Neutral Citation Number: [2024] EAT 31

Case No: EA-2021-SCO-000069-DT

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 05 March 2024

Before :

THE HONOURABLE LADY HALDANE

- -

Between :

MR DONALD GABEL	**Appellant**
- and -	
THE HEALTH AND SAFETY EXECUTIVE	**Respondent**

- -
- -

Mr Donald Gabel, the **Appellant**
Ms Lindsey Cartwright, for the **Respondent**

Hearing date: 21 November 2023

- -

JUDGMENT

The Honourable Lady Haldane:

Introduction

1. The claimant appeals against a decision of the Employment Tribunal dated 8th July 2021 in terms of which his claims for unlawful discrimination in terms of section 15 of the **Equality Act 2010** ("EqA") (Discrimination arising from disability), section 19 **EqA** (Indirect discrimination) and sections 20/21 **EqA** (Duty to make adjustments /failure to comply with the duty) were dismissed. In order to engage those sections, the claimant required to establish that the respondent was and is a qualifications body in respect of the post of diving supervisor for the purposes of ss 53 and 54 of **EqA**. The Tribunal determined that the respondent was not a qualifications body for that purpose, and nor was the position of diving supervisor a personal office for the purposes of s 49 **EqA**.

2. This matter came before me for a full hearing on 21st November 2023. The claimant represented himself, and the respondent was represented by Ms Cartwright. I had the benefit of a full and detailed note of reasons for allowing the Full Hearing following an earlier Preliminary Hearing. The Preliminary Hearing Judge explained that the grounds of appeal were re-drafted and focussed into three succinct grounds following discussions between the claimant and the Judge during the course of that hearing and it is those three grounds which came before me for consideration.

Background

3. This claim is brought against the background of the legislation and codes of practice which govern the diving industry in the UK. This framework is complex, and I am grateful to parties for their respective efforts in seeking to elucidate and render these matters more readily

comprehensible. Mr Gabel, in particular, is to be commended for the articulate and helpful manner in which he presented his submissions.

4. The nub of the claimant's complaint is that he wishes to hold the position of diving supervisor and argues that the respondent is the body with the power to grant him that qualification. He argues that the respondent has a broad power to do so as set out in ss 53 and 54 of **EqA**. The key plank of the decision of the Tribunal rests on their conclusion that although the respondent is in a general sense a 'qualifications body', it is not a qualifications body **in respect of the position of diving supervisor** (emphasis added) for the purposes of sections 53 and 54 of **EqA** and thus cannot grant the desired qualification. The claimant appeals against that conclusion, and argues in addition two further grounds of appeal as set out in more detail below.

5. The claimant's own background has relevance in understanding the context in which this claim is made. I have drawn the following summary largely from the decision of the Tribunal, which was not challenged in these factual respects. The Claimant served in the US Navy, and prior to 1991 was a senior diving instructor and supervisor with them. He suffered knee and foot injuries during the course of his service. As a result of these injuries, in 1991 he was placed on a Temporary Disabled Retired List and finally retired from service in 1996. It was a matter of agreement between the parties that he was and is disabled in terms of **EqA**. The claimant later came to work, in 2007, for a Diver Competence Assessment Organisation in the UK, specifically the Professional Diving Academy in Dunoon. During his time with that organisation the claimant carried out the role of supervisor and assessor. He did so on the basis of a recognition of his having worked *de facto* as such in the two year period prior to 1981. I will come on to explore the significance of that date below. However the claimant wishes accreditation as a 'Diving Supervisor' as that term is defined in the relevant legislation.

The Professional Diving Academy applied to the respondent for such approval, which was denied. That event was the genesis of the current complaint.

6. Both before and after his period of employment with the Professional Diving Academy the claimant embarked on a lengthy period of correspondence involving his MP and the respondent with a view to persuading the respondent to issue him with the necessary documentation to allow him to seek employment as a 'diving supervisor.' The significance of this qualification, according to the claimant, was that it would widen his employment opportunities. The correspondence evolved into litigation which was unsuccessfully pursued firstly in the Court of Session, and then before the Employment Tribunal in proceedings against the Secretary of State for Work and Pensions. Finally in September 2019 the claimant wrote again to the respondent asking if it maintained its previous stance so far as granting the desired qualifications was concerned and in particular that in order to work as a diving supervisor an individual must hold an HSE approved qualification. The respondent confirmed that it did, and the current proceedings ensued.

