EMPLOYMENT TRIBUNALS (SCOTLAND)

Case no 4113127/2019 (V)

Held remotely on 7 and 8 June 2021

Employment Judge: W A Meiklejohn
Tribunal Member: Mrs M Taylor
Tribunal Member: Mr A Matheson

Mr D Gabel	**Claimant** **In person**
Health and Safety Executive	**Respondent** **Represented by:** **Ms L Cartwright – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that –

(a) the respondent is not a qualifications body in respect of the position of diving supervisor for the purposes of sections 53 and 54 of the Equality Act 2010 ("EqA") and

(b) the position of diving supervisor is not a personal office for the purposes of section 49 EqA

and accordingly the claimant's complaints of unlawful discrimination under section 15 EqA (**Discrimination arising from disability**), section 19 EqA (**Indirect discrimination**) and sections 20/21 EqA (**Duty to make adjustments/Failure to comply with duty**) do not succeed and are dismissed.

REASONS

1. This case came before us for a final hearing, conducted remotely by means of the Cloud Video Platform, to determine complaints brought by the claimant that the respondent had acted unlawfully under certain provisions of the EqA. These complaints were resisted by the respondent.

Procedural history

2. This is a dispute which dates back to 2011. There was litigation in the Court of Session in 2017 where the claimant was unsuccessful because his claim should have been raised in the Employment Tribunal. In a previous claim brought by the claimant in the Employment Tribunal (Case no 4103960/2018) arguments similar to those in the present case were advanced. Following a hearing on 17/18 September 2018 (before Employment Judge Gall) that claim was dismissed because it was found to have been brought out of time.

3. The claimant presented this claim on 18 November 2019. It was resisted by the respondent. The claims and issues were summarised in the Note issued after a case management preliminary hearing on 7 December 2020 (before EJ Whitcombe). That case management preliminary hearing followed an open preliminary hearing on the same date at which EJ Whitcombe gave an oral Judgment determining that the doctrine of res judicata applied to the claims brought by the claimant in this case apart from the allegation of discrimination arising from the respondent's letter to the claimant dated 17 September 2019.

Claims and issues

4. These were succinctly set out in EJ Whitcombe's Note and for ease of reference (and with some minor amendments) we repeat them here.

5. It is common ground that the claimant is a disabled person for the purposes of the EqA on account of a knee injury suffered in the 1970s and a foot injury suffered in 1990. He was medically retired from the US Navy in 1996 by reason of permanent disability.

6. The remaining claim arises from the position taken by the respondent in a letter dated 17 September 2019 in which it confirmed that any person employed as a diving supervisor for recognised courses at a HSE dive school must hold the HSE approved qualification of at least the level of the unit. The claimant does not currently hold any such qualification and cannot gain one because of his medical restrictions.

7. The claims are brought both under section 49 (**Personal offices: appointments etc**) and section 53 (**Qualifications bodies**) of the EqA. The types of discrimination alleged are:

   (a) Discrimination arising from disability (section 15 EqA)

   (b) Indirect discrimination (section 19 EqA)

   (c) Failure to make reasonable adjustments (sections 20/21 EqA)

8. The "*provision, criterion or practice"* in the claims under section 19 (**Indirect discrimination**) and sections 20/21 (**Duty to make adjustments/Failure to comply with duty**) is the rule or policy reflected in the letter of 17 September 2019.

9. The unfavourable treatment for the purposes of the claim under section 15 (**Discrimination arising from disability**) is the application of that policy to the claimant with adverse consequences for his employability in certain capacities. We do not understand there to be any express denial that that the alleged unfavourable treatment arose from disability. We therefore assume that it is uncontroversial that the claimant's inability to comply with the policy arose from an inability to gain the requisite diving qualifications, which in turn arose from his inability to dive for medical reasons.

10. That is also the relevant disadvantage for the purposes of the claims under section 19 (**Indirect discrimination**) and sections 20/21 (**Duty to make adjustments/Failure to comply with duty**).

11. The justification defence relied on in the claims under section 15 (**Discrimination arising from disability**) and section 19 (**Indirect**

discrimination) is set out in paragraph 17 of the paper apart to the response. That sets out the respondent's aim and its argument that the means used were proportionate.

12. The adjustment contended for in the claim under sections 20/21 is understood to be that an exception to the policy should have been made in the claimant's case, or that he should have been afforded *"grandfather rights"* to similar effect (as explained elsewhere in the claim and the response).

13. We also had a "*Joint list of issues for final hearing"* which had been agreed between the parties which included agreed facts. We set this out in the next section of our Judgment.

Parties' joint list/agreed facts

14. The document containing the parties' joint list of issues and agreed facts was in these terms –

Issues not in dispute, previously noted by the Tribunal, and relevant agreed facts taken from the Joint Statement of Facts previously agreed between parties prior to the Preliminary Hearing on the question of res judicata.

