



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Donnelly

**Respondent:** DFDS (Guernsey) Limited

**Heard at:** Ashford (by video)

**On:** 22-26 September 2025,  
13 October & 11 November 2025 (In Chambers)

**Before:** Employment Judge Corrigan  
Ms S Dengate  
Mr R Singh

## Appearances

For the claimant: In person

For the respondent: Ms Grennan, Counsel

## Reserved Judgment

1. The Tribunal has found the Respondent did contravene the Equality Act 2010 in respect of the claim of failure to make reasonable adjustments but not in respect of the claims of discrimination arising from disability; direct disability discrimination and disability-related harassment.
2. The respondent did constructively dismiss the claimant. The dismissal was unfair.

## Reasons

1. The claims and list of issues had been set down in Case Management Orders. These were updated at the outset of the hearing and amended to reflect the

evidence during the hearing in discussion with and with the agreement of the parties. They were as follows:

**List of issues**

2. Having regard to the dates of conciliation and the date of the claim, acts or failures which took place before **15 August 2023** are potentially out of time.
3. It was conceded that claims based on his resignation are in time.
4. Were any acts or failures prior to 15 August 2023 part of a continuing act with acts that were in time?
5. If not, would it be just and equitable to extend the normal time limit?

**Constructive Dismissal**

6. Each contract of employment has an implied duty of trust and confidence. Mr Donnelly says that the company was in breach of this duty by failing to make any of the reasonable adjustments set out below (in the reasonable adjustment section) and/or by failing to allow him to return to work in March 2024, having passed his Seaman's Medical Certificate (ENG1).
7. The final straw was that the company refused to allow him to return to work and questioned the certificate he had obtained.
8. Did the Respondent act in fundamental breach of the Claimant's contract of employment?
9. Did Mr Donnelly resign because of the breach(es)?
10. Did Mr Donnelly delay too long before resigning and so affirm the contract?
11. If there was a breach of contract by the company, causing Mr Donnelly to resign, i.e. a constructive dismissal, was the dismissal nevertheless a fair one in the circumstances?
12. The company says that it had potentially fair reasons:
  - 12.1 capability and/or
  - 12.2 contravention of the duty or restriction imposed by an enactment (i.e. relating to the requirements of the Merchant Shipping (Maritime Labour Convention) (Medical Certification) Regulations 2010 and/or
  - 12.3 some other substantial reason (i.e. avoidance of illegality, relating to the requirements of the Regulations, in particular with regard to the Claimant having failed to make the MCA doctor fully aware of his back condition at the assessment on 11 March 2024. (This arises from their view that Mr

Donnelly did not make the medical examiner aware of his back condition at his last assessment.)

- 13 Was the dismissal fair (applying the test set out in section 98(4) ERA, as follows: “... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.”

### **Remedy for Constructive Dismissal**

- 14 Compensation being the main remedy sought, how much should be awarded for loss of earnings? That will depend on the financial loss suffered by Mr Donnelly as a result of his (constructive) dismissal, provided that he has taken reasonable steps to replace his lost earnings, such as by looking for another job.
- 15 Should the amount be increased or decreased for any of the following reasons?
- 16 Did the company unreasonably fail to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures by not treating his request for reasonable adjustments as a grievance, or not treating it as a formal grievance and so not allowing him to be accompanied at meetings? What increase is appropriate, up to 25%.
- 17 Did Mr Donnelly cause or contribute to his dismissal by blameworthy conduct? If so, what percentage reduction to his compensation is appropriate?
- 18 In the event the Claimant’s dismissal was procedurally unfair, should there be any reduction to compensation under the principles set out in *Polkey v AE Dayton Services Ltd* [1987] ICR 142?
- 19 Does the statutory cap apply? (This is with fifty-two weeks’ gross pay or £105,707, whichever is the lower)
- 20 If Mr Donnelly received Universal Credit or similar payments (not PIP) after his dismissal, they also have to be accounted for, either by DWP recovering those payments from the overall award (known as recoupment) or by the Tribunal reducing the compensation. Recoupment is the normal approach unless the dismissal was also an act of discrimination or other breach of the Equality Act 2010.
- 21 How much is the appropriate basic award? This is an additional amount, calculated on the same formula as a statutory redundancy payment. According

to the dates given on the claim form, Mr Donnelly had 16 years' service, all of it over the age of 41, and every year above that age entitled him to 1.5 weeks' gross pay. Hence the basic award should be 24 weeks' gross pay. This is capped at £571 per week for claim forms submitted before 6 April 2024 so the maximum is £13,704.

- 22 Should the basic award be reduced to reflect any conduct by Mr Donnelly before the dismissal? If so, what reduction is just and equitable?

**Failure to make reasonable adjustments**

- 23 Mr Donnelly says that the company had the following PCPs:

23.1 A requirement that sea-going staff had to meet the medical standards required for a Seaman's Medical Certificate (ENG1).

23.2 A requirement to work at sea in all conditions;

23.3 The manual handling and other physical elements of the Claimant's role.

- 24 The existence of these PCPs is not disputed.

- 25 If so, did the PCP put him at a substantial disadvantage compared with others in that he could not meet all the requirements of his role and had to have time off work. It is not disputed that PCPs put the Claimant at a substantial disadvantage.

- 26 If so, did the company take such steps as were reasonable to avoid that disadvantage? The burden of proof does not lie on Mr Donnelly, but he says that he should have been redeployed to a shore-based role, such as in the loading park or manning the check-in booths; if necessary by creating a vacancy for him on a temporary basis.

- 27 The company says that shore-based staff are employed by a sister or parent company based in Denmark – DFDS A/S.

- 28 Mr Donnelly also relies on the adjustments recommended in the Occupational Health Report of 1 November 2023, including:

28.1 a phased return commencing with 6 hour shifts and then building gradually to 8 hours, 10 hours and finally, full time 12 hour shifts;

28.2 abstention from routine maintenance whilst on passage to allow for physiotherapy;

28.3 providing an Able Seaman deck rating as a support worker where there is a requirement to lift and handle and push and pull against static loads;

28.4 avoiding the following tasks: forklift truck duties, throwing of heavy lines, handling of mooring ropes (except to reduced diameter supplementary lines), handling of tugboat towing lines, manual handling of loads over 10kgs and awkward loads of any weight, use of lashing chains and cargo

trestles, donning of fire suit and breathing apparatus save for emergencies, manning of lifeboats and rescue boats save for emergencies; and/or  
28.5 remaining in port to avoid cross-channel passages in storm force conditions.

- 29 Did the company not know, or could the company not reasonably have been expected to know, that he had osteoarthritis of the spine or was likely to be placed at this disadvantage?

**Direct discrimination on grounds of disability**

- 30 Did the company, in failing to redeploy him to a shore-based role, treat him less favourably than it treated or would have treated someone else in the same circumstances apart from his disability?
- 31 Mr Donnelly compares his circumstances with a junior officer who, he says, was given a job in HR for about 9 months in 2012/13 before going back to sea.
- 32 If the Claimant was treated less favourably than the comparator, was this because of the Claimant's disability?

**Harassment on grounds of disability**

- 33 In November 2023, did the company, or any of its employees, breach the confidentiality of his Occupational Health report (which recommended the appointment of an additional Able Seaman as set out above) by telling staff that he would be returning to work "as a passenger".
- 34 If so, was this unwanted conduct?
- 35 Was the conduct related to his disability?
- 36 Did it have the purpose or effect of violating Mr Donnelly's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?
- 37 In the event the conduct is found to have that effect, the tribunal should take into account:
- 37.1 The Claimant's perception;
  - 37.2 The other circumstances of the case, and
  - 37.3 Whether it is reasonable for the conduct to have that effect.

**Discrimination arising from disability**

- 38 If Mr Donnelly was constructively dismissed (i.e. if the test at section 39(7)(b) Equality Act 2010 was met) was this unfavourable treatment because of

‘something arising’ in consequence of Mr Donnelly’s disability, i.e. his absence from work or his inability to carry out his full duties?

- 39 Firstly, can the company show that it did not know that he had a disability, and could not reasonably have been expected to know? The Respondent states that Mr Donnelly was in possession of a “clear” ENG1 certificate and that at the previous assessment, the Claimant failed to obtain a clear certificate for reasons unrelated to the disability.
- 40 If the above two questions are answered in Mr Donnelly’s favour, was the treatment a proportionate means of achieving a legitimate aim?
- 41 The Respondent avers that its treatment was dictated by its need to comply with the Merchant Shipping (Maritime Labour Convention) (Medical Certification) Regulations 2010 and that it was taking proportionate and reasonable steps to ensure that it complied with and / or was not in breach of its statutory obligations under that legislation.
- 42 The Respondent further avers that it was appropriate and reasonable for it to seek to allay its doubts regarding the Claimant’s fitness for sea service before allowing him to return to work or to consider the proposed adjustments. In doing so, it was acting in accordance with its statutory obligations under the relevant legislation and the guidance in MSN 1887, section 9.5. The Respondent avers that it took reasonable and proportionate steps to understand the correct position and thereby satisfy itself that the relevant law and guidance had been complied with.

**Remedy for discrimination, including harassment**

- 43 Should the Tribunal make a recommendation that the company take steps to reduce any adverse effect on Mr Donnelly? If so, what?
- 44 What financial loss has Mr Donnelly suffered?
- 45 Has he taken reasonable steps to replace his lost earnings? If not, what reduction should be made?
- 46 What injury to feelings has Mr Donnelly suffered and how much compensation should be awarded for that?
- 47 How much interest should be awarded on the above sums?
- 48 If the ACAS Code of Practice on Disciplinary and Grievance Procedures applied, did the company unreasonably fail to comply with it in any respect, as set out above at paragraph 97.a)

## **Hearing**

- 49 The tribunal heard evidence from the Claimant on his own behalf. The tribunal heard evidence from Ms Lisa Abbott (employed by DFDS A/S Ltd as Head of Marine HR UK Fleet), Mr Matt Scott (Crewing Manager (UK) BU Channel of DFDS A/S Ltd), Mr Gregor Campbell (Senior Business Leader, Development and Wellbeing of the respondent), Mr Nicholas Saul (owner of the Bachmann Group including the respondent) and Mrs Elizabeth Powell (HR Director of the respondent) on behalf of the respondent.
- 50 Unfortunately we had a short adjournment on the second day as the Employment Judge's dependent suffered a head injury and had to be taken by her for immediate medical attention. This had the impact, due to witness availability and with the parties' agreement, that Ms Abbott's evidence had to be interposed during the claimant's evidence and the remaining witnesses were not heard in the chronological order of their involvement.
- 51 There was a 910 page bundle. In addition the respondent provided some additional documents during the course of the hearing with the consent of the claimant and the tribunal. We also had the seafarers' medical fitness standards bundle of 218 pages and a cast list and chronology prepared by the respondent. Some of the others named during the hearing, including the claimant's comparator, are not named here as these reasons will be published online.
- 52 The parties made oral submissions and both sides provided a written submission.
- 53 Based on the evidence heard and the documents before us we found the following facts.

