would be, at best, 10% utilised with very few days offshore. Mr Low could not ask a small crew to take on all his heavy lifting work for him, for their own health and safety. It would need to be an equal split of lifting duties to avoid this. Mr Low also expressed his concerns that the claimant would be pressured into doing heavy lifting work when he was offshore".

105. The respondent's solicitor also submitted that the respondent, *"does not have the whip hand"* with clients as its employees are required to be in attendance offshore at an "intervention" and remain there until it is completed.

"The claimant claims the respondent should have put in place reasonable adjustments by seeking alternative employment at an earlier stage (he argues that only a very limited search for alternative employment was carried out from October 2018"

106. The respondent's solicitor submitted that Mr Low hoped initially that the claimant would be able to return to his old Wireline Supervisor job. When it became clear that that would not be possible, it was necessary for the respondent to assess the claimant's physical capabilities for alternative roles.

"The claimant claims that the respondent should have identified and assigned the claimant a role in the Cased Hole department and tested him for roles in the Cased Hole department other than the role of Field Engineer"

107. In this regard, the respondent's solicitor referred to the "Skills Gap Analysis" which established that not only could the claimant not go to work offshore in such a role, he could not go into the workshop in the Cased Hole Engineering team. "*He had no experience of Cased Hole work. A certain level of skills is needed which the claimant did not have. Mr Low also said that you only get to come onshore into senior roles once you have the relevant amount of service and experience onshore. Mr Low reminded the Tribunal that the guarantee of getting offshore in 18 months to 2 years (which the claimant*

pursued as a condition of taking any Cased Hole Workshop role) was shorter than the three year time period needed for the claimant to gain competency as per the skills gap analysis.

108. Finally, the respondent's solicitor made the following submissions with regard to the additional "reasonable adjustments" which the claimant maintained should have been made:-

> *"The claimant also argues that the respondent failed to implement reasonable adjustments to the alternative roles that were available or would have been available:*
>
> a. ***The claimant argues that for the Cased Hole Engineering role, he could have been exempted from the heavy lifting elements and this step was not considered****: Mr Low told the Tribunal that the nature of the Cased Hole Engineering role was that it was seen as part of the Wireline Crew and that the physical element could not be removed, due to the expectation that all employees would be multi-skilled for the reasons set out above. Cased Hole engineers were expected to do all elements of the job including the "rigging up". The whole crew needed to be fully able to do the wireline tasks and if a member of the crew can't perform to the required level for any reason, and client expectations cannot be met in terms of delivery then this would result in the respondent falling short on client delivery.*
>
> b. ***The claimant argues that the respondent did not consider whether the one year intensive training needed for the Subsea role could be adjusted****: Mr Low explained that investigations had been made but that the Subsea role would have required physical labour with the employee working on their own during their shift. The work could not be put to someone else. The removal of the 1 year training period would not have made the role appropriate for the claimant.*
>
> c. ***The claimant argues that the Company did not consider whether a degree was genuinely required for a sampling role****: Mr Low told the Tribunal that there were no roles available in the sampling department. He also explained that while only some of the roles required chemistry degrees, all jobs in the sampling department required an element of heavy lifting e.g. rigging up".*

Indirect Discrimination

109. The PCP identified by the claimant was that of, *"being required to carry out all elements of his role including heavy lifting elements*". The claimant maintained that this PCP indirectly discriminated against him because it put him and others with his disability at a substantial disadvantage because the PCP put them at risk of dismissal on the grounds of incapacity. The respondent's solicitor referred to the "four-stage test" in s.19 of the 2010 Act and submitted that the respondent's defence to this particular complaint was, *"objective justification, based on the argument that the heavy lifting PCP was objectively justified as a means of achieving the legitimate aims of client requirements, operational integrity and health and safety requirements"*.

110. In support of his position in this regard, the respondent's solicitor made the following submissions:-

> "*Mr Low explained that he had tried to identify adjustments to the claimant's current role, namely the heavy lifting element but had not been able to identify any. Mr Low did not see how the respondent could amend the role and lighten the physical side of it. Mr Low's concern was that if the claimant had to go out in a small crew, that would mean that every physical aspect in terms of lifting, pulling, pushing would be put on to someone else. It would put a lot of stress on other individuals and could cause injury. There was also a concern from both the claimant and Mr Low that a client would put pressure on the claimant to carry out heavy lifting. The respondent would be impeded from carrying out its overall objective for the client, namely service delivery. The respondent's position is that the requirement for all elements of the role to be carried out (including the heavy lifting element) was implemented for reasons unconnected with the claimant's disability. The requirement was both an appropriate means of achieving these aims and reasonably necessary. The ability of all offshore employees to provide a full range of work activities offshore (including heavy lifting), was essential to the service ethos on which the respondent depended".*

Discrimination arising from Disability

111. The respondent's solicitor referred to the terms of s.15 of the 2010 Act. He explained that the respondent's defence of this complaint was the same as that for indirect discrimination: that it was *"objectively justified*": *"the respondent maintains that the dismissal was a proportionate means of achieving those same legitimate aims of client needs, operational integrity and protecting the health and safety of the claimant and his colleagues offshore"*. The same basis as his submissions in relation to the defence for the indirect discrimination complaint.