1. *It is agreed that the Claimant is a disabled person, under the Equality Act 2010 on account of a knee injury suffered in the 1970s and a foot injury suffered in 1990. He was medically retired from the US Navy in 1996 by reason of permanent incapacity.*

2. *For the purposes of the claims of indirect discrimination (section 19) and reasonable adjustments (section 20/21), the "provision, criterion or practice" is the rule reflected in the letter of 17 September 2019 (246) – any person employed as a diving supervisor for the recognised courses at HSE Diver Competence Assessment Organisations must hold the HSE approved qualification of at least the level of the unit.*

3. *For the purposes of the claim under section 15 (discrimination arising from a disability), the unfavourable treatment is the application of the above policy to the Claimant with adverse consequences for his employability in certain capacities.*

4. *The claimant's inability to comply with the policy (to hold an HSE approved qualification) arises from his disability as he cannot dive for medical reasons (and therefore cannot obtain the qualification by the usual route).*

5. *The application of the policy at 2. above is the relevant disadvantage for the purposes of the claim of indirect discrimination and failure to make reasonable adjustments.*

6. *Agreed facts from Joint Statement :-*

The following facts were considered by the Employment Tribunal in claim number 4103960/2018:-

a. *The Claimant was employed with the US Navy until 1991. He had been a senior diving instructor and supervisor with them. His retirement was a medical one due to an injury which had affected him. He is disabled in terms of the 2010 Act. His disability is a physical impairment rather than a mental impairment. In 1991, the Claimant's disability placed him on the Temporary Disabled Retired List (TDRL) until 1996 when it became a permanent retirement on medical grounds after the required five year waiting period.*

b. *The Diving at Work Regulations 1997 apply to diver competence assessment organisations/commercial diving operations within Great Britain. Regulation 9(2) provides that "No person shall be appointed or shall act as a supervisor unless he is competent and, where appropriate, suitably qualified to perform the functions of supervisor in respect of the diving operation which he is appointed to supervise".*

c. *The HSE are authorised in terms of Regulation 14 of the 1997 Regulations to "approve in writing such qualification as it considers suitable for the purpose of ensuring the adequate competence of divers for the purpose of Regulation 12(1)(a)".*

d. *The ACOP provides that a supervisor must be suitably qualified. Under the provisions contained within the ACOP at paragraph 123 the claimant met the definition of someone suitably qualified by reason of what was known as "Grandfather rights" – this was by virtue of him having acted as a supervisor of a diving operation in which the same diving techniques were used during the two year period before 1 July 1981.*

e. *The HSE have issued the May 2011 Protocol which Assessment organisations are to follow. Paragraph 38 of the May 2011 Protocol states, in relation to supervisors under the heading of "Minimum qualifications of supervisors" – "Supervisors should have an HSE approved qualification of at least a level of the Unit or equivalent which the assessment course is intending to achieve".*

f. *The Claimant's qualification to work as a diver does not constitute "an HSE approved qualification" as defined by the Diving at Work Regulations. In order to work as a diver under DWR an individual must hold an HSE approved qualification.*

g. *Although the claimant therefore has grandfather rights , and can be appointed as a Diving Supervisor on commercial diving projects in accordance with DWR and associated ACOPs, the Respondent maintains that he cannot be a diving supervisor within a HSE diving school due to the 1997 Regulations, the ACOP and the May 2011 Protocol.*

h. *Requests were made of the Respondent by the Claimant to obtain authority for Claimant to act as a diving supervisor at an HSE diving*

school. Those requests were refused on the basis that the claimant did not have an approved diving qualification.

i. In March 2012, there was an exchange of correspondence between the Claimant and the Respondent. That related to the possibility that the Claimant work as a diving supervisor. In that correspondence, the Respondent expressed their decision to the Claimant that a supervisor required to be a suitably qualified diver in accordance with the 1997 Diving at Work Regulations and associated ACOPs. They referred to ACOP, paragraph 123. The claimant does not have an "an HSE approved qualification".

j. The claimant involved his MP as a result of the view expressed by the Respondent. The claimant proceeded to raise his issues with the ombudsman. The ombudsman did not uphold the Claimant's referral to him. The Claimant questioned that, and a further investigation was carried out by the ombudsman. The outcome of that was that the view earlier expressed was adhered to.

k. The Claimant wrote to the Respondent by a letter of 8 November 2014 seeking confirmation that he met the requirements of the May 2011 Protocol. The Claimant received a reply to that letter on 8 December 2014. The Respondent replied on 8 December 2014.

l. The Claimant sought clarification from the Respondent by letter of 2 January 2015. The Respondent replied on 11 February 2015 stating that "for someone to act as a Diving Supervisor at a Diving School they must have a relevant, approved qualification for diving at work in the UK.