## **Facts**

- 54 The claimant commenced employment with the respondent on 10 October 2007. By the relevant time he was employed as an Assistant Bosun. He has worked at sea for his entire career. His job description is at page 197 and has key supervisory tasks and secondary tasks. One of the key supervisory tasks is being in charge of loading deck 5; mooring stations and anchoring operations. It does not specify handling or lifting or forklift driving.
- 55 The claimant describes the respondent as an integral part of the DFDS Group within which all employees at land and sea share a common requirement to follow the Group Code of Conduct. The respondent is in fact a wholly owned subsidiary of the Bachmann Group which specializes in off shore employment. The respondent's purpose is to employ and supply the seamen and other sea based staff to DFDS A/S (part of the DFDS group running the cross channel ferries from

Dover to Dunkirk and the Dover shore -side operations). The respondent has no shore-side staff in UK which enables them to pay competitive rates because there is no liability for employer's National Insurance, with the consequence that the claimant had no entitlement to statutory sick pay. The other consequence is that work on shore by those who are classified as sea-based is limited due to the respondent's need not to trigger liabilities with HMRC. As those rules are dependent on interpretation they necessarily adopt a cautious approach to this, especially in more recent years due to action taken by HMRC against other companies. The HR staff employed by DFDS A/S are described as the agents of the respondent when dealing with the claimant. The DFDS A/S address in Whitfield is used by staff of the respondent when they are on shore and the claimant's grievance meeting took place there. We also note that staff of each entity conducted grievances involving staff of the other in this case.

- 56 The claimant worked two weeks on two weeks off, and lived on board when at sea. He did a night and day shift pattern. When on board his management was the Chief Officers and the Captain of the ship. These vary from ship to ship. The respondent has a contractual agreement with DFDS A/S to provide line management and report back to DFDS Guernsey. When off sick the claimant's day to day welfare and wellbeing is the responsibility of a team at DFDS A/S acting as agents for the respondent. The crewing department of DFDS A/S also act as agents for the respondent. However DFDS A/S cannot make decisions about an individual's employment which must be referred back to DFDS Guernsey. Hence when he is not on ship there is no direct line management as such. There is also Mr Campbell who provides HR support in development and wellbeing who is employed by DFDS Guernsey but shares his time between the ships, the DFDS A/S office in Whitfield and his home in Scotland. We were told he works sufficient time on the ships to count as off-shore.
- 57 On 20 September 2022 the claimant was diagnosed with osteoarthritis of the spine and he notified the respondent the next day. The claimant commenced sick leave until he rejoined his vessel on 25 January 2023 (having passed the seafarer medical examination without restriction (ENG1) on 9 January 2023). Adjustments were made in respect of allowing a phased return and time to continue his physio exercises on board. He was supposed to be doing a two-week stint onboard but had to leave after 8 days, on 2 February 2023.
- 58 As early as 26 January 2023 the Chief Officer reported to Mr Scott, Ms Abbott and Mr Campbell that "[the claimant] is struggling but is carrying on with his exercise routine. Slight movements of the ship as it rolls does make the pain worse. He told me he sees this trip as an experiment to some extent and is realistic that he may need to make a difficult decision in the coming weeks and months. He does not want to be "carried" and does not want to be a burden. He was planning to retire in 3 years. All this for information only but I think it would be sensible if we all think about possible outcomes, particularly the possibility of redeployment if it would be suitable for him."

59 On 2 February 2023 the Master of the ship queried with Matt Scott how the claimant had an ENG 1 with no restrictions but that he needed to do exercises on board and cannot do physical jobs. He said "So was the claimant fit to work or not. He [also gave me] his list of pain killers...With all my sympathy to [the claimant] and I understand he [is] suffering with pain, he needs to make [a] decision." Another Chief Officer wrote to Matt Scott to say

"the claimant came to see me yesterday and it was very apparent he was suffering. I know he is desperate to work and this situation is affecting him. He wanted to stay on until we got suitable cover but I told him that he would get off regardless if we got cover or not, I don't want him to cause any more pain or damage to himself. As I say he is obviously in a lot of pain physically and I have no doubt he is suffering mentally...I would suggest that at the moment [the claimant] is a long way off being capable of doing his job. Perhaps with more time he may be able to return to work but that is a decision for someone better qualified than me. It has been suggested that the claimant speak to yourself or Lisa and discuss the possibility of another role within the organisation. He has only around three years to work before he retires and it would be a shame if he is unable to work for those three years..."

60 The claimant says he followed this suggestion and spoke to Matt Scott and asked about the possibility of being redeployed ashore whilst he explored a referral to a specialist. Matt Scott's email of that date to the Chief Officer (and a similarly worded update to Ms Abbott and Mr Campbell) said "we did discuss possibilities working ashore, he plans on working until retirement but does not want to do anything regarding that until he has seen specialist."

61 Mr Scott said he would look into it but did not get back to the claimant. Mr Scott says in fact he spoke to a colleague in DFDS A/S who told him to speak to another colleague who deals with operations recruitment. They had a discussion about there being more computer based work in the shore-side role but that they had had a number of staff from ship go to operations and that everyone making that transition has to pass a screening program (p 784). He also spoke to her about what an Operations Coordinator did, which is a mixture of loading car parks and directing traffic using computer systems in the check-in booth. He says there was no conversation about when the best time for vacancies is (before May/June).

62 On 28 March 2023 the claimant discovered he had exhausted his sick pay. He had not received notice of this and he raised a complaint about this. As he had not received the written notification in the end he received a further month's pay. There are messages from him to Mr Campbell which refer to his need to claim benefits due to the financial hardship and also that obtaining treatment was "financially crippling". As he did not receive statutory sick pay he was not paid from this date and had to rely on benefits.

63 On 24 May 2023, following an appointment with a specialist at Guy's Hospital, the claimant emailed Gregor Campbell, to ask whether there was scope for reasonable adjustments or a different role within the company where heavy lifting

was avoidable. He explained that he had a further appointment and anticipated subsequent injection treatment. The claimant said "He advised [me to] enquire about this and consider a career change within the company if at all possible, perhaps part-time or reduced hours to begin with as part of a phased return to work plan, and I would be grateful if this could be looked at. ...I confirm I will return to work after the treatment and if it's not possible to accommodate me elsewhere within the company I will be prepared to return to my contracted role, although I fear this may once again prove to be detrimental to my disability."

- 64 That message was forwarded to Mr Scott and Ms Abbott on 26 May 2023 with an email saying "...with regards to coming back to work and other available positions within DFDS, ...I have copied in Lisa and Matt, they are best placed to talk to you regarding this. I hope that we can all work something out and that you are indeed fit to return in time..."
- 65 On 26 May 2023 Gregor Campbell said with regards to other available positions ...I hope we can work something out and that you are indeed fit to return in time.
- 66 The claimant attended a meeting with Ms Abbott to discuss this on 31 May 2023. She sent her version of that meeting in an email to be filed and copied to Mr Campbell. She noted "[the claimant] reports he is uncomfortable for a couple of hours after waking but then can go about normal duties other than; Heavy Lifting and standing for long periods...we talked about a phased return to work with adjustments on board such as alternative duties as [Quarter Master] if a position becomes available, but [the claimant] tells me the Orthopaedic surgeon who assessed his condition has advised against working at sea due to the motion and vibration....for these reasons he currently feels doubtful that he will return to sea. We discussed a shore side position in Port Operations if available. [the claimant] said he currently feels this would be the best option, although he does not anticipate returning to sea but he would like to discuss this again after his next appointment, just in case he receives different advice." She referred to the claimant's next appointment being 20<sup>th</sup> June.
- 67 The claimant says that at this meeting they discussed a long-term plan that if he returned to sea and failed again they would consider a permanent transfer to shoreside Port Operations in Dover. He says they discussed that this could initially be as a no-cost supernumerary on the marine payroll until a suitable vacancy arose. She said she would also look into temporary redeployment ashore before any return to sea though she said this would be complicated. The claimant said he wanted temporary redeployment ashore but would still like one more attempt to return to sea if possible, before committing to a permanent role ashore. It is likely that notice periods in the event of the claimant not being able to return or be redeployed were discussed and the claimant told he would be entitled to 12 weeks' notice pay. The claimant says he understood it as a veiled threat which we find is unlikely to have been the intention. Ms Abbott says, and we accept, she was answering a number of questions from the claimant and this was said in that context. The reality is the respondent at no stage started

dismissal proceedings despite the claimant remaining absent almost a further year. Although there are different recollections of this meeting essentially the claimant was wanting redeployment to shore-side if possible, without ruling out another return to sea if that became possible.

- 68 Ms Abbott did check with Port Operations at DFDS A/S the next week as the relevant person was away the week of 31 May 2023. They said there were no suitable vacancies. By that time the summer peak season staffing are in place. In evidence she said they were hopeful of a vacancy in a few days. The vacancy list shows there were Operations Coordinator vacancies on 1 February 2023 and 9 March 2023 and then Seasonal roles with fixed term contracts on 1 March 2023; 9 March 2023; 23 March 2023; 29 March 2023; 12 April 2023; 19 April 2023; 26 April 2023; 3 May 2023; 10 May 2023; 24 May 2023 and 9 June 2023. It is not clear whether the 9 June 2023 vacancy had been filled when Ms Abbott spoke with Port Operations, or if this was the vacancy that it was hoped was coming in a few days.
- 69 She did not pass any information about this discussion back to the claimant. She says she was waiting to speak to him again after his next specialist appointment. Ms Abbott did not take the redeployment further or explore how realistic the return would be. There was no meeting at all at this point. She sent a brief email reply acknowledging and wishing him well with the treatment and ending "let's see how you go and chat again anyway when like you say the time comes so we can look at suitable duties around what you feel comfortable doing and are able to do.
- 70 The claimant updated Ms Abbott on 21 June 2023 (p232). He said the treatment plan was to do physio and have injections for pain relief to enable him to exercise more so that he could then build his core strength. It was not clear whether he would be able to return to sea, with the specialist saying it would depend on the "discomfort to pain threshold experienced by the claimant as he exercised". It is right that a return to sea had not been ruled out. The claimant's final paragraph said that following the injections he would really like to have one more throw of the dice onboard. This would be his final return and if it did not work out then he would turn to plan B and look towards a possible position within shoreside operations, as we discussed previously. He continued "I would be grateful if, when the time comes, I could return on similar terms to those when I returned in January, which was basically that I worked normally for crew management, arrivals, port turnarounds and departures, leaving me free to attend to my physiotherapy needs during crossings. In the meantime, I patiently await the appointment for the injections." On 12 July 2023 the claimant emailed Mr Campbell saying he was still waiting for his appointment and attaching his fit note (p249).
- 71 The claimant updated Ms Abbott on 28 August 2023 to say he had not had the injections yet and forwarding a chasing email he had sent the hospital (pp241-242). Within that it was clear he had been referred to have the injections locally at the William Harvey Hospital and told the wait time was 33 weeks whereas he

felt if he had stayed with Guys Hospital he would have had the injections by now and returned to work. He was seeking to reopen the possibility of treatment at Guys. He said he had been off work for 12 months and although his employer had been supportive in keeping his job open he could not expect them to keep it open another 33 weeks+. He said the outstanding spinal injections are the primary link to my return to work.