Relevant legislation

7. In order to put parties' arguments in their proper context, it is necessary to set out, at least in part, the relevant legislative and regulatory framework against which the claim is made. The respondent's functions are set out at section 11 of the **Health and Safety at Work Act 1974**. Read short those purposes include securing the health and safety of persons at work, and making such arrangements as it considers appropriate for the provision of training and information. Part of its function in that context is to regulate diving operations in the UK. This it does through the **Diving at Work Regulations 1997** ('DWR'), supported by an approved

code of practice and an associated Protocol for Diver Assessment Organisations. For present purposes, the relevant parts of the **DWR** are as follows:-

The diving contractor

5.—(1) No person at work shall dive in a diving project and no employer shall employ any person in such a project unless there is one person and one person only who is the diving contractor for that project.

(2) The diving contractor shall, subject to paragraph (3), be the person who—

(a)is the employer of the diver or divers engaged in the diving project; or

(b)dives in the diving project as a self-employed diver.

Duties of diving contractor

6.—(1) The diving contractor shall ensure, so far as is reasonably practicable, that the diving project is planned, managed and conducted in a manner which protects the health and safety of all persons taking part in that project.

(2) The diving contractor shall—

(a)ensure that, before the commencement of the diving project, a diving project plan is prepared in respect of that project in accordance with regulation 8 and that the plan is thereafter updated as necessary during the continuance of the project;

(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; and

(iii)ensure that the person appointed is supplied with a copy of any part of the diving project plan which relates to that operation;

(c)as soon as possible after the appointment of a supervisor, provide that supervisor with a written record of his appointment.

Appointment of supervisor

9.—(1) Only one supervisor shall be appointed to supervise a diving operation at any one time.

(2) 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.

Approved qualifications

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

(2) Any approval given under paragraph (1) may be limited to any diver or class of divers or any dive or class of dive, may be subject to conditions or limited to time, and may be revoked in writing by the Executive at any time.

(3) An approved qualification shall not be valid for the purposes of regulation 12(1)(a) unless any limitation or any condition as to the approval of the qualification under this regulation is satisfied or complied with and the approval has not been revoked.

8. In order to assist with the implementation of the Regulations in practice, the respondent has from time to time published an **Approved Code of Practice** ('ACOP'). So far as relevant for

present purposes, there is a paragraph in both the 1997 and 2014 iterations of the **ACOP** which is in essentially identical terms, so far as relevant for this case, and under the heading of 'Supervisors' provides, *inter alia*, as follows

> *'A supervisor must be suitably qualified as a diver for the diving techniques to be used in the operation,* ***or have acted as a supervisor of a diving operation in which the same diving techniques were used during the two year period before July 1981****.....'* (emphasis added).

This paragraph is the only reference to the so-called 'grandfather rights' upon which the claimant relies as the basis for his assertion that he has a relevant qualification that would permit the respondent to issue him with the necessary certification as a 'diving supervisor.'

9. However, a full understanding of the position requires consideration not only of the Regulations and the **ACOP**, but the Protocol for Diver Competence Assessment Organisations dated 24th May 2011 which provides at paragraph 38, that

> '*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;*
> - *Have acted as supervisor to at least the level of the Unit or equivalent for which the assessment course is being conducted with at least 100 hours and 100 dives supervisory experience at that level.*

10. The Tribunal concluded that the claimant's claim failed because the respondent was not a

qualifications body in respect of the position of diving supervisor for the purposes of sections 53 and 54 **EqA** the relevant parts of which are in the following terms:

> ***53 Qualifications bodies***
>
> *(1)A qualifications body (A) must not discriminate against a person (B)—*
>
> *(a)in the arrangements A makes for deciding upon whom to confer a relevant qualification;*
>
> *(b)as to the terms on which it is prepared to confer a relevant qualification on B;*
>
> *(c)by not conferring a relevant qualification on B.*
>
> ***54 Interpretation***
>
> *(1)This section applies for the purposes of section 53.*
>
> *(2)A qualifications body is an authority or body which can confer a relevant qualification.*
>
> *(3)A relevant qualification is an authorisation, qualification, recognition, registration, enrolment, approval or certification which is needed for, or facilitates engagement in, a particular trade or profession.*

The Grounds of appeal

11. The claimant's grounds of appeal were three in number. Firstly that the Tribunal had erred in its conclusion that the respondent was not a qualifications body in respect of the position of 'diving supervisor'; secondly that its reasons for holding that it would in any event have held that the justifications in the **EqA** that its actions were a proportionate means of achieving a legitimate aim were inadequately reasoned; and thirdly that the Tribunal erred in concluding that the respondent was not a 'relevant person' for the purposes of sections 49 (6) and 52(6) of

EqA. I will deal with each of these grounds in turn.