List of Issues for the Full Hearing

Qualifications Body

7. *The Respondent is a qualifications body in terms of sections 53 and 54 of the Equality Act 2010, but was the Claimant a person seeking the conferment of a qualification upon him, in terms of section 53(1) of the Equality Act?*

8. *What qualification was the Respondent able to confer upon the Claimant that it did not confer?*

9. *By not conferring the qualification referred to at 4. above , and taking into account the Respondent's justification defence (relevant to a. and b. below),has the Respondent*

    a. *Discriminated against the Claimant for a reason arising from his disability under section 15 of the Equality Act 2010?*

    b. *Indirectly discriminated against the Claimant under section 19 of the Equality Act 2010?*

10. *Question 9 requires the Tribunal to consider whether the Respondent's justification was a proportionate means of achieving a legitimate aim. What was the aim? Was the means of achieving that (by the application of the policy) proportionate?*

11. *Would the conferring of the qualification (referred to at 4. above) have been a reasonable adjustment for the Respondent to have made? Would it have alleviated the disadvantage to which the Claimant was put by not having the qualification? Has the Respondent failed to make a reasonable adjustment for the Claimant under section 20 and 21 of the Equality Act 2010?*

12. *Is the post of diving supervisor at an HSE Approved dive school a "personal office", in terms of section 49 and section 52(2) of the Equality Act 2010?*

13. *If the answer at 12. is yes, was the Respondent a "relevant person" in relation to the post of diving supervisor for any HSE approved dive school? In determining this, the Tribunal must consider:-*

    a. *Would the Respondent be involved in the terms of the appointment?*

    b. *Would the Respondent have "the power to afford access to such an opportunity" or if this is not the case is the Respondent "the person who has the power to make the appointment"?*

    c. *Would the Respondent be involved in terminating such an appointment?*

    d. *Would the Respondent have power over the appointee's conduct in the role?*

14. *If the post is a "personal office" and the Respondent is a "relevant person" has the Respondent discriminated against the Claimant in any of the ways set out in section 49(6) to (8) of the Equality Act 2010? Has the Respondent failed to make a reasonable adjustment?*

Remedy

15. *If discrimination is established and cannot be justified, or the Respondent failed to make a reasonable adjustment what is the appropriate level of award for:-*

    a. *losses arising from the act of discrimination referred to on 17 September 2019 and*

    b. *injury to feelings*

16. *To what extent has the Claimant mitigated his loss of earnings?*

Evidence

15. We heard evidence from (a) the claimant and (b) Ms J Tetlow, the respondent's Chief Inspector of Diving. Their evidence in chief was contained in written witness statements which were taken as read in accordance with Rule 43 of the Employment Tribunal Rules of Procedure 2013. We had a bundle of documents extending to 288 pages to which we refer above and below by page number.

Findings in fact

16. It is not the function of the Tribunal to record every piece of evidence presented to it and we have not attempted to do so. This case was unusual in the sense that findings in fact had already been made following the hearing in case no 4103960/2018 (at paragraphs 5-12 of EJ Gall's judgment). While that hearing was to determine the preliminary issue of time bar, those findings in fact were relevant to the present claim. However, they are reflected in the agreed facts set out above so we do not require to repeat them here.

Letter of 17 September 2019

17. The claimant wrote to the respondent on 4 September 2019 (245) in these terms –

> "*I have been informed that all Diving Supervisors , without exception, employed at HSE approved Dive Schools must have an approved certificate to work as a diver in accordance with the Protocol for Diver Competence Assessment Organisations.*
>
> *It has been stated that this preferred employment option (having a certificate to work as a diver) is considered as a higher competence standard for Diving Supervisors and therefore excludes individuals working under "Grandfather Clause" from employment at HSE approved diver training establishments.*

Does the Health and Safety Executive still maintain this stance or has it changed?"

18. Ms Tetlow replied to the claimant on behalf of the respondent on 17 September 2019 (246) as follows –

"*Your letter dated 4th September 2019 has been passed to me for response.*

I can confirm that HSE's position on the required qualifications to work as a diving supervisor at HSE Diver Competence Assessment Organisations (known colloquially as HSE Dive Schools) remains as per my letter to you on 13 August 2018, and previous letters to you and to your MP Mr Alan Reid on numerous occasions dating back to 2012.

Any person employed as a diving supervisor for recognised courses at such an organisation must hold the HSE approved qualification of at least the level of the unit."

Earlier correspondence

19. EJ Gall's judgment describes (at paragraph 21-26) the earlier correspondence. The position taken by the respondent is set out at paragraph 21 of that judgment in these terms –

"*….in March of 2012, the claimant was informed by Mr Crombie of the ….respondents that whilst a diving contractor could appoint diving supervisors, and while grandfather rights would appear to be met by Mr Gabel, the position was different in relation to appointment as a supervisor at an HSE diving school. To hold the position of supervisor at an HSE diving school required a person, including therefore Mr Gabel, to hold an approved qualification for diving at work in the UK. Mr Gabel's US Navy qualification was not such an approved qualification. He could therefore not be a diving supervisor at an HSE diving school…."*

20. Much of the claimant's evidence in chief, set out in his witness statement, described the correspondence between the claimant (and his MP) and the respondent about this issue since 2012. This was helpful in providing the background against which the exchange of letters in September 2019 took place. However our focus was on the alleged discriminatory effect of the respondent's letter of 17 September 2019. The claimant's right to complain about the alleged discrimination arose only if section 49 EqA (**Personal offices: appointments etc**) and/or section 53 EqA (**Qualifications bodies**) was/were engaged. We did not consider that it was necessary for us to record the terms of the earlier correspondence beyond our reference to EJ Gall's judgment.