- 72 Ms Abbott responded by email to say this was disappointing but his summary of events was so well written she sincerely hoped logic would prevail and that he was not in too much discomfort.
- 73 The claimant was offered a swift appointment and updated Ms Abbott. Then on 8 September 2023 the claimant contacted Ms Abbott to say his appointment had not been as he had hoped and requesting to meet.
- 74 In the end due to Ms Abbott being away from work Mr Campbell met with the claimant on 19 September 2023. The claimant's account of that meeting is at page 250 in his later email of 5 October. He says that although he had not yet had the injections they are secondary to the primary treatment of physiotherapy which he had been doing continuously over the past 12 months. He said his core had strengthened significantly and he was fit for work and wanted to try a return to work at sea, which he described as experimental. He said they had discussed Mr Campbell's concerns about the Company liability if the claimant suffered further injury and the claimant explained that if he did get an onset as he had before he would now know to leave the vessel earlier. They had discussed phased return with a support worker to allow for adjusted hours and additional breaks and to keep the vessel fully manned if he had to disembark at short notice. They had discussed whether the claimant should be "walk on walk off" but the claimant had said he preferred to live on the vessel to test his response to the vibrations. He stressed that it would be experimental as he could not predict whether the environmental conditions would prove detrimental. He said it would be his final return and if it failed then he would turn his back on the sea and focus entirely on possible alternatives.
- 75 In that email he referred back to the discussions in May and in February 2023 and that Lisa Abbott and Matt Scott had both been of the view that a shore side redeployment was a last resort.
- 76 The claimant says and we accept that he stopped sending his sick notes from September as he was available to work. He had sent sick notes simply saying he was not fit to work throughout the period from February 2023. There are later sick notes in the bundle but the claimant says these were for benefits.
- 77 Mr Campbell did not follow up the meeting until 4 October 2023 when he wrote: "sorry for the length in time to get back to you, but I have been waiting to talk things through with Lisa. She is of the same mind as me, we are concerned that another trip onboard may aggravate your symptoms and set you back again,

however if you are adamant that you feel fit enough, then why don't we start with getting you a new ENG1. We can then refer you to Occupational Health and if all goes well, Matt will get you back on board and we can see how it goes".

- 78 This is what led to the claimant's email of 5 October 2023 and his account of their meeting. He confirmed he would welcome an occupational health referral. He said his condition was covered by the Equality Act 2010 and referred to the duty to make reasonable adjustments. He said short-term adjustments could include adjusted hours, abstention from routine maintenance on passage in favour of physiotherapy; carrying an extra crew member as a support worker to allow for adjusted hours, additional breaks, assistance with mooring operations, cargo lashing and any other circumstances that may arise. Long-term adjustments could include refraining from the following: forklift duties on the ramp and ashore (but not onboard); handling of mooring ropes; handling of tugboat towing lines; throwing of heavy lines; manual handling of loads over 10kg; use of lashing chains & cargo trestles; donning of firesuit and BA except for emergencies; manning of lifeboats and rescue boats except for emergencies (p251). He said he would ask the OHA to consider these also. He said these were just a few ideas and he welcomed suggestions.
- 79 He added in the footnote an informal complaint (p251). He said he had made himself available several weeks ago but remained excluded from the payroll and this had put him at a substantial disadvantage. He suggested he could have been included on the payroll from the day he made himself available and his return managed proactively without a significant delay.
- 80 Mr Campbell replied with a date for an ENG1 medical. Ms Powell said this was something that could be arranged by the employee at any time but it appears that in fact on this occasion the employer arranged it. He also said he was preparing the occupational health referral. Otherwise the rest of the email would be responded to in due course.
- 81 The claimant then sent a further email on 9 October 2023 adding further to his complaint. He said he had now become aware of the Equality Act and duty to make reasonable adjustments. He said that he had been removed from the payroll as he was unable to work at sea; that he had enquired about working ashore on 2 February 2023 and 31 May 2023 and been declined or told it was too complicated to facilitate on a temporary basis as the marine and shore operate as separate companies with separate payrolls. He said a temporary redeployment to shore could have been a reasonable adjustment and was denied twice. He said that it had been facilitated for others previously. He requested wages since April 2023 and compensation for the considerable impact the 6-month exclusion had had on the mental health and well-being of his family and him (p254).
- 82 At his seafarer medical exam the claimant was found temporarily unfit for non-disability reasons on 10 October (the ENG3). The estimated end date for the

unfitness was 9 January 2024. The reasons were raised glycosuria and elevated blood pressure (p273). The claimant updated Mr Campbell the same day and said he had been referred to his GP and he would get back to him (p272).

- 83 The claimant had an informal conversation with the Training & HR Officer of DFDS A/S referred to above about his informal grievance on the same date (p274). He said he felt discriminated against as others had been given positions ashore and there was no urgency on the company's part. He said he was fit to work from the back-health perspective. He said again he had asked about redeployment twice in February and May. He also said that it had been said that if the return to sea failed he could be a no-cost item in Dover for eg 2 months until there was a vacancy. It was agreed they would meet again on 23 October 2023.
- 84 On the same day the employee assistance details were provided. The Training & HR Director updated Mr Campbell that the claimant had been given a temporary unfit medical, that he said his back is better but he now has blood pressure and possible diabetes issues that need resolving. She anticipated that once resolved he would be fit for work. She also explained that he requests to be redeployed temporarily and feels that his requests have been ignored.
- 85 She sent the referral to OH the same day, 10 October 2023, stating "[the claimant reports as being ready to work albeit in an adjusted role from 13<sup>th</sup> September 2023, and his mandatory seafarers medical appointment is on 10 October 2023. The questions asked were: "is [the claimant] fit for work in full? If yes, are there any reasonable measures we can put in place to assist [the claimant] returning to work? How long do you anticipate these measures should remain in place? Can you confirm that [the claimant's] condition is classed as a disability under the equality act? [the claimant] has discussed possible redeployment. If an alternative role was available, what type of role would you recommend? Further specific questions that were checked included "if the employee is not fit to fulfil their role, would adjusted duties or temporary redeployment apply?"
- 86 The claimant reminded Gregor Campbell that he was fit for work generally even though temporarily unfit for seafaring, on 16 October 2023, when he updated with the steps his GP was taking. This was passed to Ms Powell and the Training & HR Manager at DFDS A/S.
- 87 The Training & HR Manager met with the claimant again on 23 October 2023. She confirmed she had spoken to Matt Scott who had said that he had thought in February [the claimant] was enquiring rather than requesting a job ashore. He was only now told that Matt Scott had spoken to the relevant staff about the port operations position and they had said it is possible, but there is a screening process for the role. She herself had also spoken to one of them who had said she didn't think there were positions at that moment (23 October 2023) but that there had been a number of crew move to the operations department having passed the pre-screening tests. The roles are extremely systems heavy in relation to checking in vehicles. She confirmed having spoken to Ms Abbott who

said she had spoken to operations management when the claimant had made the request but then had been led by the claimant's email of 21 June 2023. The Claimant responded saying his email had been 3 weeks later and that he had been expecting a reply within days and that he still had not heard anything. The Training & HR Manager asked at the meeting on 23 October 2023 whether he would definitely like to be considered for a position in operations or any position. He confirmed he would consider any position and she gave him a vacancy list. He ended that meeting saying he had been in contact with his union due to time constraints and a three-month limit on any tribunal application.

- 88 Ms Powell was updated about this outcome (p 285) and passed the request about going back onto salary. That update records that the claimant had been passed the vacancy list and that there do not appear to be any suitable vacancies. The Training & HR Manager said she had asked operations if there are any upcoming vacancies but that it was unlikely to be positive as port operations assistants are usually employed in May ready for summer peak season and she said "we are now heading for a slow point in the year operationally". She said that the claimant was considering tribunal.
- 89 The message that did come back from DFDS A/S Operations was "we currently don't have any vacancies, I've recently filled the vacancies we did have with some of our seasonal staff. I would imagine we'll be advertising at some point in the New year if we lose some to the next round of Border Force intakes". There is nothing in that email that suggests he was going to remain responsible for updating the respondent with those vacancies just as he clearly had not done when he "recently" filled the vacancies with the seasonal staff. These vacancies do not appear on the vacancy list we have been shown. All the vacancies since the 9 March 2023 had been the seasonal vacancies so we infer that he is talking about filling more recent vacancies with those seasonal staff. As the reference was to recent we also infer that it is likely this post-dated the claimant's contact of 8 September 2023 about being fit to work.
- 90 The claimant chased the outcome of his grievance on 31 October 2023. Instead of getting an outcome Ms Powell then invited the claimant to a grievance meeting on her own initiative as his employer on 31 October 2023. She refers to the claimant's emails to their "agents" at DFDS A/S. The meeting was to be held at DFDS A/S. The claimant took issue with the information in the letter with respect to his right to be accompanied but this was resolved and in any event is not itself a claim before us. In his response at p 291 on 31 October 2023 he also explained that he thought his informal grievance had already been dealt with and he was awaiting the decision. He then said that he was instead now making a formal grievance.
- 91 In that formal grievance he made clear reference to wanting short-term redeployment in February 2023 and May 2023 and that a long-term plan had been decided upon, but they had also discussed short-term redeployment in advance of a return to sea. He refers to their having talked about the complications

because of the two companies and it was described as their having a collaboration by Ms Abbott. He explained that his view was that they are all DFDS, all subject to the Conduct Code, though their companies might be separate for tax liability purposes. He had only come to realise he had been treated badly with his recent knowledge of the Equality Act. He gave more detail of what he was told on 23 October 2023 about the operations role. The Training and HR Manager told him you are expected to be quick, to be on your own, expected to check-in large numbers of people and make payments across several systems. The claimant confirmed he still wanted to be considered for this role or any other position that may be suitable. In his formal complaint he complained that she had said she would not want to put him in a role he could not do, even with reasonable adjustments.

92 The DFDS Code of Conduct does say at page 340 “All DFDS employees on land and at sea are expected to be aware of and comply with this Code of Conduct”.