Unfair Dismissal

112. The respondent's solicitor reminded the Tribunal that, unlike the burden of proof provisions in the 2010 Act, the burden of proof in relation to an unfair dismissal complaint was neutral.

113. The respondent's solicitor submitted that the reason for the claimant's dismissal was capability and that it was fair.

114. He further submitted, with reference to s.98(4) of the Employment Rights Act 1996 ("the 1996 Act"), that the respondent had acted reasonably in treating capability as a sufficient ground for dismissal, *"in accordance with equity and the substantial merits of the case".*

115. He submitted, with reference to ***Shook***, that an employer does not have to prove that an employee's illness renders him incapable of performing *all* the duties under his contract. All that is required of the employer is that he shows the ill health relates to the employee's capability and that it was a sufficient reason to dismiss.

116. He further submitted, with reference to ***BS***, that a reasonable procedure was followed and, with reference to ***Merseyside***, that the respondent had considered alternatives to dismissal, such as redeployment, in a reasonable

manner. "*However, there is no onus on employers to create a special job where none exists" (**Merseyside**).*

117. The respondent's solicitor also recognised that: "*The Tribunal must decide whether the employer genuinely believed in their stated reason for dismissal, whether it was reached after a reasonable investigation and whether it had reasonable grounds in which to conclude as it did. The Tribunal will need to be satisfied that the dismissal fell within the band of reasonable responses (see para 33 of **DB Schenker Rail***).

118. The respondent's solicitor submitted that all these tests had been met and set out his reasoning as follows:-

> "*The claimant relied on medical reports from occupational health, the claimant's Consultant Neurosurgeon and also the provider of the functional capacity evaluation to determine what the claimant was able to do after his long sickness absence and multi medical interventions for back and neck. There were clear restrictions placed on lifting, bending, twisting which were completely incompatible with the Wireline Supervisor role. The claimant did not challenge these assessments. Full consideration was given by Mr Low as to how the claimant's existing role could be adapted, but to remove the physical elements completely went against the nature of the role and the service ethos on which the respondent depended.*
>
> *Once it was determined that no changes could sensibly be made to the role which was in line with the recommended restrictions, the respondent investigated redeployment opportunities along a host of departments. The claimant was party to a full consultation process while the Company strove to keep him in employment.*
>
> *I invite the Tribunal to find that the respondent made great efforts to find a job that was safe enough for the claimant to do, did not impact on service delivery or health and safety of the claimant or others, and which matched with the claimant's skill set. The respondent offered the claimant the role of Wireline Workshop technician primarily (Wireline administrator latterly), clearly hoping he would take the Workshop job. He refused both. He was set against a role onshore or in the Workshop unless it was in the Cased Hole team and guaranteed him an offshore job in the Cased Hole engineering team in 12 to 18 months. For the reasons set out above, the respondent did not consider that this was practicable. There was no vacancy in the Cased Hole workshop in any event. The claimant was therefore dismissed.*

A full appeal investigation and hearing was carried out after the dismissal had been confirmed".

Conclusion

119. In conclusion, the respondent's solicitor submitted: *" I therefore invite the tribunal to find that the claimant was not unfairly dismissed, nor was he subject to indirect discrimination or discrimination arising from disability. Finally, the respondent did not fail in its duty to implement reasonable adjustments. Coming back to my opening statements, while the legal tests are different for these separate claims, the one overriding non-legal question is whether the respondent did enough for the claimant before it made the decision to dismiss. I invite the tribunal to find that it did".*

Claimant's submissions

120. The claimant's solicitor also spoke to written submissions. These are referred to for their terms. In support of her submissions she referred to the following cases:-

Tarbuck v Sainsbury Supermarkets Ltd UKEAT/0136/06/LA
DB Schenker Rail
British Home Stores Ltd v Burchell [1980] ICR 303
East Lindsey District Council v Daubney [1977] ICR 566
Essop and others v Home Office (UK Border Agency); ***Naeem v Secretary of State for Justice*** [2017] UKSC 27
Allonby v Accrington and Rossendale College and others [2004] IRLR 224
Pnaiser v NHS England, Coventry City Council UKEAT/0137/15/LA

Failure to make reasonable adjustments

121. The claimant's solicitor referred to the PCP, *"relied upon by Mr Osborne"* namely that the claimant, "*was required by the respondent to be fit to carry out all aspects of his role, including heavy lifting".* She further submitted that there did not appear to be a dispute that this PCP was applied by the respondent to its Wireline team and to the claimant in particular and that he was disadvantaged by the PCP as compared to those who did not have a back condition. The claimant was put through a capability process which led to his dismissal as he was unable to carry out all aspects of his role including heavy lifting. This meant that, "*the sole matter that requires to be determined in relation to this head of claim is whether the claimant failed to make adjustments that would have been reasonable to the PCP to avoid the disadvantage suffered by Mr Osborne".*

122. The claimant's solicitor referred to the adjustments which the claimant felt should have been made to his role of Wireline supervisor to allow him to return (P18).