Claimant's previous employment

21. Between June 2007 and January 2011 the claimant worked with a Diver Competence Assessment Organisation. This was the Professional Diving Academy in Dunoon ("PDA"). PDA obtained the respondent's approval for the claimant to work as an assessor (according to Ms Tetlow "*to a very limited extent"*). PDA were not granted approval for the claimant to work as a supervisor.

22. The respondent had not retained records which covered their approval for the claimant to work as an assessor at PDA. They had a retention policy for the purpose of GDPR compliance, although it seemed to us probable that the relevant records had been disposed of before the enactment of the Data Protection Act 2018 (implementing GDPR).

Role of HSE

23. Ms Tetlow's evidence described the respondent's functions in these terms –

> "*The HSE's functions are set out in section 11 of the Health and Safety at Work Act 1974….Section 11(1) includes the general duty "to do such things and make such arrangements as HSE considers appropriate for the general purposes of this Part. The general purposes are described in section 1 of the Act as "securing the health, safety and welfare of*

persons at work" and "protecting persons other than persons at work against risks to health or safety arising out of or in connection with the activities of persons at work". Section 11(2)(b) goes on to state the HSE shall "make such arrangements as it considers appropriate for the….provision of training and information, and encourage….the provision of training and information by others."

24. The respondent regulates diving operations in the UK through the 1997 Regulations. As the 1997 Regulations are made under the Health and Safety at Work etc Act 1974 they are enforced by the respondent.

25. To obtain an HSE approved qualification, a person requires to attend a Diver Competence Assessment Organisation. That organisation carries out the training and assessment. If successful, the person who had undertaken the training and assessment is recommended to the respondent, and the respondent issues a certificate. The respondent is a qualifications body in respect of divers.

26. The respondent publishes a list of approved diving qualifications (25-52). The list contains both UK diving qualifications and approved foreign qualifications. The list does not include any USA qualifications. The respondent does not approve qualifications issued by overseas military organisations.

27. The respondent regards trainee divers attending an HSE dive school as more vulnerable than divers on commercial projects on the basis that the latter are experienced. Ms Tetlow said that "*a trainee diver may not react in the way that might be expected of a more experienced diver".*

Role of diving supervisor

28. The obligation of a diving contractor to appoint a diving supervisor is set out in Regulation 6(2) of the 1997 Regulations –

"*The diving contractor shall –*

….(b) before the commencement of any diving operation –

(i) appoint a person to supervise that operation in accordance with regulation 9;

(ii) make a written record of that appointment…."

29. In terms of Regulation 2(1) of the 1997 Regulations –

""supervise" means the exercise of direct personal control and "supervising" shall be construed accordingly"

30. Regulation 9(1) of the 1997 Regulations states -

"Only one supervisor shall be appointed to supervise a diving operation at any one time."

Regulation 9(2) is quoted at paragraph 14, sub-paragraph 6b., within the agreed facts set out above.

31. Paragraph 122 of the ACOP states –

"A supervisor must be appointed in writing by the diving contractor….Written appointments should clearly define the times and areas of control. The supervisor should have immediate overriding control of all safety aspects of the diving operation for which he or she is appointed."

32. Paragraph 123 of the ACOP states –

"*A supervisor must be suitably qualified as a diver for the diving techniques to be used in the operation…."*

The paragraph continues in terms which describe the *"grandfather rights"* referred to in paragraph 14, sub-paragraph 6d., in the agreed facts set out above.

33. Paragraph 125 of the ACOP states –

> "*The diving contractor must consider the competence of a person before appointing him or her as a supervisor…."*

34. Paragraph 128 of the ACOP states –

> "*Supervisors are responsible for the operation that they have been appointed to supervise and they should only hand over control to another suitably qualified supervisor appointed for that diving project by the diving contractor."*

35. The supervisor therefore has overall responsibility for all safety aspects of the diving operation in respect of which he or she is appointed as supervisor.

Supervisor qualifications

36. The respondent does not issue supervisor qualifications. There are industry supervisor schemes – the Association of Diving Contractors ("ADC") operates a supervisor scheme for the inland/inshore diving sector and the International Maritime Contractors Association ("IMCA")"operates the scheme for the offshore sector. Ms Tetlow's understanding was that ADC and IMCA did not recognise *"grandfather rights".*

Applicable law

37. Section 49 EqA (**Personal offices: appointments, etc**) provides as follows –

> *"(1) This section applies in relation to personal offices.*
>
> *(2) A personal office is an office or post –*
>
> *(a) to which a person is appointed to discharge a function personally under the direction of another person, and*
>
> *(b) in respect of which an appointed person is entitled to remuneration.*

(3) A person (A) who has the power to make an appointment to a personal office must not discriminate against a person (B) –

(a) in the arrangements A makes for deciding to whom to offer the appointment;

(b) as to the terms on which A offers B the appointment;

(c) by not offering B the appointment….