93 The Occupational Health appointment took place on 31 October 2023 and the report was returned to the Training & HR Officer who had requested it (pp349-353). She forwarded it to Ms Powell on 10 November 2023. The report referred to the claimant saying that his back had improved considerably even without the injections.

“He talks now about a mild ache in his lower back area, but it is not bad enough to disturb him at night. Occasionally, he gets sensory symptoms in his right leg. He reported he is being careful about how he uses his back.”

94 It referred to the Occupational Health doctor conducting his own examination:

“I can confirm there was no tenderness to be listed from his spine. Movements-inflexion (forwards) and to each side were full, normal and pain free. Extension (leaning backwards) was reduced and there was some increase in pain on this movement, typical of facet joint pathology.

Essentially therefore , his back problem is considerably improved from what it was, and he is waiting for injections now to help it even more. In the meantime, he continues to carry out his exercises, but needs to be careful about some of the more physically demanding work.”

95 The report also noted he was waiting to see whether or not he might have diabetes, which OH referred to as an eminently treatable condition. His blood pressure was reported as coming under better control all the time.

96 He said “in my opinion, [the claimant] is fit to resume working (subject to his ENG1 medical of course), subject to my comments below....

[the claimant will need some adjustments in order to be able to resume working at sea. In the short term, he will certainly need a phased return and I would

suggest starting on 6 hour shifts and then building up gradually to 8 hours, 10 hours and the full 12-hour shifts. He will need to have time to carry out his exercises whilst at sea...He will also be limited in what he might be able to manage on arrival in port, for which reason, a support worker would be beneficial to carry out more physically demanding tasks at the ports.” He suggested a manual handling risk assessment with the main issues likely to be the requirement to lift and handle and push and pull against static loads. He said he would not be able to manage the heavier physical work whilst in port although he could control the winches. He suggested that in bad weather the movements of the ship could exacerbate his back condition. He said at sea the claimant’s role was more supervisory.

- 97 He confirmed the claimant was in his opinion protected by the Equality Act and the adjustments should be considered as ones that could potentially be reasonable adjustments required under the legislation.
- 98 He said that apart from the phased return the other adjustments were likely to be long-term. He said if a return to sea was not successful he would support a shore-based role that was not physically demanding.
- 99 He explained that the claimant had struggled financially due to not being offered alternative work and the best way the respondent could support him would be to facilitate his returning to work in some capacity.
- 100 Neither Ms Powell or the other HR officer met with the claimant to discuss that report when received. Ms Powell said in evidence she filed it waiting for him to be fit to return to sea.
- 101 On 8 & 9 November 2023 the claimant added further points to his grievance in particular in respect of an injury to feelings claim due to stress and anxiety and that this may have been why he had failed the medical.
- 102 The grievance hearing went ahead on 13 November 2023. Mostly this repeated what had already been said but the claimant did say he had now been cleared of the diabetes and his blood pressure was coming down and he had a review due with his GP on 29 November 2023. He said that the return to work would be an experiment for him to see how he can handle working back at sea. He also mentioned he would prefer to return to work at sea with adjustments in place for him, but if not, then a shore-side temporary job.
- 103 The claimant contacted ACAS on 14 November 2023 and informed Ms Powell of this. He also sent two revised schedules of loss (one based on returning to work and one based on his leaving).
- 104 On 20 November 2023 a colleague messaged the claimant to say “Hi Sean, I hear you’re making an appearance next trip as a pax. No change there.” This was

followed by two emojis suggesting it was intended as a joke. The claimant says that pax means “passenger” (p367).

105 The claimant replied light heartedly but asked who the sender had heard that from. The reply was that it was in the monthly meeting with a named Chief Officer.

106 The claimant then explained about the suggested adjustments. The sender responded “aye aye. We understand.”

107 The claimant made comments to the notes of the grievance meeting when he received them. Of particular significance he clarified that he would prefer to work at sea with adjustments but would like a temporary shore-side job in the meantime.

108 On 30 November 2023 the claimant updated Ms Powell that he had a blood pressure review that was adverse and his GP had altered the medication and scheduled a further review for 13 December 2023. He reminded Ms Powell that although he was temporarily restricted from working at sea he remained fit and available for work generally. He chased the outcome to his grievance.

109 On 5 December 2023 the claimant chased his grievance outcome again and added a complaint about the text message chain above and his belief it was disability-related harassment and a breach of data protection.

110 On 13 December 2023 the claimant updated Ms Powell that he had a further blood pressure review on 9 January 2024. Again he reminded her that he was fit for redeployment elsewhere in DFDS. He had once again amended the schedules of loss and sent further copies to the respondent (p378).

111 He received his grievance outcome on 19 December 2023. This had found that the claimant had not been denied redeployment. It explained there were discussions and then the claimant had asked to wait, citing the claimant’s email of 21 June 2023 stating he wanted one more throw of the dice at sea before turning to plan B. She further stated that “we did not explore options of redeployment as you requested we didn’t”. With respect to the alleged harassment following the WhatsApp messages she said:

“There has been no discussion with any onboard managers in relation to your absence. That would not happen until you are fit to return to work, a return to work plan would take place along with a risk assessment. These would all be carried out in conjunction with yourself. With your permission obtained and you would be part of this process...we would not have discussed the Occupational Health report with anyone other than those involved in your absence management, who are all ....within HR team”.

She said “in conclusion the company have followed the correct absence management procedures and we have with our best endeavours kept in regular contact with you.

112 She noted at present the claimant remained unfit to work at sea but would like to be considered now for redeployment within DFDS Port Operations. She did not say how this would be taken forwards. No recommendations were made for example. She also noted that he wished to return to sea and when he is in receipt of his ENG1 there would need to be a full risk assessment and medical report (pp383-385).

113 The claimant appealed the grievance on 27 December 2023 (p386). He said the fact he had asked for redeployment was supported by Matt Scott following up with his enquiries in relation to the operations role; he repeated that he had asked Lisa Abbott which is why she had explained the complications of temporary redeployment and queried again why she would have conducted investigations if he had not asked; he continued to maintain that his medical data had been breached and discussed at a general meeting where his dignity was violated. He said that “DFDS abandoned [him] in April 2023 as a no-cost item...[he] received no employee assistance at all for more than one year....based on [Matt Scott’s] enquiries... it is more likely than not that I had asked him for redeployment. It is fundamentally wrong to single out one paragraph in an email to summarise my meeting with Lisa. That email was sent three weeks after the meeting when it had become clear, by Lisa not keeping her word, that redeployment had been disregarded. The very reason I had called the meeting with Lisa was to request redeployment....It is illogical for DFDS to say that, at a time of financial hardship, I had made the bizarre request for the Company not to explore the options of redeployment, especially as I had been requesting such redeployment since February.”

114 He made this claim on 31 December 2023.

115 On 9 January 2024 he updated Ms Powell saying that although he was temporarily restricted from working at sea he continued to remain fit for redeployment elsewhere in DFDS. Ms Powell replied asking about the BP reading. The claimant explained the reading and that a further medication adjustment had been made. He repeated again that although his blood pressure restricted him from working at sea he was perfectly fit for redeployment anywhere else within the DFDS Group (p393). His blood pressure was to be reviewed again on 6 February 2024.

116 The appeal hearing took place with Mr Saul, Director of DFDS (Guernsey) Limited on 10 January 2024. Mr Saul said he would not be giving a decision that day as he would need to reflect and revert with an outcome and “if necessary some action plan” Mr Saul said in reference to the disability- harassment complaint “at some stage..it would appear that the shore office in Dover told the ship that you might

be returning...it would appear that all staff were made aware of the EAP on multiple occasions including literature that was sent around the fleet in 2019 and again via email on 17 April 2020. He also said ...”as I understand it you currently and have confirmed that you do not have an ENG1 and I understand that also you continue to receive medical care. As it stands as far as the [respondent] is concerned you cannot return to sea until you get your ENG1. As you have said you have an ENG3 but not an ENG1. Once you can produce an ENG1 we would then undertake a full risk assessment and a medical report will need to be conducted when you report fit to work, because you mentioned that on numerous occasions that you have requested a job onshore and I just wanted to clarify....At the moment you work for DFDS Guernsey Limited... the offer of a position in Dover for someone who is working for a different company is not always possible because it is a different company. ...As I understand, you have raised the issue that you have spoken to Lisa on a couple of occasions and Matt and both of them indicated that there were no jobs available in Dover.”

- 117 There was some discussion about the example the claimant had given about another person who was redeployed to shore, the claimant said working in the crewing office. Mr Saul went on to say “assuming that was correct and I have no evidence to show me that it wasn’t, I’m guessing ... that there was a job for this person and from what I am aware of, and it could be slightly contradictory in terms of what we have been told, I have been told there are no vacancies ashore at present time...we cannot force another company to take you on. All we can do is request and see if there are any vacancies within the shore force in Dover and we are being told that there are not. I am not sure really what else we can do in terms of assisting in this matter....we are saying there are no vacancies.”
- 118 The claimant asked if he was saying there had been no vacancies for 13-15 weeks? Mr Saul said he was not saying that “because I’m assuming that your desire when you first went sick was you were going to return to the ship”. The claimant confirmed this was the case until February 2023.
- 119 Mr Saul said “I can only say I am being told that currently there are no vacancies and when you spoke with Lisa on 31 May last year.... you were discussing a return to work onboard the ship”. The claimant reminded him again of his account of his meeting with Lisa, that he went to see her about his specialist’s recommendations and he had asked for redeployment ashore and she said it was too difficult due to payroll and administration. Mr Saul said “you would’ve had to leave the employment in Guernsey and start with the company in Dover.” And his understanding was that people who work onboard are seconded onshore for a very short period of time.
- 120 The claimant then raised disability and the Equality Act. Mr Saul responded “I am unsure about what you have said, reading through your appeal you have said that it was always your intention to return to work and now you have used the word disabled”. He asked how the claimant stated that he was disabled at the current

time (p400) and went on to query whether “the disability act” the claimant was referring to applied in Guernsey.

121 On 22 January 2024 he responded with the appeal outcome in which he said he had found no evidence of discrimination and that DFDS A/S and DFDS Guernsey are two separate businesses and a transfer of roles is not something they have control over. He made no action plan in respect of this going forwards. There was also discussion that the claimant had not disclosed the details of the data breach relied on for the disability-related harassment (p402).

122 In oral evidence Mr Saul said that seafarers do work ashore for short periods but the maximum that would be prudent to avoid HMRC interpreting the company as having a place of business on-shore is one calendar month. Normally now, if someone is seconded shore-side they ask the shore-based employer to take over with a temporary contract. He confirmed it is possible to switch between the two employers with their consent.