"Sending the claimant on jobs where 3 man crews were required which would have obviated the need for the claimant to carry out heavy lifting parts of the job"

123. The claimant's evidence was that he suggested this adjustment to Mr Low. "*In his experience, this work had been sporadic but when it was carried out could often take longer than a single two-week deployment. It was his evidence that this would have been known pre deployment".*

"Sending the claimant on jobs where the rig up/heavy lifting had already been completed"

124. It was the claimant's evidence *"that you can have a run of jobs where this has been done"* and again, "*it would have been known, before deployment offshore, whether rig up or rig down would be required in the course of that*

rotation as the work program was discussed at pre phase meetings onshore before deployment offshore". Mr Low accepted that the claimant also discussed this suggestion him.

"Deploying the claimant on annualist top up jobs which is an activity not requiring heavy lifting required by every operating client as part of their well integrity procedures"

125. The claimant's evidence was that, "*this task is required to be fulfilled every year and in the course of his 15 years of experience he had taken part in around 12 to 14 campaigns of annulus top ups, each of which could have lasted several rotations. It was his evidence that while annulus top up is required on a regular basis, it is not always the same crew that is deployed".* The claimant also gave evidence that he made the suggestion to Mr Low at the time of the capability process.

"Deploying the claimant on pumping jobs where acids/fluids are pumped into the wells and which does not require heavy lifting"

126. "*It was Mr Osborne's evidence that this was a less frequent task but still something he had done in the course of his employment. His evidence was that he did not raise this suggestion at the time of the capability process".*

"Deploying the claimant on panel watching/Performing Authority activities for operations where other service companies were carrying out well intervention activities but where there remained a need for the respondent to provide Wireline Supervisors"

127. The claimant's solicitor referred once again to the claimant's evidence, "*that there can be campaigns where the rig up is done and other departments are*

deploying tools and equipment down the well, with Wireline's role being to have control of the well and carry out performing authority tasks. On such deployments physical activity for the Wireline Supervisor would be minimal, and such campaigns could last for several months". Again the claimant's evidence was that he discussed this with Mr Low at the time of the capability process.

Medical Evidence

128. The claimant's solicitor referred to the respondent's "Ill Health Procedure" (P76-87). She submitted it was necessary for any employer to, *"ascertain the true medical position and the employee's actual capabilities and limitations before deciding on the reasonableness of any adjustments".* While in the present case the claimant was referred to Occupational Health on several occasions, the dates of which were agreed in the "Joint Chronology" (P311-315), it was submitted that*, "there was insufficient clarity or information as to what Mr Osborne's actual limitations were to make a reasonable assessment as to whether reasonable adjustments were possible".* The claimant's solicitor then went on in her submissions to make reference to the various exchanges between the respondent and Occupational Health and the claimant's Consultant, Mr Kamel, to support this submission.

129. So far as the claimant returning to his role as Wireline Supervisor was concerned, the claimant's solicitor clarified the claimant's position: *"He stated that he was paranoid about reinjuring himself and was afraid of it happening again. His evidence was that he felt the functional capacity report "hit the nail on the head" when it discussed fear avoidance as being a barrier to return to work in relation to his wireline role. His evidence was that he felt he could have returned if he had had "support" from his employer. The report recommended a course of physiotherapy, something which both Mr Low and Mr Osborne confirmed was never organised".*

130. The reason for the claimant's hesitancy about going offshore was that he had been under the mistaken understanding that the risk of recurrence of his

injury was 35-45%. However, Mr Kamel advised in his letter of 24 September 2018 (P176) that it was actually *"around 5-10%".*

131. The claimant's solicitor was also critical of Mr Low not explaining properly to the claimant why the scope of the work offshore both in Wireline and in Cased Hole had changed to "multi skilling" since the claimant last worked and nor did he discuss with him the loss of the Shell contract. These changes, according to Mr Low, meant that the "*annulus top up work*" and *"pumping jobs"* are rarely done as "*stand-alone tasks"*. However, "*Mr Low made assumptions, based on Mr Osborne's length of experience about what he knew and understood".* In support of her submissions in this regard, the claimant's solicitor referred to the following passage from the decision of the EAT paragraph 69 in ***Tarbuck***:-

> *"There can be no doubt that any employer would be wise to consult with a disabled employee in order to be better informed and fully acquainted of all the factors which may be relevant to a determination of what adjustment should reasonably be made in the circumstances. If the employer fails to do that, then he is placing himself seriously at risk of not taking appropriate steps because of his own ignorance. He cannot then pray the ignorance in aid if it is alleged that he ought to have taken certain steps and he has failed to do so. The issue for the Tribunal will then be whether it was reasonable to take that step or not".*

132. The claimant's solicitor further submitted that Mr Low was, *"not fully acquainted with all the relevant factors when making the decision that no adjustments to the role were possible as he had failed to discuss with the claimant at any of the capability meetings, what his specific restrictions and capabilities were and to rely on general statements".*

"Alternative Employment"

133. The claimant's solicitor then went on in her submissions to address the claimant's contention that he should have been placed in an alternative role.