(6) A person (A) who is a relevant person in relation to a personal office must not discriminate against a person (B) appointed to the office -

(a) as to the terms of B's appointment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by termination B's appointment

(d) by subjecting B to any other detriment….

(9) A duty to make reasonable adjustments applies to –

(a) a person who has the power to make an appointment to a personal office;

(b) a relevant person in relation to a personal office…."

38. Section 52 EqA (**Interpretation and exceptions**), so far as relevant, provides as follows –

"(1) This section applies for the purposes of sections 49 to 51.

(2) "Personal office" has the meaning given in section 49….

(6) "Relevant person", in relation to an office, means the person who, in relation to a matter specified in the first column of the table, is specified in the second column….

Matter	***Relevant person***
A term of appointment	*The person who has the power to set the term*
Access to an opportunity	*The person who has the power to afford access to the opportunity (or if there is no such person, the person who has the power to make the appointment*
Terminating an appointment	*The person who has the power to terminate the appointment*
Subjecting an appointee to any other detriment	*The person who has the power in relation to the matter to which the conduct in question relates (or if there is no such person, the person who has the power to make the appointment).”*

39. Section 53 EqA (**Qualifications bodies**) provides as follows –

“*(1) A qualifications body (A) must not discriminate against a person (B) –*

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

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

c. by not conferring a relevant qualification on B….

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

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

40. Section 54 EqA (**Interpretation**) provides as follows –

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

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

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

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

Submissions – claimant

41. The claimant submitted that *"grandfather rights*" under the ACOP were a relevant qualification. They were an authorisation which was needed for or which facilitated engagement in diving work under the 1997 Regulations in the UK diving industry. The respondent had confirmed that the claimant could work in the UK industry as a diving supervisor.

42. The claimant had asked the respondent to issue a document confirming that they recognised and/or authorised his engagement in the UK diving industry as a diving supervisor (rather than as a working diver). The respondent had failed to do so. Their position was that he could be a diving supervisor on a commercial diving project but not within a HSE dive school. This, the claimant argued, was a breach of section 53(2)(b) EqA. We observe that the claimant's argument probably engaged section 53(1)(b) EqA rather than section 53(2)(b) EqA.

43. The claimant referred to the terms of section 49(2) EqA. He submitted that the respondent had the power to afford access to the opportunity to work as a diving supervisor in a HSE dive school. That meant that the respondent was involved in the terms of that appointment. If the dive school lost its right to train divers, the respondent would be involved in the termination of that appointment. The respondent carried out audits of HSE dive schools and accordingly had authority over the conduct of an appointee as a diving supervisor.

44. The respondent, the claimant contended, was a *"relevant person"* within the meaning of section 52(6) EqA. They had the power to authorise a person to act as a diving supervisor at a HSE dive school. They insisted on a HSE recognised certificate to work as a diver to demonstrate suitability to work as a diving supervisor at a HSE dive school. That was a competence standard, which they had applied to the claimant as a disabled person. They had failed to show that this was a proportionate means to achieve a legitimate aim under section 19 EqA.

45. It would, the claimant submitted, have been a reasonable adjustment for the respondent as a qualifications body under EqA to confirm that the claimant held a relevant qualification to enable him to work as a diving supervisor at a HSE dive school.

Submissions – respondent

46. Ms Cartwright provided a written submission which she supplemented by oral submissions at the hearing. We set out her main points below.

47. Ms Cartwright accepted that the respondent is a qualifications body in terms of sections 53 and 54 EqA in relation to the qualifications contained in the respondent's list of approved diving qualifications (25-52). That list did not contain a diving qualification certifying a person as qualified to be a diving supervisor in a HSE dive school. This was not a qualification which the respondent issued nor one which they could confer on the claimant. The

respondent also did not issue qualifications for diving supervisors outwith HSE dive schools. That was done by the ADC and the IMCA.

48. What the claimant was seeking from the respondent, Ms Cartwright argued, was an authorisation not for a particular trade or profession (per section 54(3) EqA) but for a particular role within a trade or profession. The role of diving supervisor required a number of matters to be present not all of which were for the respondent to satisfy themselves about – for example it was for the dive school to assess the claimant's experience.

49. This was not a relevant qualification under the EqA. *"Relevant qualifications"* were authorisations etc needed for, or facilitating engagement in, a particular trade or profession - not for particular roles in that trade or profession – which the respondent was able to confer (per section 54(2) EqA). Ms Cartwright submitted that what the claimant was looking for was an exception to the Protocol so that he could undertake a particular role within the diving industry (ie supervisor at a HSE dive school). That was not a matter appropriate to be dealt with under "*Qualifications bodies"* provisions of the EqA.

