Judgments

London Underground Ltd v Sullivan (Personal Representative of Mr M O'Sullivan (Deceased))

UKEAT/0152/15/DA, (Transcript)

EMPLOYMENT APPEAL TRIBUNAL

JUDGE HAND QC, BEYNON, EZEKIEL

29 JANUARY 2016

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L Seymour for the Appellant

K Harris for the Respondent

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SUMMARY

DISABILITY DISCRIMINATION - Compensation

Ground 1 of the grounds of appeal argued that the Judgment of the Court of Appeal in *Fox v British Airways plc* [2013] EWCA Civ 972, [2013] ICR 1257 pursuant to which the estate can recover against the Respondent losses which the Claimant and her children have suffered was wrongly decided but it is, of course, binding on this Tribunal, and counsel reserved the Respondent's position for further argument in the Court of Appeal. Therefore we dismissed that ground. Grounds 3 and 4 of the grounds of appeal raised the question as to whether the Employment Tribunal had reached a perverse conclusion as to whether there was an 80 per cent chance of the deceased still having been employed at the date of his death. We concluded that there was sufficient evidence to support that conclusion and dismissed the appeal.

JUDGE HAND QC:

(reading the judgment of the Tribunal)

[1] This is an appeal from a Judgment on remedy of an Employment Tribunal comprising Employment Judge Stewart, Ms Stennet and Mr Javed sitting at London (Central) at a hearing on 18 and 19 November 2014, which hearing was followed by two further days of consideration in chambers in December 2014. The Judgment and Reasons were sent to the parties on 30 January 2015. The result was that the Claimant, on behalf of the estate of her late husband, who died in September 2010, subject to an additional sum yet to be agreed between the parties in respect of what was described

as the second and third daughters' pension shortfall, was awarded compensation of some £223,869.17, made up of a basic award of £8,360, compensation under the *Disability Discrimination Act 1995* ("DDA") of £203,009.17, and an award of injury to feelings in the sum of £12,500. Miss Seymour of counsel, who did not appear below, has represented the Appellant, the Respondent below, who we shall call "the Respondent" in this Judgment. The Respondent to this appeal, the Claimant below, who we shall call "the Claimant" in this Judgment, has been represented by Mr Harris of counsel, who did appear below.

[2] This is not the first appeal to this Tribunal in this case, which is essentially a disability discrimination case. Just over a year ago a division of this Tribunal presided over by HHJ Peter Clark allowed an appeal by the Respondent in respect of the Judgment on liability of this Tribunal, a Judgment that had resulted from a hearing in April 2013 and was embodied in a Written Judgment and Reasons sent to the parties on 10 May 2013. We shall call this "the Liability Judgment". As a result of the Judgment of the division of this Tribunal presided over by HHJ Peter Clark, the case was remitted to the same Employment Tribunal for reconsideration of its finding about reasonable adjustment. That case was heard in October 2014, and we shall call that "the Remittal Judgment". Pursuant to the remission and to the Judgment on remission there was a further hearing held in November 2014, which we shall call "the Remedy Judgment". It is against that Judgment and Reasons that this appeal is brought.

[3] After a hearing before HHJ Richardson, the appeal was allowed to go through to this Full Hearing on three out of the four grounds of appeal. Ground 1 deals with a clear question of legal principle, which, unhappily, this Tribunal cannot engage with because it is accepted that it is bound by a decision of the Court of Appeal which the Respondent wishes to challenge. The issue of principle is whether the Judgment of the Court of Appeal in the case of *Fox v British Airways plc* [2013] ICR 1257, pursuant to which an estate can recover losses, which in this case the Claimant and her children had suffered, against a Respondent was wrongly decided. The third and fourth grounds of appeal are of a different character. They are both directed to specific findings made by the Employment Tribunal, which, in the submission of the Respondent, are connected to the extent that they are in reality the same finding. These are that had the late Mr O'Sullivan undertaken the shadowing of a particular employee, there probably would have been an improvement in his state of health of a particular degree and the further finding that there was an 80 per cent chance of the late Mr O'Sullivan still being in the employment of the Respondent when he died on 27 September 2010. In different ways and on different arguments these are said to be findings that a reasonable Employment Tribunal properly directing itself could not have reached on the evidence in this case.