She was critical of the delay in looking for alternative roles until October 2018.

134. She also submitted, with regard to the alternative roles of, *"Wireless Wells, Subsea and WSS",* which the claimant had suggested, that the claimant could have carried out these roles had suitable adjustments been implemented. Once again, she alleged that Mr Low did not go into sufficient detail as to the claimant's suitability for these alternative roles and appropriate adjustments.

"Cased Hole Position"

135. The claimant's solicitor submitted that the claimant had made it clear *"throughout the process"* of his desire to be considered for this position and that he did not expect to move straight into such a position at an equivalent grade or seniority to his role as Wireline Supervisor. He accepted that he would require training for the role. Although a "skills gap analysis" was carried out, the claimant's evidence was, "*that when the assessment was carried out, he realised it was for a grade 9 or 10, senior engineer position. It was his evidence that he protested at the time to Mr Low who told him to try his best, and that he repeated that complaint at the subsequent meetings".*

136. There was also a conflict in the evidence, it was submitted, between Mr Low and Ms Paley as to whether positions were available in Cased Hole below a grade 9. Nor was the position in the "Cased Hole Workshop" discussed with or offered to him. So far as the client seeking a "guarantee" of offshore work was concerned, the claimant's solicitor said this:-

> "*The respondent has also mentioned that Mr Osborne sought "promises" that he would be offshore within certain periods of time if he were to consider a workshop role in the Cased Hole department. Mr Osborne's evidence was that while he did use the word guarantee, what he was seeking was an assurance that if such a role arose that he would be considered for it".*

137. Finally, so far as the Cased Hole position was concerned, the claimant's solicitor made the following submissions:-

> "*It is the claimant's submission that the Cased Hole department would have been a suitable alternative for Mr Osborne, and that as a reasonable adjustment, moving him to this department should have been considered. The respondent could not have accurately determined whether a role in that department was or was not suitable for Mr Osborne from an assessment aimed at a mid to senior level position, when Mr Osborne was seeking a junior position. Furthermore, it is Mr Osborne's submission that the Cased Hole workshop vacancy should have been offered to him, and that with the respondent's assurance that he would be considered for future offshore positions he would have accepted this role".*

Unfair Dismissal

138. In support of her submissions with regard to this complaint, the claimant's solicitor referred to ***DB Schenker Rail, British Home Stores Ltd and East Lindsey District Council***.

139. She submitted, with reference to ***East Lindsey District Council***, that, "*The respondent did not carry out a reasonable investigation into Mr Osborne's capability that would have allowed them to reach reasonable grounds to conclude that he was incapable of carrying out his role"*. It was submitted that the respondent had failed to consult with the claimant and ascertain the true medical position. In this regard, the claimant's solicitor referred to the submissions which he had made regarding the alleged failure to make reasonable adjustments.

140. She also submitted that:-

> *"Despite the suggestion of work hardening, either offshore or in the workshop, being raised by both the Occupational Health provider and IPRS. Nothing was arranged. Ms Paley's evidence was that this was*

because Mr Osborne was adamant that he was not returning to his role as Wireline Supervisor; Mr Low suggested it was because a one week offshore hitch was not possible, and because Mr Osborne was adamant that he did not wish to work in the workshop. When I put it to Mr Low that arranging a week in the workshop might have been a reasonable way for Mr Osborne to assess whether he really did not wish to work there, Mr Low's position was that he anticipated that Mr Osborne would not have agreed to this. Mr Osborne's evidence was that while work hardening was mentioned in a meeting it was not brought up again or arranged. The lifting restrictions in the IPRS report at page 178 note that Mr Osborne's ability to lift 'may improve following a period of work hardening and may be retested if required at 3-4 weeks'. It is the claimant's submission there was no adequate reason not to take any steps to explore what could have been arranged by way of work hardening".

"Alternative employment"

141. The claimant's solicitor also submitted that the respondent had failed to properly investigate the possibility of alternative employment for the claimant, rather than dismissing him. In this regard, she also referred to her submissions in relation to the complaint of a failure to make reasonable adjustments in respect of the alternative roles which the claimant had suggested, including the Cased Hole department.