50. Ms Cartwright submitted that, if the respondent was not a qualifications body for the purposes of this case, it was not under an obligation to make reasonable adjustments in terms of section 53(6) EqA. For the same reason, the respondent could not have discriminated against the claimant in terms of section 15 EqA (**Direct discrimination**) or section 19 EqA (**Indirect discrimination**).

51. Turning to the issue of whether the position of diving supervisor was a personal office within the meaning of sections 49 and 52(2) EqA, Ms Cartwright said that the statutory definition was not particularly helpful. There had to be –

- an *"office"* or a *"post"*
- which was discharged personally
- under the direction of another person

- with an entitlement to remuneration attached

52. Ms Cartwright pointed out that most jobs satisfied the last three requirements yet were not personal offices. The Tribunal had to consider what was an *"office"* and what was a *"post".* The examples given in the EqA Explanatory Notes both related to company directors. A director was not necessarily an employee. The role of director was a post created by statute.

53. Ms Cartwright referred to the Government's website at https://www.gov.uk/employment-status/office-holder (provisions on employment status) where *"office holder"* is described. This states that "*A person who's been appointed to a position by a company or organisation but doesn't have a contract or receive regular payment may be an office holder".* It also states that "*Office holders are neither employees nor workers. However, it's possible for someone to be an office holder and an employee if they have an employment contract with the same company or organisation that meets the criteria for employees".*

54. One of the examples of an office holder given on the Government's website was an "*ecclesiastical appointment, such as members of the clergy".* Ms Cartwright referred to ***Percy v Church of Scotland Board of National Mission [2005] UKHL 73*** quoting from paragraph 17 –

> "*The distinction between holding an office and being an employee has long suffered from the major weakness that the concept of an "office" is of uncertain ambit. The criteria to be applied when distinguishing those who hold an office from those who do not are imprecise. In* ***McMillan v Guest [1941] AC 561*** *at 566, Lord Wright observed that the word "office" is of indefinite content. Lord Atkin suggested, at page 564, that "office" implies a subsisting, permanent, substantive position having an existence independent of the person who fills it, and which goes on and is filled in succession by successive holders. As Lord Atkin indicated, this is a generally sufficient statement of the meaning of the word. It is useful as a broad description of the ingredients normally present with any office.*

18. I am sure Lord Atkin would have been the first to recognise that a difficulty with this general description is that it is wide enough to embrace cases where the relationship between the parties is essentially contractual. In the McMillan case the context was liability to tax under Schedule E in respect of a public "office". The issue was whether a taxpayer held a (public) office. So the question whether the taxpayer was also an employee was not directly in point. In the present case the nature of the issue is quite different. The question is not whether Ms Percy held an office. The issue is whether she had entered into a contract to provide defined services. Holding an office, even an ecclesiastical office, and the existence of a contract are not necessarily mutually exclusive.

19. This requires elaboration. Sometimes the existence of an office is clear. Or an office may be created by statute, with attendant statutory functions. A superintendent registrar of births, deaths and marriages is an example: ***Miles v Wakefield Metropolitan District Council [1987] AC 539****.*

20. Less clear cut are cases where an organisation, ranging from the local golf club to a huge multi-national conglomerate, makes provision in its constitution for particular posts or appointments such as chairman or vice-president. In a broad sense these appointments may well be regarded as "offices". But caution needs to be exercised here, lest the use of this term in this context lead to a false dichotomy: a person either holds an office or is an employee. He cannot be both at the same time. This is not so. If "office" is given a broad meaning, holding an office and being an employee are not inconsistent. A person may hold an "office" on the terms of, and pursuant to, a contract of employment. Or like a director of a company, a person may hold an office and concurrently have a service contract."

55. Ms Cartwright acknowledged that the claimant might argue that the post of diving supervisor was a statutory one in terms of the 1997 Regulations. However, she argued, the 1997 Regulations did not create a generic "*post"* or

"*office"* of diving supervisor. She referred to Regulations 6 and 9 (see paragraphs 14 (sub-paragraph 6b.), 28 and 30 above). Regulations 10 and 11 referred to the supervisor's duties and powers "*in relation to the diving operation for which he is appointed".* Once the diving operation was over, the role of supervisor did not necessarily exist independent of the diving operation. The 1997 Regulations did not provide for the office of diving supervisor to exist as a permanent role which a diving contractor had to have at all times.

56. The existence of the role of diving supervisor depended upon whether diving operations were taking place. The permanency, or otherwise, of the role depended on how the organisation of a particular diving contractor was set up. HSE dive schools would appoint a diving supervisor appropriate for the diving course they were running at the time. It was not an "*office"* which existed at all times. It did not meet Lord Atkin's description in ***McMillan v Guest***.