123 On 1 February Ms Powell wrote to the claimant asking for sick notes since the last one which had expired 28 September 2023. She asked whether he had any to cover from October to date. She also asked about moving his items from his cabin (p407). The claimant replied on 7 February 2024 saying his mental health continued to suffer; that he declared himself fit to work on 13 September 2023 and the return to work process was initiated. His only sick note was the ENG3 which declared him temporarily unfit for sea-faring only.

124 He said he has continuously made himself available for redeployment elsewhere. He had another review scheduled for 5 March 2024 when he hoped his blood pressure would hit target. He said that as he expected to begin the return to work process again in a few weeks he could not see why the status quo in respect of his belongings could not be maintained for the short period that remained. He referred to his view that clearing out a seafarer’s locker onboard is a symbolic formality and generally takes place only when it is confirmed that the crew member will not be returning. He asked for confirmation of her intentions. He ended with a reminder he was fit for redeployment elsewhere in the organization.

125 On 9 February 2024 Ms Powell replied to the claimant and acknowledged he was hopeful for a return to work soon. She justified her request in respect of the belongings. She suggested they awaited the outcome on 5 March 2024 and revisit. She suggested that if there was a further extension of his absence she would ask again about the temporary removal of belongings (p405). She did not pick up on the redeployment reference and any contingency plan in respect of that if there was a further extension of absence.

126 On 13 February the respondent submitted their response to the claim. On 23 February 2024 when emailing about other matters the claimant again said that although temporarily unfit for sea he remained fit for employment elsewhere.

127 The vacancy list for the role of Operations Coordinator shows there was a vacancy listed on 21 February, 28 February and 6 March 2024 and a further seasonal vacancy listed on 27 March 2024. No action was taken about these in respect of the claimant. He was not even informed of them despite Ms Powell envisioning that he might not be fit to return to sea by 5 March 2024.

128 On 5 March 2024 the claimant informed Ms Powell that the concerns in his ENG3 had been satisfied and on 11 March that he had an unrestricted ENG1 certificate. He said he made himself available for immediate deployment subject to reasonable adjustments under the Equality Act (p410).

129 A return to work meeting took place on 19 March 2024. Ms Powell said at the outset that in the normal course with a two year unrestricted ENG1 he would be put straight back on board and on pay. However he had mentioned reasonable adjustments so they first needed to consider these. She made clear they were not discussing his status under the act as that question was to be determined by the Employment Tribunal. She said the sole concern was to be sure that all reasonable steps have been taken on his return to work to ensure his health and safety and the safety of the ship, passengers, crew and cargo. She asked the claimant if he was recording the meeting and he said no. This was in fact not true and the claimant had been recording the meetings, without informing the respondent, since 10 October 2023 including the appeal meeting.

130 She said the ENG1 doctor has not imposed any limitations. She said the MCA's approved Doctor is required to take into account working conditions at sea and assess the claimant's fitness

- 130.1 to undertake the full range of tasks onboard ship;
- 130.2 fitness in both physical and psychological terms to deal with emergencies at sea;
- 130.3 the potential need to play a role in emergency or emergency drill which may involve strenuous physical activity in adverse conditions.

131 The claimant provided his own list of adjustments and not the list from OH. The claimant's list went beyond the OH recommendations and was the list he had already presented to Mr Campbell (p251). He suggested abstention from routine maintenance on passage to allow for 4 hours a day physiotherapy – split up. Whereas Occupational Health had recommended a support worker at port, the claimant wanted provision of a crew member as a dedicated support worker to undertake manual handling more generally. He considered this should be another Assistant Bosun. He listed tasks to avoid and said this meant to not do them at all, permanently. The respondent had understood that to mean he could not do them, though this was one of the amendments the claimant made to the minutes, removing the line that said he could not do them at all. This is reference to the

distinction that although he could physically do them it was not advisable as they would cause his condition to deteriorate.

132 There was no medical evidence to support the extended list.

133 He was asked if he had listed these to the MCA approved doctor and he said he had not as she had remembered him from the previous appointment. It was the same Approved Doctor that assessed the claimant in January 2023, October 2023 and March 2024. On the certificate itself at page 728 the Approved Doctor has stated the claimant has osteoarthritis but this is controlled with exercise and analgesia. She had his medication list (p722). On his record are the notes from January 2023 and October 2023 when he had told her he was off for many months and had attempted to go back in January but had lasted 8 days before having to come off again. It was noted that he had been having long term physio and was feeling a lot better now and feels able to start going back to work.

134 The ENG1 is not inconsistent with the OH report. It was the claimant's own list that was a significant expansion of the adjustments needed.

135 Ms Craft said the list was most of the claimant's job. They did not distinguish between the forklift truck on board, which the claimant had said in the email he could do. He listed the key tasks in his job description (418) all of which he could do. The secondary tasks are also all more overseeing. The tasks discussed in the meeting were more physical tasks which are not listed in the job description. The respondent was saying that there were more physical tasks than were listed in the job description.

136 On 26 March 2024 Ms Powell wrote to the claimant (p455-6). She set out the obligations of the MCA doctor and noted the claimant had asked for an extensive list of adjustments which would effectively exclude him from most of the routine duties of the Assistant Bosun. She said the respondent needed to be satisfied he was indeed fit for sea and proposed to write to the Approved Dr sending her the minutes of the return to work meeting, the Job Description for Assistant Bosun and the claimant's list of adjustments. She requested his agreement to this.

137 The claimant responded on 27 March 2024 (pp452-3) saying he did not agree with the sending of his list of reasonable adjustments or the minutes of the meeting but he did agree to sending the OH report and the job description. He explained his list was suggestive and made the accusation that the minutes were "seriously falsified and are not a true record of the meeting". This accusation did not stand up in evidence before us. He said the disability discrimination had been going on more than a year now and that Ms Powell was continuing to protract the situation unjustly and he needed to bring the matter to an end.

138 He said there were 3 satisfactory outcomes. Either the respondent agree to the requested reasonable adjustments so he could continue at sea; the respondent

have him assigned to a shore-side position that does not involve heavy lifting or the respondent create a suitable position.

139 He said if the respondent had no intention of allowing any of these outcomes the respondent would be effectively terminating his employment by way of constructive dismissal and he would add this to his claim. He said if the respondent did intend one of these outcomes then he needed the respondent to return him to payroll with immediate effect whilst the respondent decided on the preferred outcome.

140 He said he required a decision by 5pm on 5 April 2024 or he would deem constructive dismissal to have taken place.

141 Ms Powell replied assuring the claimant her one concern was to get him back to work at sea if that were feasible. She said he could amend the minutes or he could attach his own note and she agreed to the OH report being included. She said they just needed the Approved Doctor's confirmation that he was fit for sea once she had the full picture. She did not mention the shore-side vacancy though there was a vacancy advertised that date.

142 On 28 March 2024 the claimant said he had reconsidered and any attempt to contact the GP directly would be professional misconduct. The correct procedure was to contact the MCA and request an independent medical review and he rescinded his permissions for contact with the Approved Doctor.

143 He said he agreed to attend an independent medical review at the respondent's expense and referred again to the employment relationship being scheduled to end on 5 April 2024.

144 On 29 March 2024 Ms Powell repeated that their objective was to get the claimant back to sea if they could. She said she would check the options available if the claimant did not agree to a reference back to the Dr who had done the ENG1 (p450).

145 The claimant replied on 29 March 2024 saying his objective had always been to return to work within the DFDS organization in any capacity and any location whether that be ashore or at sea. He said he had been requesting this for more than one year but it had been ignored (449). He considered the respondent was resisting his return.

146 On 1 April 2024 the claimant wrote again to say he had reconsidered. He would attend a new appointment with the Approved Dr and make all relevant documentation available. He explained that any avoidable strain would accelerate degeneration of his back. He said he would say he can complete every task in the job description and is physically able to complete any supplementary task on board. Although able to do them, tasks that require lifting and holding and pulling and pushing against static loads would place the avoidable strain on his back and

this is where he needs a support worker. He said he would not have to deal with emergencies as his support worker would do so, but if needed he would be physically and psychologically capable to deal with emergencies at sea. He asked if Ms Powell would like him to make a further appointment. He said that the employment relationship would still end on 5 April 2024 in the absence of the commitment he had requested (a reference back to the request to be put back on the payroll).

- 147 On 3 April 2024 Ms Powell replied. She clarified the respondent's position on some issues raised by the claimant but noted he was now content to go back to the approved doctor and that the respondent would pay for this. She clarified that although not specifically set out in the job description the Assistant Bosun role is very much part of the working AB team, undertaking all the physical elements of the work alongside the others. She said that she did not propose to be drawn into a debate now as to how that could be modified, for example, with a support worker. She proposed sending the minutes of the meeting with the appended list of adjustments, any personal notes of the minutes, the job description and the current email chain.
- 148 The claimant replied on 5 April. He maintained that the respondent's minutes were seriously falsified. He continued to set out his position in respect of the respondent's alleged failings. He said he did not agree to the respondent sending the information to the Dr. He said he would provide the letter of 26 March, his email of 1 April, the OH assessment, his job description and the list of "suggested reasonable adjustments for the supplementary tasks" (p446).
- 149 The respondent replied saying unfortunately they did not have agreement in respect of the process. She said the reason why they needed the further appointment was because "there was previously a failure on [the claimant's] part to discuss relevant issues] with the doctor. The respondent was not prepared to pay for a further appointment if it was not on her terms, which were designed to give the respondent comfort there had been appropriate transparency. She gave two options (p445) and sought to reassure the claimant that the respondent was anxious to take this forward as quickly as they could.
- 150 The claimant did not agree to the respondent's terms because he maintained the respondent's minutes were falsified. He took exception to the suggestion that he would not put all information to the Dr and said it was disappointing the respondent had no trust in his doing this.
- 151 On 8 April 2024 Ms Powell said she was following up with external guidance. The claimant replied saying "I wrote in my email of 27 March 2024 that I needed commitment from you. Such commitment was not received. Consequently, I have now made an application to the tribunal to amend my claim to include constructive dismissal on 5 April 2024 by way of disability discrimination. He said personal items in lockers were no longer wanted and could be disposed of (p443).

152 On 9 April 2024 Ms Powell wrote again. She said “....please let me reassure you yet again that [the respondent] has been totally committed to maintaining your employment and getting you back to sea, if we can legitimately do so. All my efforts latterly have been with a view to clarifying your proper ENG1 status. We just need clarity as to whether you are considered fit for sea service and, if so, whether that is unrestricted or subject to restrictions.

153 Although you are telling us your employment has ended I would urge you to reconsider and allow us to move this forward with a view to getting you back to sea if we can. I hope that you will allow us to do so....”