142. So far as the, *"lower grade Wireline Workshop role"* suggested by Mr Low was concerned, the claimant's position was that this was a 'dead end' role with no progression for him, in contrast to a Cased Hole Workshop role. *"Furthermore, he was given no assurance or indication that this was not, or might not, be the case, during the capability or the appeal process. He gave evidence that he was an offshore person and not an office person and that this was all he had ever known and worked in and wished to continue doing so. He did not consider the Wireline Workshop to be a suitable alternative position".*

143. The claimant's solicitor was also critical of the manner in which Ms Paley had conducted the appeal. She alleged that there was a failure on her part to properly consider the alleged failure to investigate the medical position.

144. Finally, the claimant's solicitor made the following submissions with regard to the unfair dismissal complaint:-

> "*It is submitted for the claimant that insufficient investigation was carried out by the respondent to reach a reasonable belief on reasonable grounds as to whether Mr Osborne was unfit to carry out his Wireline Supervisor role and insufficient investigation of possible alternative employment. These failings were not rectified by Ms Paley in the course of the appeal process. Accordingly it is submitted that Mr Osborne was unfairly dismissed".*

Indirect Discrimination

145. The claimant's solicitor referred to the terms of s19 of the 2010 Act and the PCP relied upon by the claimant namely, *"that he was required to be fit to carry out all aspects of his role including heavy lifting".* This PCP was not disputed by the respondent. The issue so far as this complaint was concerned was whether the PCP was "*a proportionate means of achieving a legitimate aim"*.

146. The claimant's solicitor referred to the submission by the respondent's solicitor, *"that clients would not have been prepared to accommodate an operative who was incapable of carrying out all aspects of his role".* She submitted that, "*this appeared to be based on his perception rather than any actual discussions with clients"*.

147. It was also submitted by the respondent's solicitor that if the claimant was not required to do any heavy lifting that this would have placed an unreasonable burden on the other operatives in his team. However, the claimant's evidence was that, "*in 2004 after his first lower back operation, for a number of rotations his team were directed to assist him with lifting of heavy items, and that they did so"*.

148. In support of her submissions in this regard the claimant's solicitor referred to the following passage from the Judgment of Baroness Hale at paragraph 47 in ***Essop***:-

> "*The burden of proof is on the respondent, although it is clearly incumbent upon the claimant to challenge the assertion that there was nothing else the employer could do. Where alternative means are suggested or are obvious, it is incumbent upon the Tribunal to consider them".*

149. The claimant's solicitor also referred to the Court of Appeal decision in ***Allonby*** and submitted that, *"the correct approach is to first critically assess a real need for the PCP has been demonstrated; if there was such a need, consideration of the seriousness of the disparate impact of the PCP on the affected group, including the claimant; and an evaluation of whether the former were sufficient to outweigh the latter. It is submitted for the claimant that the respondent has not shown that its need for the PCP outweighed the disparate impact on those with Mr Osborne's disability".*

Discrimination arising from disability

150. The claimant's solicitor referred to s15 of the 2010 Act. She also referred to, *"the tests set out by the EAT in **Pnaiser** at paragraph 31: a) it is first necessary to identify whether there was unfavourable treatment and by whom; b) the Tribunal must determine what caused the impugned treatment, or what was the reason for it; c) motives are irrelevant. The focus of this part of the inquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant and d) the Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability"*".

151. She submitted that the four limbs of that test had been satisfied which meant that the issue was whether or not the respondent had established that the claimant's unfavourable treatment was "*a proportionate means of achieving a legitimate aim"*.

152. In this regard, she referred again to the Judgment of the Supreme Court in ***Essop*** that the burden of proof was on the respondent to show the proportionality of the PCP and that this was to achieve a legitimate aim.

153. She submitted that the respondent's position appeared to be the same as that which was advanced in relation to the indirect discrimination complaint – "*that clients would not have been prepared to accommodate an operative who was incapable of carrying out all aspects of his role, and that requiring other operatives to assist Mr Osborne with heavy lifting would have placed an unreasonable burden on them.*

Again, as with the argument in relation to indirect discrimination, it is submitted for the claimant that the respondent has not shown that the respondent's need to carry out the unfavourable treatment outweighed the disparate impact on those with Mr Osborne's disability".

"Conclusion and Disposal"

154. Finally, the claimant's solicitor said this by way of conclusion: *"It is the claimant's position that he has been unfairly dismissed, and that he has been discriminated against by virtue of a failure to make reasonable adjustments; subjected to indirect discrimination and discriminated against because of something arising from his disability".*

Discussion and decision

155. We wish first to make some general comments on the evidence about a number of factors which, in our unanimous view, were material and apposite to all of the complaints which the claimant advanced.