The claimant's submissions – Ground 1

12. The claimant's position in relation to his first ground of appeal was that the tribunal had erred in its conclusion that the respondent was not a qualifications body within the meaning of s 54 of the **EqA**. It had the power to confer relevant qualifications, and had recognised in the **ACOP** that a suitable qualification could include the 'grandfather rights' predating the coming into force of the 1997 regulations which the claimant possessed – put very short, his diving qualifications from the US Navy coupled with his subsequent experience upon which he had previously relied for employment purposes. In failing to recognise that the respondent could grant equivalence to those pre-existing occupational diving qualifications under its broad powers as defined in s 54(3), the Tribunal had fallen into error. The claimant pointed to what he suggested were contradictions in the findings of the Tribunal at paragraph 63 where it is accepted that the claimant could rely upon his grandfather rights as a relevant qualification, and at paragraph 70 where the Tribunal accepted that the respondent could confer an approved qualification upon him. Such conclusions were inconsistent with the Tribunal's ultimate conclusion that the respondent was not a qualifications body for the purposes of ss 53 and 54 **EqA** as it could not confer the qualification of 'diving supervisor' upon the claimant.

Submissions for the respondent – Ground 1

13. Ms Cartwright began her submissions by providing an overview as to the functions of the respondent in terms of the law – emphasising their responsibility for the safety of those at work, and the power given to them to make such arrangements as it considers appropriate to provide training and information, including 'by others' (s 11(2)(b)). In the case of diving operations, that training is carried out 'by others', specifically HSE dive schools. In short, the

respondent delegates its responsibility for training and information to these schools who train others. To work on a commercial diving project an individual requires to attend an HSE approved school or to hold an approved qualification in terms of regulation 14 of the **DWR**. The respondent publishes a list of its approved qualifications which includes some foreign qualifications but no US qualifications in general nor any US military qualifications. Thus the claimant's qualifications do not appear on the list of approved qualifications. Nor does the list contain a qualification with the title 'diving supervisor'.

14. Ms Cartwright acknowledged that situation begged the question as to how a person might become a 'diving supervisor' if their qualifications did not appear on the list of approved qualifications, that qualification itself did not appear on the list, and nor had such a person attended an HSE dive school. The answer, she submitted, lay in the **DWR**, in particular regulations 6 and 9, which in combination delegate to the diving contractor appointed for any particular diving operation the responsibility for appointing a diving supervisor of the requisite degree of competence for the particular operation. Ms Cartwright submitted the reasoning underlying such an approach was pragmatic and practical, only the diving contractor could know precisely what was involved in any particular operation and they are the only ones who can know if a person has the requisite level of competence. The respondent sits in effect above that, it cannot approve the person in question as competent for the operation, the contractor must do that in terms of the **DWR**. Any qualifications issued by the respondent in this context were issued in reliance upon the assessment carried out by the diving contractor and/or dive school.

15. So far as the claimant was concerned, he was entitled in a general sense to rely on his grandfather rights in terms of the **ACOP**. These rights, she explained, are only found in that

document and represent an exception made in respect of divers with some form of qualification to allow them to continue working notwithstanding the development of a more regulated diving environment, brought about after a number of fatalities. These prompted a desire to ensure that those supervising dives were teaching best practice and in accordance with up to date guidelines. However, the question of whether or not those rights are sufficient for the claimant to be appointed a diving supervisor would be one for the individual diving contractor, having regard to the requirements of the regulations. In a practical sense, this would involve the claimant being interviewed by the diving contractor about his experience and qualifications, and making a decision as to whether or not to appoint him. That left open the possibility, as had been recognised by the Tribunal at paragraph 65 that:

> '*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*'.

16. However, the Tribunal concluded that what the claimant was actually requesting of the respondent was a recognition of his grandfather rights as a qualification or perhaps more accurately to grant him an exemption from the requirement to have a qualification obtained through an HSE dive school, in other words an exemption from the requirements of the May 2011 protocol so far as the qualifications necessary to be a 'diving supervisor' was concerned.

This conclusion was set out in paragraph 63 of the Tribunal's judgment:

> '*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.*'

17. Ms Cartwright submitted that the Tribunal had reached a correct conclusion in law on the first ground of appeal. The claimant did not hold a qualification approved by the respondent. He was not able to pursue a route to gaining such a qualification by undergoing additional training at an HSE dive school due to his disability. There was in any event no standalone qualification of 'diving supervisor', this being an appointment on an operation by operation basis, made by the diving contractor delegated with the responsibility of appointing a diving supervisor with appropriate qualifications for the particular diving operation in question, in terms of the **DWR**. The respondent did not itself grant such qualifications and therefore was not a qualifications body in respect of the position of diving supervisor for the purposes of section 53 and 54 **EqA**. The appeal on this ground should be refused.