57. Ms Cartwright submitted that the role of diving supervisor at an HSE dive school did not have the nature of a "*subsisting, permanent, substantive position"* which existed independently of the person filling it and which went on and was filled by a succession of successive holders. Different people would be appropriate to supervise different diving operations at HSE dive schools, depending on what training course was being run. It was therefore not a *"personal office".*

58. Ms Cartwright submitted that, if we found that the role of diving supervisor was a *"personal office"*, we would require to consider whether the respondent was a *"relevant person"* for the purpose of section 52(6) EqA (see paragraph 39 above). The rules applicable to relevant persons were contained in sections 49(6), 49(7) and 49(8) EqA. Those sections provided that a relevant person must not discriminate against, harass or victimise a person appointed to a personal office. The claimant had never been appointed to the role of diving supervisor in a HSE dive school. Accordingly sections 49(6), 49(7) and 49(8) EqA could not be applicable to him and the respondent could not be a

"relevant person" in relation to him. If the respondent was not a *"relevant person"*, the respondent could not have discriminated against the claimant nor failed to comply with a duty to make reasonable adjustments.

59. In view of our decision as explained below, we did not require to engage with the rest of Ms Cartwright's submissions.

Discussion and disposal

60. We considered firstly whether the respondent was a *"qualifications body"* within the meaning of sections 53/54 EqA. We decided that, for the reasons set out in Ms Cartwright's submission (see paragraphs 48-50 above), while the respondent was a qualifications body in relation to the list of approved diving qualifications (25-52), it was not a qualifications body relative to the role of diving supervisor. The respondent did not confer a relevant qualification for the purpose of that role.

61. We agreed with Ms Cartwright's argument that the role of diving supervisor was not a *"particular trade or profession"* for the purpose of section 54(3) EqA but rather a particular role within a trade or profession. The respondent could confer a relevant qualification which came within the list of approved diving qualifications but the list did not include a diving supervisor qualification.

62. We considered whether an exemption from the need to hold a particular qualification came within the scope of section 54(3) EqA. If a HSE dive school wanted to appoint the claimant to work as a diving supervisor, it would require to consider his competence, so as to comply with paragraph 125 of the ACOP. It would also require to satisfy paragraph 123 of the ACOP – that the claimant was suitably qualified as a diver for the diving techniques to be used in the operation. This would take the HSE dive school to paragraph 38 of the May 2011 Protocol, ie the need to have a HSE approved qualification.

63. The claimant's argument was that his *"grandfather rights"* under the ACOP were a relevant qualification. That was correct in respect of a commercial diving operation to which the May 2011 Protocol did not apply, but not in

respect of a HSE dive school. The Protocol applies to HSE dive schools. In our view, the respondent could in theory grant an exemption from the Protocol if asked to do so by a HSE dive school which wished to engage the claimant to work as a diving supervisor. That was not however the same as granting directly to the claimant an exemption from holding an approved qualification which was, in effect, what the claimant had asked for in his letter of 4 September 2019.

64. The claimant focussed during the hearing on the use of the word "*should*" in the May 2011 Protocol, arguing that it meant something different from "*must*". We considered this point. Our view was that to become and remain HSE approved, a HSE dive school had to comply with the May 2011 Protocol. We noted that the word "*should"* was used throughout the May 2011 Protocol. It was used to indicate steps which a HSE dive school was expected to take. If such steps were not taken there would be non-compliance with the May 2011 Protocol, and it would be reasonable to expect that this would have potentially adverse consequences for the dive school. In those circumstances we found no particular significance in the use of *"should"* rather than "*must".*

65. We noted the terms of paragraph 38 of the May 2011 Protocol – *"Supervisors should….have an HSE approved qualification of at least the level of the Unit or equivalent which the assessment course is intending to achieve".* We believed that this left open the possibility that if a HSE dive school wished to appoint the claimant as a diving supervisor, it could argue that the claimant's *"grandfather rights"* under the ACOP were equivalent to a HSE approved qualification. However, that did not assist the claimant in the present case as it did not bring the respondent within the meaning of *"qualifications body"* under section 53 EqA because it would not be conferring a qualification as a diving supervisor but granting an exemption (or perhaps more accurately a recognition of equivalence) to a HSE dive school.

66. We then considered whether the role of diving supervisor was a personal office in terms of sections 49(2) and 52(2) EqA. In terms of Regulation 6(2) of the 1997 Regulations, before the commencement of any diving operation,

a diving contractor had to appoint a person (the diving supervisor) to supervise that operation. That could be achieved by recruiting that person as an employee, engaging that person as a worker, contracting with that person as an independent contractor or contracting with a third party to provide that person's services. None of the 1997 Regulations, the ACOP or the May 2011 Protocol dictated what the employment status of the diving supervisor should be.

67. We considered that, irrespective of the employment status of the appointed diving supervisor in respect of a particular diving operation, the person with the power to set the term of the appointment, to afford access to the opportunity to be appointed and to terminate the appointment, and who was in a position to subject the person appointed to detriment or harassment, was the HSE diving school. If the role of diving supervisor was a personal office, the relevant person (in terms of section 52(6) EqA) in relation to that office was the HSE diving school, and not the respondent.