- **Both of the respondent's witnesses presented as entirely credible and reliable.**

- **David Low was the respondent's principal witness. His evidence was pivotal to the issues with which we were concerned. He gave his evidence in a measured, consistent and thoroughly convincing manner. He was an impressive witness. He was familiar with the claimant's role as Wireline Supervisor as that was a role he had carried out himself before he became the respondent's UK Operations Manager. This meant, as the respondent's solicitor put it, that he had, *"a particular insight into the reasonableness of adjustments suggested by the claimant and also whether the heavy lifting requirement was objectively justified"***

- **We were in no doubt that the respondent did not want to lose the claimant. They had kept his job open for over two years. They valued him as an employee and recognised his particular expertise gained over many years of employment with them. Their endeavours to find a suitable alternative role for him, compatible with his skills set and disability were comprehensive.**

- **The Wireline Supervisor and Cased Hole roles had changed significantly since the claimant last worked for the respondent some 27 months previously. There had been a change to a "multi skilling model working with a smaller team". Although the tools and how to deploy them hadn't changed, the working practices had.**

- **The Wireline Supervisor and Cased Hole roles were both physically demanding.**

- **The claimant did not wish to return to his role as Wireline Supervisor. He made that very clear.**

- **In any event, the claimant was unfit for the role of Wireline Supervisor due to its physical demands.**

- **The claimant had no desire to work onshore. As he put it he was "an offshore person".**

- **The claimant was only prepared to work onshore provided he was given a "guarantee" of offshore work in 12-18 months. This was not something that the respondent could guarantee. That was a reasonable position for the respondent to take.**

Unfair Dismissal

Relevant law

156. In every unfair dismissal case where dismissal is admitted s.98(1) of the Employment Rights Act 1996 ("the 1996 Act") requires the employer to show the reason for the dismissal and that it is an admissible reason in terms of s.98(2), or some other substantial reason of a kind such as to justify dismissal of an employee holding the position which the employee held. An admissible reason is a reason for which an employee may be fairly dismissed and among them is capability. That was the reason which the respondent claimed was the reason for the claimant's dismissal. We were satisfied that he was dismissed for that reason. That was not an issue between the parties.

157. The remaining question which we had to determine, therefore, under s.98(4) of the 1996 Act, was whether the respondent had acted reasonably in treating that reason for dismissing the claimant as a sufficient reason and that

question had to be determined in accordance with equity and the substantial merits of the case.

158. In ***East Lindsey District Council***, which was referred to by the claimant's solicitor, the EAT stressed the importance of consultation and discovering the true medical position. In that case Mr Justice Phillips stated:-

> *"Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done. Discussions and consultation will often bring to light facts and circumstances of which the employers were unaware, and which will throw new light on the problem. Or the employee may wish to seek medical advice on his own account, which, brought to the notice of the employer's medical advisers, will cause them to change their opinion. There are many possibilities. Only one thing is certain, and that is that if the employee is not consulted, and given an opportunity to state his case, an injustice may be done".*

159. While that case is the leading authority on medical investigation in the context of a fair capability dismissal, the sufficiency of the employer's belief and the grounds for dismissal is still governed by ***British Home Stores Ltd***. Although that case was decided in the context of a conduct dismissal, it set down general principles of reasonableness with wider application – namely, that the employer must genuinely believe in its stated reason for dismissal, having conducted a reasonable investigation which yields reasonable grounds for the employer's conclusion. The EAT in ***DB Schenker Rail (UK) Ltd***, to which the Tribunal was referred by the respondent's solicitor, emphasised that while ***East Lindsey*** requires an employer to establish the "true medical position" before deciding to dismiss, that should not be read as requiring a higher standard of inquiry than required for a misconduct

dismissal. The test in ***British Home Stores Ltd*** requiring that a reasonable investigation into the matter be carried out still applies.

160. We also remained mindful that the *"range of reasonable responses"* test of fairness applies to both the decision to dismiss and to the procedure which was followed in reaching that decision (***Sainsbury's Supermarkets Ltd v Hitt***).

Present Case

161. We were entirely satisfied that the procedures which the respondent followed were within the *"range of reasonable responses"* which a reasonable employer could have adopted. As we recorded above, the respondent did not want to lose the claimant. In our unanimous view, they did all they possibly could do to keep him in their employment.

162. The investigations they carried out to establish the true medical position and what the claimant was capable of doing were comprehensive. They consulted extensively with the claimant; they obtained medical reports from Occupational Health and the claimant's neurosurgeon; they commissioned a "Functional Capacity Evaluation Report" in which each element of the Wireline Supervisor job description was analysed in relation to the claimant's ability to perform it.

163. On the basis of those investigations, the respondent concluded that the claimant was not fit to return to his role as Wireline Supervisor. We were satisfied that that decision was within the range of reasonable responses which a reasonable employer could have made. In arriving at that view we were satisfied, in all the circumstances, that was so, notwithstanding that the respondent did not arrange the *"course of functional physiotherapy"* recommended in the "Functional Capacity Evaluation Report" in respect of the claimant's Wireline Supervisor role.