[4] After Mr O'Sullivan had been working for the Respondent for around 21 years, during which he had an unblemished service record, latterly as a Station Supervisor at Barbican Underground station, he started to suffer from depression, diagnosed as being a reaction to his mother's death in 2008. As a result of that illness, he was absent from his work, which, it is said, he loved. As a result of the medication prescribed - citalopram and later amitriptyline, in varying doses - advice was given to the Respondent by its Occupational Health Department that Mr O'Sullivan should not carry out any safety critical work. This restriction was later extended to track work and safety critical decision making as well as safety critical work.

[5] In the year 2009 and again in 2010 Mr O'Sullivan was referred to two different units within the Respondent dealing with the rehabilitation of those who have been absent through illness. His referral to the first unit was in 2009, and his later referral to the redeployment unit was for a period of about 13 weeks just before his dismissal in 2010. Neither of those referrals brought about any improvement in his condition. During a case conference on 23 March 2010, "the idea of a Customer Service Assistant ["CSA"] role arose for the first time" (Liability Judgment, para 20). At a case conference on 16 April 2010 Mr O'Sullivan was accompanied for the first time by Mr Jason Gerrard, a trade union representative. Mr Gerrard appears to have been an enthusiast of Mr O'Sullivan getting back to work and of a process described as a work hardening period. Mr O'Sullivan's manager, Mrs Ani, spoke to the Respondent's Occupational Health Department, who had been involved throughout his periods of absence. At para 22 of the Liability Judgment it is said they:

"22. ... replied that there was no reason for the Claimant not to undertake a CSA role provided that he was accompanied and

observed, with a review once that process commenced. Occupational health was unable to offer a time frame for the Claimant being able to work unaccompanied "as this depends not only on his recovery from mental health symptoms but in gaining confidence and work hardening an individual gets for returning to work which may be the key factor in his recovery"."

[6] That is, we hope, a literal reproduction of the text. One wonders whether the word "for" at some point, whether in the original or in the transcription, is an erroneous replacement for the word "from" so that it would read, "... but in gaining confidence and work hardening an individual gets [from] returning to work ...". Be that as it may, Mrs Ani, having received that communication from Occupational Health, then corresponded with Mr Beveridge of the Operational Resources Team. His position was that if the restrictions on what Mr O'Sullivan could do remained in place permanently then he could not be employed in operations, which we understand to be where the CSA role resided. On the other hand, said Mr Beveridge, if the restrictions proved to be only temporary (Liability Judgment, para 23):

"23. ... it appeared that the employment position remained open and that it would be up to Mrs Ani as to whether or not she could accommodate the period of accompanied duties."

[7] Mrs Ani clearly felt she could not accommodate him, because when Mr Gerrard suggested at a case conference on 26 April 2010 that Mr O'Sullivan should shadow a CSA for a period of four weeks she responded that he had been (Liability Judgment, para 25):

"25. ... "... accommodated already. I have accommodated you as long as possible; I will medically terminate you with effect from 1 May 2010". ..."

[8] So, Mr O'Sullivan was dismissed with effect from 1 May 2010. He started these proceedings just over three weeks later. Unhappily, nearly five months later, on 27 September 2010, he died quite unexpectedly of a (we quote from his death certificate):

"... large left subarachnoid haemorrhage and intra-ventricular bleed and an anterior communicating aneurysm."

Thereafter the proceedings were taken over by the Claimant pursuant to s 206(1) of the

EMPLOYMENT RIGHTS ACT 1996.

[9] As we have already mentioned above, the original Liability Judgment was the subject of an appeal to this Tribunal. When that appeal succeeded and the matter was remitted, the Employment Tribunal presided over by Employment Judge Stewart reconvened on 10 October 2014 to consider the question (Remittal Judgment, para 1):

"1. ... Would a four week CSA shadowing period have given rise to a real prospect of the Claimant retaining his employment?"