Analysis and Decision - Ground 1

18. As I said at the outset, to the uninitiated the regime by which Diving Operations, and the

requirements in order to work in an HSE Dive School are regulated is far from straightforward. There is a requirement to read across from the **DWR**, to the **ACOP** to the 2011 Protocol in order to understand the framework and routes to qualification, and in particular what might be required to be appointed as a 'Diving Supervisor' in order to work at an HSE approved Dive School. I confess that the apparent recognition of 'grandfather rights', to be found somewhat opaquely in a paragraph in the **ACOP**, but an absence of a clear framework within which such rights may or may not be exercised is not easy to understand. However, be that as it may, what was determined by the Tribunal, and not challenged by the claimant, were the following findings in fact:-

> '*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. 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……..*
>
> *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 (witness for the respondent) understanding was that*

ADC and IMCA did not recognise "grandfather rights".

19. From those findings, and on the basis of submissions made, the tribunal concluded that:-

> ‘*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. lt 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 of the May 2011 Protocol, i.e. the need to have a HSE approved qualification.*

Further, at paragraphs 64 and 65 the Tribunal concluded

> *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.*

20. These were all findings that the Tribunal were entitled to make. Despite at first blush appearing

somewhat contradictory to suggest that the respondent is a qualifications body but not for the purposes contended for by the claimant, such reflects the regulatory framework by which the respondent exercises its responsibility for ensuring safety in the diving industry. That is, read very short, that to work in the diving industry, including supervising at an HSE dive school, an individual requires to have a pre-existing qualification that appears on the respondent's approved list, which the claimant does not, or to have obtained a relevant qualification from an HSE dive school, which the claimant cannot, due to his disability. For the specific post of diving supervisor, this is an appointment on a project by project basis depending on what activity or training is being undertaken. The assessment of competence for such a post is delegated to the diving contractor in terms of the **DWR**, and which must be assessed in accordance with the **ACOP** and the 2011 protocol. The Tribunal further concluded, as they were entitled to do, that taking all those factors into consideration, the role of diving supervisor is a role within a trade or profession rather than a distinct trade or profession for the purposes of s 54(3) **EqA**.

21. Where then does this leave someone in the position of the claimant? He does have experience and qualifications that come under the umbrella of 'grandfather rights' that he can in theory present to a diving contractor/HSE dive school and upon which he can seek appointment as a diving supervisor. However if a diving contractor or school wished to employ the claimant they would be required to persuade the respondent that some sort of exemption from the requirements of the **DWR** and the 2011 Protocol should be granted, because the claimant's grandfather rights are not relevant qualifications in and of themselves as envisaged by the DWR or the protocol. The Tribunal's conclusion that the direct grant of a qualification or certification as a 'diving supervisor' to someone in the position of the claimant was not one open to them reflects the regulatory structure, and most importantly recognises and reflects the

key delegation of responsibility for the assessment of competence to HSE dive schools and/or diving contractors. I can discern no error of law in its approach. The first ground of appeal accordingly fails.

The Claimant's submissions – ground 2

22. The claimant submits that the Tribunal failed to give adequate reasons for its conclusion expressed at paragraph 72 of its judgment that the defences of justification in sections 15(1)(b) and 19(2)(d) of **EqA** were made out. These sections provide as follows:-

> **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.(Emphasis added)***
>
> ***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, it 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

(Emphasis added)

23. The claimant contends that the Tribunal failed to give adequate reasons for determining that, had it been required to consider this matter, it would have concluded that the defences of justification were made out in this case. He argues that the respondent provided no permissible justification for 'ignoring and/or disregarding' the claimant's entire occupational history and instead told him he required to satisfy the terms of the 2011 Protocol by requiring him to undertake a medical and undertake diver training rather than recognising his existing qualifications and experience as equivalent to a 'relevant qualification.' The inadequacy of the Tribunal's reasoning on why the respondent's approach was a proportionate means of achieving a legitimate aim amounted to an error of law.

The Respondent's submissions – ground 2

24. Ms Cartwright accepted that the paragraph criticised was short in compass but submitted that the findings in fact at paragraphs 15, 23, 24, 27, 73 and 74 were sufficient to support the conclusion ultimately reached. These findings in fact, in summary, were that the respondent's key function was to secure the health safety and welfare of persons at work and that in the context of trainee divers at HSE dive schools, such persons were particularly vulnerable due to their inexperience. Thus requiring a diving supervisor to have an approved qualification as was demanded by the 2011 Protocol was a proportionate means of achieving the legitimate aim of securing diver safety.