164. The respondent also considered whether the role might be adapted by removing the physical elements, but decided that that could not be done. Again, we were satisfied that that was a reasonable view to take, based on Mr Low's intimate knowledge of the role, the respondent's clients, the investigations the respondent carried and the information they obtained. As the respondent's solicitor put it in his submissions: "*to remove the physical elements completely went against the nature of the role and the service ethos on which the respondent depended".*

165. Further, and in any event, as we recorded above, the claimant himself accepted that he was not fit to return to his previous role as a Wireline Supervisor. Nor was *"work hardening"* for a week, as suggested by Occupational Health, a reasonable and practical option. That would not have been compatible with the offshore rotas which operated and, in any event, it was not something the clients would have allowed and the cost of helicopter flights would be prohibitive.

Redeployment

166. Having come to this view, the respondent then considered redeployment, as any reasonable employer would do. Once again, their endeavours in this regard were comprehensive. We accepted the submission by the respondent's solicitor that it was necessary, "*to find a job that was safe enough for the claimant to do, did not impact on service delivery or health and safety of the claimant and others and which matched with the claimant's skill set*".

167. In this regard, the respondent was restricted by the fact that the claimant wished to work offshore, he had no desire to work onshore and he would only have taken a job onshore provided he was "guaranteed" offshore work within a specified period. We were satisfied that that was not a guarantee the respondent could give.

168. In addition, the claimant was able to look for vacancies online using the respondent's "Portal" and he was encouraged to do so. The claimant requested a role as a Cased Hole engineer and was prepared to train in the workshop. However, he was only prepared to do so with a *"guarantee"* that he would be given offshore work within 12-18 months. The respondent could give no such guarantee. They could not predict that such a role would be available in that period. In any event, they had established that the claimant did not have the skill set for such a role by conducting a "Skill Gap analysis" and it would have taken him at least 36 months, "*to reach minimum competence required*".

169. The claimant complained when he gave evidence at the Tribunal Hearing that the "Skill Gap Analysis" was for a "Grade 9-10 senior field engineer 2" and it should have been at a lower level. However, it was reasonable for the respondent to assess him at that level given the amount of time it would have taken to train the claimant to that level; the fact that he was only prepared to go through training onshore if the respondent could guarantee him offshore work in 12-18 months and this was something the respondent could not reasonably do. Also, he did not complain about this at the time in any meaningful way. We were of the view that this was something of an afterthought.

170. Further, and in any event, there were no vacancies for Cased Hole engineers and, as we recorded above, the role and requirements of a Cased Hole engineer had changed significantly and the role was physically demanding to an extent that it was not compatible with the claimant's disability .

171. The respondent took the view, therefore, that this was not a suitable post for the claimant. In all the circumstances, that was a view that a reasonable employer could have taken.

172. The respondent went to great lengths to explore redeployment. They investigated each and every one of the many alternative roles suggested by the claimant. There was not only the evidence of the respondent's witnesses

in this regard but extensive supporting documentation. As it transpired, there were either no vacancies or the post was not suitable.

173. The respondent did offer the claimant the role of Wireline Workshop technician and then Wireline Administrator. The claimant refused both offers.

174. The respondent concluded, therefore, that as the claimant could not return to the Wireline Supervisor role and there was no suitable alternative employment, that they had no option other than to dismiss him. They did so with reluctance. They followed a fair procedure and the decision to dismiss was within the range of reasonable responses which a reasonable employer could have taken.

Appeal

175. Ms Paley also carried out a comprehensive appeal. She carried out further investigations and fully considered each of the appeal points which the claimant raised. She set out her reasons for upholding the dismissal in a detailed letter to the claimant in which she addressed, satisfactorily, every point the claimant had raised (P302-307).

176. For all these reasons, therefore, and having regard to the terms of s.98(4) of the 1996 Act, the dismissal was fair. The respondent had a genuine and reasonable belief that the claimant was not capable of returning to his existing role of Wireline Supervisor or to any other role within their organisation.

Discrimination Complaints

Reasonable Adjustments

177. s.20 of the 2010 Act states that the duty to make adjustments comprises three requirements. It was the first requirement in s.20(3) which was relevant to the present case:-

"***20 Duty to make adjustments***

(1) Where this act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule applies; and for those purposes, a person on whom the duty is imposed is referred to as A

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage".

The PCP

178. The "provision, criterion or practice" ("the PCP") relied upon by the claimant was that: *"he was required to be fit to carry out all aspects of his role, including heavy lifting". That was not disputed.*

179. When considering this issue, we also had regard to the Equality and Human Rights Commission: Code of Practice on Employment (2011) ("the EHRC Code"). Whether the employer took, "reasonable steps" is an objective test and depends on e.g. the size and type of employment as well as financial resources; whether the steps are practicable and whether they will be effective.

When did the duty arise?

180. We were mindful, with reference to ***NCH Scotland***, that for employees who are off on long term sick the duty to make reasonable adjustments is not "triggered" unless and until the employee indicates that he or she intends or wishes to return to work. In any event, it was clear that the respondent was in no haste to dismiss the claimant.

Adjustments proposed by claimant

181. We do not propose rehearsing all the adjustments suggested by the claimant in his claim form. The reason for this is that in his submissions the respondent's solicitor addressed each one in turn, in a comprehensive, detailed manner, and we were satisfied that his submissions were well-founded. In our unanimous view, none of the adjustments suggested by the claimant were "reasonable".