154 The claimant responded reiterating that he had first brought the suggested adjustments to Mr Campbell on 5 October 2023 and they had been ignored until now they were being used to refuse his ENG1. He said in his request for commitment to avoid constructive dismissal he had given the option for shore-side working but this was ignored. He had been asking for an adjustment to work ashore continuously for more than one year and every request had been ignored. He said there was no justifiable reason why an employer can expect an able employee to be suspended from work and remain indefinitely retained as a no cost item. He noted the respondent’s request to reconsider and said that unless the respondent could give a retrospective commitment (again a reference to the request to go back on pay roll) the status quo would remain effective as of 5 April 2024”. I.e. if the respondent would put him back on the payroll from the date requested he would continue with the employment relationship (p442).

155 Ms Powell’s response was that she noted the decision and that she was sorry he had not reconsidered (p472). She did not respond on the payroll point or the shore-side working point.

156 She wrote again on 2 May 2024 saying that the advice the respondent had received from the MCA was as set out on page 474, including that a seafarer who cannot undertake the tasks in the request for reasonable adjustments is unlikely to even get a restricted medical certificate, and that the respondent had therefore been right to question his unrestricted ENG1. She nevertheless said that they were prepared to consider him for further employment if he is given a new certificate. She said you should give the Approved Doctor full details of your medical condition and also of your role on board, the routine duties and the emergency duties (p474).

157 The claimant began receiving enhanced rates of PIP to help with his daily living needs and his mobility needs from 10 April 2024. He has continued to get this since then although this will or has ceased with the claimant’s move abroad in October 2025. The claimant says this reflected a very fast deterioration in his condition after he temporarily stopped physio following the impact of the return to work meeting on his mental health. He says some days he could not leave the bedroom.

- 158 On the 10 questions under the daily living section the claimant scored between 0-4 out of 8 per question giving a total across the tasks of 14 which qualified him for the rate. In the mobility section he scored 12 out of 12 for the statement “you can stand and then move more than 1m but no more than 20m either aided or unaided” (p477-479).
- 159 In particular the claimant said that he had difficulty standing and walking in the kitchen because compression from his spine creates pain in his back, hips, pelvis and legs and he cannot sustain this for a reasonable length of time. It can create a loss of feeling in his legs and he risks falling when this happens. He says on bad days, 1-2 days a week he cannot get to the kitchen at all because of the pain. He said he had difficulty remembering when to eat or drink because of both mental health symptoms and the side-effects of medication. He said on 2-3 days per week he needs constant monitoring and prompting to eat and drink. He said he needed his wife’s help to remember to take medication and to do his physiotherapy. He also needed help getting clean for example to get in and out of the bath [and toilet needs] and getting dressed. In fact in the mobility section the claimant said he could walk between 20 and up to 50 metres. He said he is in pain whenever he walks and needs to rest for a few minutes every 20-30 metres. When he tries to walk this distance repeatedly he becomes more at risk of falling.
- 160 He accepted in evidence that these symptoms were not compatible with work at sea, though he maintained he could do the on-shore role.
- 161 We do find that there is an inconsistency between the statements made on the PIP application and the statements being made to the respondent at the same time. For example the email on 1 April 2024 saying he would go back to the approved doctor and say he can complete every task in the job description and is physically able to complete any supplementary task on board (p448-9).
- 162 Of all the evidence about the Claimant’s health at the time (including his PIP application) we find the most reliable to be the OH report as it was based on a physical examination the detail of which is described in the report, albeit it was in October 2023 and did not reflect the position in April 2024. At the time the ENG1 was issued they did not have either the OH report or the claimant’s list of tasks that he wished to avoid.
- 163 We heard no evidence that the respondent ever enquired as to whether temporary deployment shore-side as part of a phased return to sea- based work, would be too risky from the point of view of HMRC.
- 164 The evidence is that a number have gone through from ship to operations and passed the screening and there are a number who have not succeeded in making the transition (p784). Mr Scott gave an example of a stewardess on board who applied to the operations department and left and moved to DFDS A/S. It

happened to be when they were recruiting. She did really well and became permanent. It is possible to be paid by the off-shore side and work on shore for a very short period but then Mr Saul said that any longer secondment or similar they would be asking shore-side to take over the pay. Another factor is whether or not there was a sufficient connection between the on-shore and off-shore role. The reason we were told Mr Campbell's employment was compliant with HMRC is that his on-shore role had sufficient connection to the off-shore role. Sufficient connection with the off-shore role justifies a longer placement on-shore whilst remaining on the off-shore payroll. Mrs Powell said this would involve suspending the employment with the respondent and being employed by DFDS A/S. Where staff have transitioned completely they have had to end their employment with the respondent, receive a P45, and are employed by DFDS A/S. It is correct that what had happened 12 years ago was not necessarily indicative of what would happen now as practice has changed to reflect HMRC's position.

165 There was some discussion in evidence of the Quarter Master role on board but the claimant confirmed this was not suitable as it is on the bridge, at the top of the vessel towards the front and this would be worse in terms of the experience of the ships motion.

### **Relevant law**

166 Under s95(c) Employment Rights Act 1996 an employee is dismissed by his employer if the employee terminates the contract with or without notice in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct (constructive dismissal).

167 Every employment contract has an implied term that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee (*Malik v Bank of Credit and Commerce International SA* [1997] IRLR 462).

168 It is possible that the breach is made up of a series of acts which together have the cumulative effect of a breach. Where an employee relies on a "last straw" it must contribute something to the breach, even if relatively minor. It must not be utterly trivial.

169 S13 Equality Act 2010 provides that a person (A) discriminates against another B if because of a protected characteristic, A treats B less favourably than A treats or would treat others. There must be no material difference between the circumstances relating to the case of B and that of any comparator (s23).

170 Under s15 Equality Act 2010 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. This 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.

171 s20 Equality Act requires "...where a provision, criterion or practice of [the employer] puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled" [the employer]... is "to take such steps as it is reasonable to have to take to avoid the disadvantage." A substantial disadvantage is defined in section 212 as more than minor or trivial.

172 The EHCR Code of Practice on Employment (2011) at paragraph 6.28 lists some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

172.1 whether taking any particular steps would be effective in preventing the substantial disadvantage;

172.2 the practicability of the step;

172.3 the financial and other costs of making the adjustment and the extent of any disruption caused;

172.4 the extent of the employer's financial or other resources;

172.5 the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to work); and

172.6 the type and size of the employer.

173 *RBS v Ashton* [2011] ICR 632, in particular paragraphs 13 and 24, provides that:

"it is irrelevant...what an employer may or may not have thought in the process of coming to a decision as to whatever adjustment might or might not be made. It does not matter what process the employer may have adopted to reach that conclusion. What does matter is the practical effect of the measures concerned....It is an adjustment which objectively is reasonable, not one for the making of which, or the failure to make which, the employer had (or did not have) good reasons."

174 The Tribunal does need to consider how effective the adjustment would be in removing or reducing the particular disadvantage, and a prospect of it doing so may make an adjustment reasonable (*Romec Ltd v Rudham* EAT 0069/07 and *Leeds Teaching Hospital NHS Trust v Foster* EAT 0552/10).

175 Whether an adjustment is reasonable depends on the particular circumstances of the case.

176 It is principally for the employer to explore possible adjustments, not for the employee to suggest them. Although it is obviously wise and good practice to consult the employee, if an employer fails to make reasonable adjustments it is not a defence that it consulted the employee (*Tarbuck v Sainsbury's Supermarket Ltd* [2006] IRLR 664). The duty to make reasonable adjustments is on the employer.

177 S26 Equality Act 2010 provides that a person (A) harasses another (B) if A engages in unwanted conduct related to disability, and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. In deciding whether the conduct had such an effect the tribunal must take account of B's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

178 The burden of proof is set out at section 136 Equality Act. This states that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that ss13, 15, 20 or 26 has been contravened by A then it must hold the contravention occurred unless A shows that it did not contravene the provision.

179 s123 Equality Act 2010 states that the tribunal does not have jurisdiction to consider a claim submitted more than three months after the act complained of, unless it is just and equitable to extend the time limit.

180 s123(3) states that conduct extending over a period is to be treated as done at the end of the period however a failure to do something is done when the person decides not to do it. In the absence of evidence to the contrary a person is taken to decide on a failure to do something when either they do an act inconsistent with it or on the expiry of the period when they could reasonably be expected to do it. It is possible for there to be an ongoing duty and a continuing omission to make reasonable adjustments where the evidence suggested the employer was still considering the adjustments and in the absence of the employer making the assertion of an intervening inconsistent act (*Kingston upon Hull City Council v Matuszowicz* [2009] ICR 1170).

## **Conclusions**

### **Constructive Dismissal**

*Each contract of employment has an implied duty of trust and confidence. Mr Donnelly says that the company was in breach of this duty by failing to make any of the reasonable adjustments set out below (in the reasonable adjustment section) and/or by failing to allow him to return to work in March 2024, having passed his Seaman's Medical Certificate (ENG1).*

181 The first question for us is what conduct by the respondent led the claimant to resign. The resignation letter is the claimant's email of 27 March 2024 (pp452-3) read with the email of 8 April 2024 (p443). We agree with the claimant that he resigned in part because of the respondent's failure to make the reasonable adjustments found below. We also consider that it was the respondent's failure to respond and/or ignoring his multiple requests to consider shore-side work. In the email 27 March 2024 one of the outcomes which he sought was assignment to a shore-side role. In addition to this, as per the email, it was what he perceived as the respondent's questioning of the integrity of the GP who had done his ENG1, and the respondent's continuing to protract the situation which had been going on for over a year and failure to allow him back to sea. Given that the letter included an ultimatum to return him to the payroll and the later email made reference to his needing that commitment from the respondent, his resignation was also because the respondent had failed to put him back on the payroll prior to 5 April 2024.

182 The final straw was that the company refused to allow him to return to work and questioned the certificate he had obtained.

*Did the Respondent act in fundamental breach of the Claimant's contract of employment?*

184. We do agree that the respondent was in breach of the implied term of mutual trust and confidence by the failure to explore reasonable adjustment on shore, or even reply to those requests in a timely and constructive manner. Nor were they proactive when suitable vacancies arose.

185. Although Mr Scott and Ms Abbott each made enquiries these were not communicated to the claimant promptly but only in response to his grievance. The grievance and the appeal responses on this issue were inadequate as there was no action plan or recommendation put in place for once a vacancy arose. Likewise, the respondent gave no proactive consideration to the OH report and its recommendations (which included redeployment) but simply put it in a drawer for later. Vacancies did arise in February and March 2024 and the respondent did nothing about these (though the claimant was not aware of them). That the claimant was neglected for so long was likely to seriously damage trust and confidence.