68. We considered the role of diving supervisor with a view to deciding whether it came within the scope of "*personal office".* We agreed with the arguments advanced by Ms Cartwright as set out at paragraphs 52-58 above. A person could be employed or engaged by a HSE dive school to work as a diving supervisor and given that as a job title. However, that person would only be acting as a diving supervisor under the 1997 Regulations when appointed in respect of a particular diving operation and fulfilling that role during that operation. The role of diving supervisor was not a "*subsisting, permanent position"* as described by Lord Atkins in ***McMillan v Guest***.

List of issues

69. Having addressed these matters, we turned to the list of issues agreed between the parties - see paragraph 14 above. We adopt the same paragraph numbering as used there.

Qualifications Body

7 The respondent is a qualifications body in terms of sections 53 and 54 EqA, but was the claimant person seeking the conferment of a qualification upon him, in terms of section 53(1) EqA?

70. The answer to this is yes. He was seeking authority to act as a diving supervisor at a HSE dive school. That required him to hold an approved qualification in terms of the ACOP and the May 2011 Protocol. The respondent could confer an approved qualification but claimant was unable to obtain this because he was no longer able to dive. What the respondent could not do was confer a qualification as a diving supervisor because no such qualification was included in the list of approved qualifications.

8 What qualification was the respondent able to confer upon the claimant that it did not confer?

71. The answer to this is none. The respondent was able to confer an approved qualification but the claimant was unable do what was required to obtain this. The respondent was not able to confer a qualification as a diving supervisor.

9 By not conferring the qualification referred to at 4. above, and taking into account the respondent's justification defence (relevant to a. and b. below), has the respondent –

a. Discriminated against the claimant for a reason arising from his disability under section 15 EqA?

b. Indirectly discriminated against the claimant under section 19 EqA?

72. This issue became academic by reason of our finding that the respondent was not a qualifications body in respect of the role of diving supervisor. However, if we had to determine whether the respondent had discriminated against the claimant by not granting an exemption from the need to comply with the May 2011 Protocol (in terms of holding an approved qualification) we would have

found that the justification defence in sections 15(1)(b) and 19(2)(d) was made out.

10 The previous question requires the Tribunal to consider whether the respondent's justification was a proportionate means of achieving a legitimate aim. What was the aim? Was the means of achieving that (by the application of the policy) proportionate?

73. We accepted the evidence of Ms Tetlow that the respondent regarded trainee divers attending a HSE dive school as more vulnerable than divers on commercial projects on the basis that the latter are experienced. Protecting the safety of trainee divers while they were undergoing training was a legitimate aim and requiring that a diving supervisor at a HSE dive school should hold an approved qualification was a proportionate means of achieving that aim.

11 Would the conferring of the qualification (referred to at 4 above) have been a reasonable adjustment for the respondent to have made? Would it have alleviated the disadvantage to which the claimant was put by not having the qualification? Has the respondent failed to make a reasonable adjustment for the claimant under sections 20 and 21 EqA?

74. This question also became academic by reason of our finding that the respondent was not a qualifications body in respect of the role of diving supervisor. However, if we had to determine whether this would have been a reasonable adjustment for the respondent to have made, our answer would be no. Our reasoning was the same as for the respondent's justification defence. The requirement that a diving supervisor at a HSE dive school should hold an approved qualification was to protect the safety of trainee divers. That was an important consideration for the respondent as the statutory body tasked with promoting health and safety at work. It was not reasonable to expect the respondent to deviate from that requirement.

75. As we found that the respondent was not under a duty to make the reasonable adjustment contended for, we did not require to address the further issues of (a) whether the adjustment would have alleviated the disadvantage to the claimant and (b) whether the respondent had failed to make the adjustment.

Personal office

12 Is the post of diving supervisor at an HSE Approved dive school a "personal office", in terms of section 49 and section 52(2) of the Equality Act 2010?

76. The answer to this is no. See paragraphs 66 and 68 above.

13 If the answer at 12. is yes, was the Respondent a "relevant person" in relation to the post of diving supervisor for any HSE approved dive school? In determining this, the Tribunal must consider:-

a. Would the respondent be involved in the terms of the appointment?

b. Would the Respondent have "the power to afford access to such an opportunity" or if this is not the case is the Respondent "the person who has the power to make the appointment"?

c. Would the Respondent be involved in terminating such an appointment?

d. Would the Respondent have power over the appoi8ntee's conduct in the role?

77. In view of our answer to the previous question, this became academic. See paragraph 67 above.

14 If the post is a "personal office" and the Respondent is a "relevant person" has the Respondent discriminated against the claimant in any of the ways set out in section 49(6) to (8) of the Equality Act 2010? Has the respondent failed to make a reasonable adjustment?

78. Once again, in view of our answers to the previous questions, this became academic. The post of diving supervisor was not a "*personal office"* for the purpose of sections 49 and 52(2) EqA and respondent was not a *"relevant person"* for the purpose of sections 49(6) to (8) EqA.

79. In view of our findings as set out above, the claims brought by the claimant did not succeed and required to be dismissed.

Employment Judge: Sandy Meiklejohn
Date of Judgment: 08 July 2021
Entered in register: 13 July 2021
and copied to parties