[10] The Employment Tribunal approached that task without hearing any further medical evidence. Whilst acknowledging that in *Smiths Detection (Watford) Ltd v Berriman* UKEAT/0712/04, a division of this Tribunal presided over by HHJ Serota QC, it was observed at para 88 that, as a general rule, where the disability relates to mental health, some medical evidence is likely to be required as to the effectiveness of any proposed adjustments, it is clear that the Employment Tribunal did not accept that as an absolute and overarching principle. They said that there was no "absolute requirement in all cases for specific specialist medical evidence on the issue" (see para 5 of the Remittal Judgment,). Also, and in any event, there was a considerable amount of medical evidence in the form of "GP records,

occupational health reports and the reports of Professor Kay Holland-Emitter" that had already been presented at various stages of the case (see also para 5 of the Remittal Judgment).

[11] Having established that approach, the Employment Tribunal went on to find that a four week shadowing period would have given rise to a real prospect of Mr O'Sullivan retaining his employment. That conclusion was expressed in these terms at para 13 of the Remittal Judgment:

> *"13. ... The Tribunal concluded unanimously that in these circumstances, the 4 weeks operational workplace shadowing would have operated to foster his continued improvement and would have given rise to a real prospect of his retaining his employment, which would have been evident at the end of the 4 week period and capable of assessment by the Occupational Health doctor at that time."*

[12] At the Remedy Hearing, which is the subject of this appeal, the Employment Tribunal set out what it regarded as the issues at paras 3.1 to 3.6 of the Judgment. We do not think anything is to be gained by repeating them here. At the outset of the hearing on remedy a further procedural issue arose as to the admissibility of the proposed evidence of Dr Donna Morgans, a Consultant Occupational Health Doctor employed by the Respondent, who the Respondent wished to give evidence. The objection to the admissibility of her evidence was based on the Claimant's characterisation of it as expert evidence. As Miss Seymour noted in the course of her submissions, the Claimant had herself hoped to adduce expert medical evidence but the application to do so had been rejected. The Employment Tribunal, however, decided that it would accept the evidence of Dr Morgans, with this proviso: that any evidence that she gave that appeared to challenge previous findings made by the Employment Tribunal in the Liability Judgment "may properly be disregarded by the parties and by the Tribunal" (see para 4.3 of the Remedy Judgment). The evidence of Dr Morgans is particularly relevant to the submissions made by Miss Seymour in relation to ground 4. In a section of its Remedy Judgment titled "Conclusions", the Employment Tribunal discussed at para 14.1:

> *"14.1. What would have happened if the Respondent had accorded the Claimant the reasonable adjustment period of 4 weeks CSA shadowing? ..."*

[13] The reasoning of the Tribunal is set out in three sub-paragraphs, and the conclusion is in para 14.3 in these terms:

> *"14.3. ... On a balance of probabilities, on the basis of all the evidence before it, the Tribunal was unanimously satisfied that there would have been an 80% chance that the Claimant would still have been employed by the Respondent at the date of his death, 4 months after the end of the shadowing period, allowing for all contingencies."*

[14] In paras 14.1 to 14.3 the Employment Tribunal collected together some of the evidential material upon which the Employment Tribunal had relied in reaching the above conclusion. Whilst recognising that summaries can be misleading and partial, it seems to us that the following factors were considered to be relevant by the Employment Tribunal: (1) Mr O'Sullivan had attempted to reduce his medication in order to get back to work on a previous occasion, but this had proved unsuccessful; (2) at the time when he was dismissed he had reduced his medication, although his doctor had not wished him to do so; (3) he perceived his time in the first of the redeployment units to be demeaning, and that had an adverse effect on him and worsened his condition; (4) he was only 45 years of age and desperate to return to operational duties even in the role of a CSA, something he found to be a cheering prospect, according to his wife's evidence; (5) in early April 2010 the Respondent's Occupational Health Department had found Mr O'Sullivan to be "much improved" and stated that "work hardening" "could be the key to his recovery"; (6) his trade union representative had experience of the value of work hardening, which he had seen to be successful in some instances; (7) there was no medical opinion that stated him to be "permanently unable to return to his job"; (8) his medical history revealed two previous periods of depression of shorter duration from which he had recovered; (9) given that Dr Morgans had never seen Mr O'Sullivan, her evidence must be regarded as theoretical and general; and (10) in any event, in her evidence she had accepted that individuals vary and that although medication is decided upon by a patient's GP and that GP treatment is likely to be within the National Institute for Clinical Excellence guidelines, that is not so in every case.