186. We have not been given any reasonable or proper cause for why the information obtained by Mr Scott and Ms Abbott (as agents of the respondent) was not passed to the claimant in a prompt manner whilst there were live vacancies. Nor why they did not themselves take proactive steps to consider the vacancies that were available with the claimant. The fact that there was no suitable vacancy available at the time of the grievance and the appeal is not reasonable and proper cause for failing to take steps to facilitate redeployment once there was the next vacancy.

187. We do not accept that the two separate companies means that there is nothing the respondent can do to facilitate shore-side redeployment. The respondent was created solely to supply the DFDS group with sea-side staff. The

respondent works closely together with DFDS A/S and it is clear that over the years redeployment shore-side has been facilitated a number of times. It is certainly no justification for the lack of communication with the claimant on this issue.

188. We accept that the respondent needed to be sure that the claimant was fit to work at sea for his own safety and the safety of others. However we do not accept there was reasonable and proper cause for failing to consider the issue of adjustments until receipt of the ENG1 and then, because of the request for adjustments, causing the process to be further protracted by querying the ENG1. The respondent did not look at the OH report and those recommended adjustments in a timely manner, or at all. Had they done then the stand-off about the validity of the ENG1 (and the delay adding the claimant to the payroll) might have been avoided. All the OH actually recommended was a phased return (common after any lengthy absence); a support worker to do the physically demanding work in port (and not at sea) whilst the claimant did the winches. Otherwise the recommendation was that he have time to do his exercises (without specifying that he should miss routine maintenance) and a manual handling risk assessment – though still the anticipation was in respect to work in port not at sea. There was a suggestion that he might find bad weather difficult. In our view the OH report as to the claimant's health and the recommended adjustments are not incompatible with the ENG1. The respondent could have gone on to do the risk assessments in advance of the ENG1 which would have informed whether any other adjustments were really needed.
189. We accept that the claimant himself requested more adjustments than the OH report did but the respondent failed, at the time the report was received, to discuss the recommended adjustments and understand that disparity with his own list or obtain a more current report if the claimant was saying there had been a deterioration (which we do not understand that he was). The claimant had said the requested list were suggestions when he first raised them prior to the OH report. He also said that again in the return to work meeting and that in fact he can do the activities but needs to avoid them to avoid further injury. This exploration might have avoided the need to query the ENG1, as in our view the OH report and ENG1 are not incompatible (only the claimant's more extensive list).
190. Although it was not necessarily a breach of contract or unreasonable to go back to the ENG1 doctor, the contribution to the breach of contract by the respondent was in waiting so long to have those discussions, such that inevitably the claimant perceived them as further protracting his return.
191. In any event the failure to redeploy was an ongoing situation until the claimant resigned so it is not really necessary for the claimant to rely on the last straw.
192. We also note that it was not necessary for the respondent to enter the protracted dispute with the claimant as to how and what further information was provided to the ENG1 doctor, especially as the disputed requirements were withdrawn

by 24 May 2024 after the employment ended. That the respondent continued to take issue with the claimant's proposal on 5 April 2024 at page 446 did not assist, although the claimant had already given his ultimatum at that point.

*If so, did Mr Donnelly resign because of the breach(es)?*

193. Yes, the claimant resigned because of the respondent's ongoing failure to consider and facilitate redeployment shore-side and the failure to return him promptly to the payroll and to his role at sea once he had his ENG1. We find the breach in respect of the latter was in not considering the OH report and recommended adjustments promptly or at all, leading to their response to the ENG1, and that was a last straw which added to the breach.

*Did Mr Donnelly delay too long before resigning and so affirm the contract?*

194. We do not consider Mr Donnelly delayed too long. He was proactively seeking redeployment and return to sea as soon as possible simultaneously, including in his resignation letter. At that time there was a shore-side vacancy though he did not know it. He resigned the day after he was told the ENG1 was under question.

*If there was a breach of contract by the company, causing Mr Donnelly to resign, i.e. a constructive dismissal, was the dismissal nevertheless a fair one in the circumstances?*

*The company says that it had potentially fair reasons:*

*capability and/or*

*contravention of the duty or restriction imposed by an enactment (i.e. relating to the requirements of the Merchant Shipping (Maritime Labour Convention) (Medical Certification) Regulations 2010 and/or*

*some other substantial reason (i.e. avoidance of illegality, relating to the requirements of the Regulations, in particular with regard to the Claimant having failed to make the MCA doctor fully aware of his back condition at the assessment on 11 March 2024.*

*(This arises from their view that Mr Donnelly did not make the medical examiner aware of his back condition at his last assessment.)*

- 195 The reasons we are considering here are the reasons for the respondent's breach of contract. The above reasons are not the reason the respondent failed to consider or even respond adequately to the requests for shore-side redeployment or failed to react adequately to the OH report.
- 196 The reason the respondent challenged the ENG1 is because the claimant requested adjustments beyond those suggested by OH and the respondent did not explore this disparity.

- 197 We also do not find that the claimant failed to make the MCA doctor aware of his back condition. It was the same doctor at every examination and she did make notes about his back condition. Given the OH report and the ENG1 are not themselves in our view incompatible, we are not satisfied that the claimant's return to ship would actually have contravened the relevant enactment, but in any event the claimant by this time was equally happy with shore-side or sea based role, and there were vacancies shore-side in the lead up to his resignation.
- 198 We do not find there was a fair reason for the constructive dismissal. It was not necessary to consider the reasonableness test.
- 199 Remedy will be considered at the remedy hearing.

### **Failure to make reasonable adjustments**

*Mr Donnelly says that the company had the following PCPs:*

*A requirement that sea-going staff had to meet the medical standards required for a Seaman's Medical Certificate (ENG1).*

*A requirement to work at sea in all conditions; The manual handling and other physical elements of the Claimant's role.*

*The existence of these PCPs is not disputed.*

*If so, did the PCP put him at a substantial disadvantage compared with others in that he could not meet all the requirements of his role and had to have time off work. It is not disputed that PCPs put the Claimant at a substantial disadvantage.*

*If so, did the company take such steps as were reasonable to avoid that disadvantage? The burden of proof does not lie on Mr Donnelly, but he says that he should have been redeployed to a shore-based role, such as in the loading park or manning the check-in booths; if necessary by creating a vacancy for him on a temporary basis.*

*The company says that shore-based staff are employed by a sister or parent company based in Denmark – DFDS A/S.*

- 200 There were shore-based vacancies that were potentially suitable for the claimant to do on a regular basis from 1 February 2023- 9 June 2023. Some were seasonal, some were permanent. There were additional vacancies in around September 2023 or October 2023 that were filled by the seasonal staff and not included on the vacancy list. The vacancies then started again from 21 February- to 27 March 2024. We don't have details after that.
- 201 It is right that shore-side staff are employed directly by DFDS A/S whereas the claimant and all off shore staff are employed to work on the routes run by DFDS A/S by the respondent to avoid an on-shore presence. The respondent was created for this purpose. Essentially the shore side and the sea side staff all work for DFDS A/S but they have chosen not to employ- sea side staff directly

and employ them through the respondent as an off-shore company. They are separate legal entities but operationally they work very closely together, with HR services being provided by DFDS A/S; their premises are used for meetings and there are blurred lines in respect of the grievances, with managers from each investigating the work of the other company and reporting back to each other. The claimant's line management onboard are also off-shore employees but whilst not on board line management such as it was, was the responsibility of staff at DFDS A/S and the respondent.

- 202 We heard evidence that it is possible for shore-side staff to work on shore for up to a month and longer if the shore-side entity agrees to take on their payroll. Staff have also made the permanent transition successfully from sea- side to shore-side where there was a suitable vacancy, with the support of the respondent. If shore-side work has sufficient connection with off-shore work then that can be done whilst on the respondent's payroll.
- 203 The claimant's immediate management onboard following his aborted return in February 2023 identified that it might be a long time, if at all, before he was fit to work at sea. They suggested the exploration of an alternative on-shore role. This was briefly taken forwards by Mr Scott at a time when there were vacancies in the one shore-side role both sides agree was the only likely potentially suitable role (Operations Coordinator). The matter was picked up again by Ms Abbott just as the last vacancy before summer was still open.
- 204 It was reasonable to expect the respondent to take steps from February 2023 to facilitate a temporary secondment or redeployment into the Operations Coordinator role on shore-side following the steer from the ship's line management. This would have involved supporting the claimant in passing the screening programme as soon as he was fit enough to work. We do not accept that the two companies are so separate that the respondent had no influence over a transfer or redeployment. Mr Scott and Ms Abbott are both employed by DFDS A/S, the ultimate user of the claimant's work, and we find it more likely than not that if there was a vacancy (and we know there was) and the claimant passed the screening they would have been able to influence a temporary secondment in the first instance. We find that if there had been a will there would have been a way and there had been other occasions where it had happened.
- 205 It may be that the claimant would not have been immediately fit for redeployment but he was fit by May 2023 and was likely fit enough sooner than that. We find it likely that the claimant would have been fit for redeployment by the end of his sick pay, namely end of April 2023, when there were still vacancies.
- 206 We find that that is when the respondent should have made a reasonable adjustment to facilitate redeployment of the claimant, at least on a temporary basis initially. The claimant would have needed to pass the screening but the respondent has not really suggested a reason why he would not have done,

such that we find this had a reasonable prospect of alleviating the substantial disadvantage.

- 207 Another opportunity was presented to temporarily deploy the claimant (or extend his deployment) when the vacancies were filled in the early Autumn (we have found September- October 2023) and the claimant was saying he was fit to return to work and wanted to explore his last attempt to return to sea. It would have been reasonable at that point to temporarily deploy him shore-side and get him back on pay roll while the OH report and ENG1 were explored. We are not persuaded that that could not have been paid for by the respondent as it would have been part of the planning for the return to the sea-based role and therefore directly linked to it, it could have included a phased return building up the hours and giving time for the physiotherapy. However it could also have been redeployment to DFDS A/S on either a temporary or more open basis.
- 208 A phased return shore-side in preparation for his return to sea would also have been a reasonable response to the OH report suggesting that the best way they could help the claimant was to urgently give him some work.
- 209 Finally a further opportunity to deploy the claimant shore-side to DFDS A/S or paid for by the respondent as part of a phased return arose with the shore-side vacancies in February and March 2024.
- 210 We note that in all those circumstances the deployment could have been extended/converted to employment to DFDS A/S in the event that the claimant did not successfully return to sea (as this always remained a possibility). The comments above about the screening and reasonable prospects of avoiding the disadvantage apply to each opportunity to redeploy.
- 211 As an aside, at the Preliminary Hearing the claimant was not allowed to amend his claim to include DFDS A/S and so we are not tasked with considering whether they had any duties themselves under the Equality Act 2010, as the end user of his labour. However it is the case that s41 Equality Act 2010 puts the duty to make reasonable adjustments on the principal as well as their employer where someone is supplied by their employer under a contract to provide his work to the principal. We have not had to grapple with the contractual arrangements set up here and which company within DFDS Group would have shared that duty with the respondent, and have not heard from the parties on this matter. However we simply note it may well not be correct that there was no onus at all on the DFDS Group to make a reasonable adjustment for the claimant.