182. We were mindful in arriving at this view that one of the factors listed by the EHRC Code which might be relevant when deciding whether any particular step was a "reasonable adjustment was:- "*6. Whether the making of the particular adjustment would increase the risk to health and safety of any person (including the individual concerned"* (para 6.27).

183. Once again, the fact that the role of Wireline Supervisor had changed markedly in the 27 month period since the claimant last worked for the respondent was relevant as 3-man wireline crews were rare. This meant that were the claimant to return to his role as Wireline Supervisor, but with the physical requirements of the job being restricted, or removed altogether, not only would there be a health and safety risk for himself, there would be a risk for his colleagues in the Wireline team. In any event, it was highly unlikely that such an arrangement would be acceptable to clients and the claimant did not want to return to the Wireline Supervisor role.

184. We have already detailed why there was no suitable alternative employment for the claimant and why, no reasonable adjustments could be made to allow the claimant to work in any of these roles. In particular, a role in the Cased Hole Department, which appeared to be the main role the claimant was seeking, was not suitable. The physical demands of that role alone rendered it unsuitable for him; he did not have the required skills set; training would have taken at least 36 months; the claimant wanted a guarantee of offshore

work within 12-18 months which the respondent could not give; and there were no vacancies.

185. We arrived at the unanimous view, therefore, that the respondent had satisfied the duty in s.20 to make reasonable adjustments. Accordingly, this complaint is dismissed.

Indirect Discrimination

186. The relevant statutory provision is s.19 of the 2010 Act:-

> "***19 Indirect Discrimination***
>
> *(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –*
>
> *(a) A applies, or would apply, to persons with whom B does not share the characteristic,*
>
> *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
>
> *(c) it puts, or would put, B at that disadvantage, and*
>
> *(d) A cannot show it to be a proportionate means of achieving a legitimate aim".*

"Objective justification"

187. We were also of the unanimous view, so far as this complaint was concerned, that the submissions by the respondent's solicitor were well-founded.

188. We were satisfied that the respondent had shown the PCP, "*to be a proportionate means of achieving a legitimate aim (known as "objective justification")*.

189. When considering this complaint we also had regard to the EHRC Code and in particular para 4.30, to which we were referred by the respondent's solicitor, that: "*the objective justification test involves a balancing exercise between the extent the impact of an indirectly discriminatory requirement and the importance to the employer of achieving legitimate aims"*.

190. We were satisfied that PCP was objectively justified, *"as a means of achieving the legitimate aims of client requirements, operational integrity and health and safety requirements".*

191. As we recorded above, the respondent considered very carefully whether the claimant's role of Wireline Supervisor could be adjusted to lighten the physical side of it. That proved impossible. The physical elements would have to be shared among the small crew; there was a concern that the claimant might still be required to carry out heavy lifting; and "*the respondent would be impeded from carrying out its overall objective for the client, namely service delivery".*

192. We accepted the submission by the respondent's solicitor that, "*the respondent's position is that the requirement for all elements of the role to be carried out (including the heavy lifting element) was implemented for reasons unconnected with the claimant's disability …. the ability of all offshore employees to provide a full range of work activities offshore (including heavy lifting), was essential to the service ethos on which the respondent depended".*

193. For all these reasons, therefore, we arrived at the unanimous view that this complaint should also be dismissed.

Discrimination arising from disability

194. The relevant statutory provision is s.15 of the 2010 Act:-

> *"**15 Discrimination arising from disability***
>
> *(1) A person (A) discriminates against a disabled person (B) if –*
>
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
>
> *(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability".*

195. Once again, we were satisfied that the submissions by the respondent's solicitor in this regard were well founded. The defence again was that the dismissal was "objectively justified". The test of "objective justification" is the same as the test for indirect discrimination.

196. For the same reasons, therefore, we arrived at the unanimous view that this complaint should also be dismissed.

197. In arriving at this view, we were also mindful that while s.15 is silent on what may amount to a "legitimate aim", the EHRC Code states that for the aim to be legitimate, it must be:- "*Legal would not be discriminatory in itself, and must represent a real, objective consideration" (para 4.28)*

198. We also had regard to the guidance of the Supreme Court in ***Chief Constable of West Yorkshire Police and another v Homer [2012] UKSC15*** where Baroness Hale stated that:-

> **"***To be proportionate, a measure must be both an appropriate means of achieving a legitimate aim (and reasonably) necessary to do so".*

199. We were also mindful of the guidance in the EHRC Code as to *"what is proportionate?"* (paras 4.30-4.32) and the "balancing exercise", which has to be carried out.

200. For all these reasons, therefore, we arrived at the view that the claim should be dismissed in its entirety.

Employment Judge N M Hosie

Date of Judgment: 8th February 2021

Date sent to parties: 8th February 2021