Analysis and decision - Ground 2

25. Standing the tribunal's conclusions on the question of whether or not the respondent was a qualifications authority for the post of diving supervisor, this aspect of matters was largely hypothetical, and detailed reasoning was not therefore required. In **Meek v City of Birmingham District Council [1987] IRLR 250**, Bingham LJ stated that although Tribunals are not required to create "an elaborate, formalistic product of refined legal draftsmanship" their reasons should:

> *"[…] contain an outline of the story which has* given *rise to the complaint and a summary of the Tribunal's basic factual conclusions and the statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this Court, to see whether any question of law arises and it is highly desirable that the decision of an Employment Tribunal should give guidance both to employers and Trade Unions as to practices which should or should not be adopted."*

26. Here, the Tribunal made the following findings in fact:-

> *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 5 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.

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"

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.*

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. lt was not reasonable to expect the respondent to deviate from that requirement.*

27. All of these findings taken together are sufficient to support the conclusion at paragraph 72 that:

> *"72. This issue (the question of whether or not the claimant had been discriminated against) became academic by reason of our finding that the respondent wasnot 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."*

The issue is adequately reasoned as that term is explained by Bingham LJ in **Meek .** The Tribunal concluded that the respondent's refusal to exempt the claimant from the qualification requirements, or grant an equivalence in respect of the qualifications which he does hold was a proportionate means of achieving the legitimate aim of promoting diver safety. There is no error of law in the reasoning of the Tribunal. It follows that this ground of appeal also fails.

The Claimant's submissions – Ground 3

28. The claimant argued that the Tribunal had erred in concluding that the respondent was not a 'relevant person' for the purpose of sections 49(6) and 52(6) **EqA**. Read short, these provisions provide that a 'relevant person' in relation to a 'personal office' must not discriminate against a person appointed to that office. A 'personal office' is defined as

> *49(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*

29. The claimant's position was that the respondent had the power to afford access to the opportunity to be appointed to a 'personal office', and that this power brought the respondent within the list of persons set out in s 52(6) **EqA** as meeting the definition of 'relevant person.' The Tribunal had erred in not so concluding and if it had not so erred, it would have followed that the duties set out in s 49(6), namely that a relevant person in respect of a personal office must not discriminate in relation to that office by affording or not affording access to opportunities, would have been engaged.

The respondent's submissions – Ground 3

30. Ms Cartwright submitted that the Tribunal had reached an entirely correct conclusion on this matter based on the relevant case law in relation to the nature of a 'personal office.' If the post of diving supervisor was not a 'personal office', as the Tribunal had concluded, then any consideration of whether or not the respondent was a 'relevant' person in relation to that office was irrelevant.

Analysis and decision – Ground 3

31. The Tribunal considered authorities relevant to the question of what constitutes an 'office' (**Percy v Church of Scotland Board of National Mission [2005] UKHL 73; McMillan v Guest [1941] AC 561**) as well as whether or not the respondent was a 'relevant person' in terms of s 52(6) of **EqA** and came to the following conclusions:-

> *"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."*

These were conclusions that the Tribunal was entitled to reach based on the facts it found established,

which conclusions are entirely consistent with their decision on the other aspects of the case. I can discern no error of law in their approach. Accordingly this ground of appeal also fails.

Conclusion and disposal

32. It is not hard to understand why a person in the position of the claimant might feel at the very least vexed that his extensive occupational history in the diving industry has not been recognised in the manner in which he contends it should. The Regulatory framework is not easy to navigate, and again it is easy perhaps to see why the claimant might find it superficially contradictory that the apparent recognition of his 'grandfather rights' in the **ACOP** cannot secure for him the post he desires. However once the legitimate and proportionate aim of diver safety is placed front and centre of the analysis of the regulatory framework, it becomes easier to understand why matters are regulated in the way that they are. This might perhaps have the consequence in some cases that the apparent recognition of 'grandfather rights' might be more theoretical than real.

33. For present purposes however, the Judgment of the Tribunal was that the respondent is not a qualifications body in respect of the position of diving supervisor for the purposes of sections 53 and 54 **EqA** and that the position of diving supervisor is not a personal office for the purposes of section 49 **EqA**. In consequence the claimant's claims of direct and indirect discrimination and breach of the duty to make reasonable adjustments failed.

34. I can identify no error of law in the reasoning underlying those conclusions. The appeal is accordingly dismissed.