*Mr Donnelly also relies on the adjustments recommended in the Occupational Health Report of 1 November 2023, including:*

*a phased return commencing with 6 hour shifts and then building gradually to 8 hours, 10 hours and finally, full time 12 hour shifts*

*abstention from routine maintenance whilst on passage to allow for physiotherapy*

*providing an Able Seaman deck rating as a support worker where there is a requirement to lift and handle and push and pull against static loads*

*avoiding the following tasks: forklift truck duties, throwing of heavy lines, handling of mooring ropes (except to reduced diameter supplementary lines), handling of tugboat towing lines, manual handling of loads over 10kgs and awkward loads of any weight, use of lashing chains and cargo trestles, donning of fire suit and breathing apparatus save for emergencies, manning of lifeboats and rescue boats save for emergencies.*

*remaining in port to avoid cross-channel passages in storm force conditions.*

- 212 The OH report starts at page 349. As found in the facts above the OH report recommended adjustments and the claimant's list are not the same. The respondent points out that the claimant could not return to sea prior to having the ENG1 which he never had prior to this claim.
- 213 The recommendations of OH were the phased return building up gradually. The OH doctor suggests time for the claimant to do exercise but does not say he should abstain from routine maintenance. There was a suggestion of a support worker to carry out more physically demanding tasks at ports. It was not a suggestion that he have another Able Seaman as a support worker all the time or at sea at all.
- 214 OH did not suggest the claimant avoid the tasks specified above. He said there would need to be a manual handling risk assessment to ensure his safety. This is more in line with the claimant's evidence that he could do the tasks but needed to make sure he did not further injure his back. The tasks of concern to OH were tasks in port, and not at sea. In port he would be able to control the winches. OH did not say he would need to remain in port in storm force conditions but that he may struggle at times in bad weather as the movements of the ship could exacerbate his condition.
- 215 There are therefore only two clear recommended adjustments in addition to the time to do exercise onboard which he had been allowed on his last attempted return to sea. The phased return (standard practice after a lengthy absence) and someone else such as a support worker to do physically demanding work in port while he did the winches. In our view these are reasonable adjustments and steps could have been taken to put these in place ready for his return prior to his having his ENG1 in place. As set out above the phased return could have commenced shore-side during the period he had the ENG3 and consideration given at the earliest to reorganising duties so a colleague, such as for example a shore-side colleague, could be the support worker at port or undertake the physical work at port.

*Did the company not know, or could the company not reasonably have been expected to know, that he had osteoarthritis of the spine or was likely to be placed at this disadvantage?*

- 216 The Respondent relies on the fact that Mr Donnelly was eventually in possession of a “clear” ENG1 certificate and that at the previous assessment, the Claimant failed to obtain a clear certificate for reasons unrelated to the disability.
- 217 The respondent knew that the claimant had osteoarthritis of the spine and had not been able to work at sea from February to September 2023 and had been without income since April 2023, a situation that was continuing in the absence of shore-side redeployment until a successful return to sea. We have found the reasonable adjustments should have been made during or at the end of this period to alleviate that disadvantage. The respondent knew that disadvantage was not likely to be alleviated until the claimant did return to work in some capacity.
- 218 For the later period, we do not consider it relevant that for a period he had an ENG3 for unrelated reasons. The ENG3 did not prevent a reasonable adjustment to work shore-side. He had already suffered the substantial disadvantage of having not earned for 5 months and an adjustment to facilitate a return to work in any capacity would have alleviated that disadvantage.
- 219 It is not clear the relevance of the ENG1, as the respondent was preventing his return based on concerns due to the claimant’s disability and need for adjustments and was still aware of the disability and the disadvantage. In any event as the respondent pointed out this claim pre-dated the ENG1.

**Direct discrimination on grounds of disability**

*Did the company, in failing to redeploy him to a shore-based role, treat him less favourably than it treated or would have treated someone else in the same circumstances apart from his disability.*

- 220 Mr Donnelly compares his circumstances with a junior (named) officer who, he says, was given a job in HR for about 9 months in 2012/13 before going back to sea. We do not accept that he is an appropriate comparator due to the rules relating to taxation and the respondent’s perception that these were tightening up in recent years, meaning that the respondent would no longer allow this, even if it did do so in 2012-13. We accept that explanation. The claimant has not established that he was treated less favourably than any particular individual in the time period covered by the claim.

*If the Claimant was treated less favourably than the comparator, was this because of the Claimant’s disability?*

- 221 In any event the claimant has not established that the reason he was not redeployed to a shore-based role was because of his disability. We have heard that others have been successfully redeployed, including for reasons relating to health, when there were vacancies. The reason the claimant was not

redeployed to shore-side is that the respondent assumed he wanted to try a final return to sea first and/or did not see themselves as having the responsibility to take this forward with any urgency. Once it became clear he had wanted redeployment, there was not a current vacancy. The respondent also did not consider it their role to keep track of vacancies at DFDS A/S in order to facilitate redeployment.

### **Harassment on grounds of disability**

*In November 2023, did the company, or any of its employees, breach the confidentiality of his Occupational Health report (which recommended the appointment of an additional Able Seaman as set out above) by telling staff that he would be returning to work “as a passenger”.*

222 This relates to the messages referred to at paragraphs 105-107 above. We have no evidence of what the management of the respondent said, if anything, about the claimant in the monthly meeting. We have no evidence to support the allegation that the claimant’s Occupational Health report was discussed. In any event the Occupational Health report does not recommend a support worker on board, only at ports. So the Occupational Health report does not logically relate to a joke about being a passenger. It was the claimant who then offered information about the OH report and a need for a support worker to the unnamed colleague who messaged him.

223 His colleague who he has not named referred to the claimant as a passenger and said “no change there” in a manner that appears intended to be a joke. Whilst the message itself could be offensive the claimant has not said that he considers the message itself to be unwanted conduct, but rather what he assumes the management had therefore said about him in a meeting.

224 The claimant would not name the person so the respondent was not able to investigate this further.

*If so, was this unwanted conduct?*

225 As above the claimant has not complained of the joke itself being unwanted conduct. We have no evidence of what was said about the claimant by management at a meeting, if at all, to form a view that there was unwanted conduct.

*Was the conduct related to his disability? Did it have the purpose or effect of violating Mr Donnelly’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?*

226 The joke itself could potentially be seen as an offensive comment related to disability but that is not what the claim is about and is not the claim that the respondent has defended. We do not even have the name of the person who sent it and the messages in any event ended amicably.

227 Again we can make no finding that there was any unwanted conduct at a monthly meeting.

**Discrimination arising from disability**

*If Mr Donnelly was constructively dismissed (i.e. if the test at section 39(7)(b) Equality Act 2010 was met) was this unfavourable treatment because of 'something arising' in consequence of Mr Donnelly's disability, i.e. his absence from work or his inability to carry out his full duties?*

- 228 Here we have to consider whether the breach of contract leading to the constructive dismissal was unfavourable treatment because of something arising in consequence of his disability.
- 229 The conduct we found to be a breach of contract was the failure to facilitate his redeployment to a shore-side role in April 2023; September-October 2023; and February -March 2024. We have also found the failure to tell him in a timely manner the results of the enquiries in February 2023 and May 2023, or communicate adequately with him or at all about his requests for redeployment up and until when he left his employment in April 2024. The grievances did not set out how this would be addressed when vacancies did arise. Vacancies did arise in February and March 2024 and the respondent did nothing about these. Though the claimant was not aware of them he was aware of a lack of action or even response from the respondent on this issue. The respondent gave no proactive consideration to the OH report and its recommendations (which included redeployment) but simply put it in a drawer for later which led to the situation with the respondent questioning the ENG1 (rather than the claimant's list of required adjustments).
- 230 The failure to redeploy the claimant was partly due to a belief he wanted to have a last chance at the sea-side role first; partly due to the respondent not seeing itself as being responsible to proactively facilitate this with any urgency and partly due to a lack of vacancies at a particular time and no effort by the respondent to keep track of those vacancies. It's not clear why there was inadequate responses to the claimant about the redeployment but there is no evidence this was for a disability-related reason rather than for example the absence of designated line management when he was not on ship. The failure to look at the OH report in a timely way was due to the ENG3 for non-disability reasons.
- 231 We do not find less favourable treatment because of something arising from disability. It was therefore not necessary to consider the remaining questions in this section.

**Time limits**

*Discrimination claims have to be brought within three months of the act in question (i.e. three months less one day) - plus any time spent in early conciliation.*

- 232 Here, the relevant dates are as follows: Early conciliation began on 14 November 2023 and ended on 26 December 2023. The claim was submitted on 31 December 2023.

233 Since ACAS was first contacted on 14 November 2023, any acts or failures which took place before **15 August 2023** are potentially out of time. (Claims based on his resignation are in time.)

*Were any acts or failures prior to 15 August 2023 part of a continuing act with acts that were in time? If not, would it be just and equitable to extend the normal time limit?*

234 The only disability discrimination claim we have upheld is a failure to make reasonable adjustments. We have found this was a persisting failure from about April 2023 until March 2024 and that it contributed to the fundamental breach of contract, making this a discriminatory dismissal.

235 There were a number of moments when the respondent should have made the reasonable adjustment of facilitating shore-side redeployment. The earliest was April 2023; then September-October 2023 when vacancies were filled by seasonal workers; then again following the advice of Occupational Health, at the latest by the next vacancy in February 2024. We therefore consider this was a continuing omission and in time. At no time was there a final decision inconsistent with redeployment shore-side for example because the claimant did not pass the screening. At no time did the respondent proactively indicate it was not something it would work with DFDS A/S to facilitate even if there was a vacancy. The respondent simply did not see it as their responsibility to keep an eye on vacancies or be proactive in facilitating this.

236 In any event, if we are wrong about the above, and the deadline ought to run from April 2023 when the respondent ought to have facilitated shore-side redeployment, it is in our view just and equitable to extend time, as shore-side redeployment was a matter that the claimant kept alive with repeated requests until well after the 15 August 2023. He also pursued internal grievances before issuing his claim. The respondent was well aware that this was part of his claim.

237 We will consider the remaining remedy issues at the remedy hearing.

Approved by:  
**Employment Judge Corrigan**  
**23 December 2025**

Sent to the parties on:

**14 January 2026**

For the Tribunal Office

**Public access to Employment Tribunal Judgments**

All judgments and written reasons for the judgments are published online shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case. They can be found at: [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions).

**Recording and Transcription**

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>