[15] At para 14.2 of the Remedy Judgment the Employment Tribunal consider what might have happened had there been a four week shadowing period and concluded that it:

> *"14.2. ... would have brought about a sufficiently marked improvement in his condition - say 25% - so as to have made it clear that he was on the road to a steady recovery, including a reduction and/or change in his medication under GP supervision. ..."*

[16] They also concluded that this meant that:

> *"14.2. ... The risk of a capability dismissal would thus have significantly receded. ..."*

and:

> *"14.2. ... the shadowing period would in all probability have been the crucial catalyst in getting the Claimant to turn the corner and engage on a path of progressive recovery."*

[17] They also at para 14.2 dealt with the size of the Respondent's undertaking, which was a factor in their conclusion that a reasonable employer of that size:

> *"14.2. ... would not have dismissed an employee of over 23 years [sic] long service but would have retained the Claimant on a progressive recovery programme, whether by way of continued shadowing, the partial resumption of certain safety critical duties, some form of tailored supervision, or otherwise, in close consultation between OH and the Claimant's GP. ..."*

[18] The Employment Tribunal then turned to the question at para 15.1 of what the proper and correct measure of damages would be in respect of death in service benefit and enhanced pension for dependants. Having carefully analysed *Fox* (mentioned above) in paras 15.1 and 15.2, the Employment Tribunal concluded at para 15.3 that the measure of damages in respect of death in service benefit and enhanced pension should be assessed on the basis that the instant case had similar unusual circumstances to those in *Fox* so that the approach adopted by the Employment Appeal Tribunal and the Court of Appeal in *Fox* should be applied here with the difference that it was not certain Mr O'Sullivan would still have been employed when he died. There was, the Tribunal concluded, only an 80 per cent chance of that being the case. In para 14.3 the Employment Tribunal dealt with the future, looking forward from 26 April. They concluded in the first sentence that Mr O'Sullivan would have been subject to regular assessment. In the second sentence, which both counsel found somewhat hard to understand, as did we, it is said that if his progress had "slowed or faltered" then it was always open to the Respondent to:

> *"14.3. ... recommence its capability procedures over a reasonable period of time, in accordance with the regular stages of the review. ..."*

[19] It is not absolutely clear whether this sentence fits on one side of the line or the other. It is possible that it impacts on both the question of how likely it would have been for Mr O'Sullivan still to have been working in September 2010, and it could impact on how likely it is that he would not have been working at that stage. Looked at in the context overall of para 14.3, Mr Harris was inclined to think that it belonged to the latter rather than the former.

[20] Against the background of those factual matters, the decisions of the Employment Tribunal and the previous decision of this Tribunal, Miss Seymour deployed three arguments. In the Respondent's skeleton argument, which had been drafted by her colleague, Mr Edwards of counsel, a suggestion had been made that this Tribunal might now be

able to take advantage of an amendment to the *Employment Tribunals Act 1996* ("ETA") made by s 65 of the *Criminal Justice and Courts Act 2015*. In what I think we can all agree is a remarkable lack of clarity as to what provisions might or might not have been in force, it has taken this Tribunal and, it should be said, two Judges of this Tribunal, consulted about the matter by me and Miss Seymour, a not inconsiderable period of time to arrive at the conclusion that s 65 of the *2015 Act* is not in force. Confusion is caused by the fact that the *Practice Direction* of the Supreme Court seems to suppose that it is in force, but when one runs to earth the Commencement Orders made so far - which number three - it is clear that none of them has brought s 65 into force and therefore inserted into the *ETA* what may be s 37A or, according to one source we came across, may now be called s 37ZA.

[21] Be that as it may, the course suggested by Mr Edwards is not open to Miss Seymour. She accepts therefore that this Tribunal cannot institute any so called leapfrogging procedure by which this case is certified suitable to go straight to the Supreme Court, and, that being so, this Tribunal is bound by the Judgment of the Court of Appeal in the *Fox* case, which, it must be said, having scrutinised it, is not only a recent but also a very considered Judgment of a Court of Appeal that might have been thought very well suited to that task. The expression "a powerful court" is sometimes used. All Courts of Appeal are powerful courts; but the Judgment was given by a past President of this Tribunal and is a carefully reasoned analysis. What might happen if the case goes to the Court of Appeal is a matter of speculation, but one possible outcome might be that the Court would think that it ought to go to the Supreme Court, so all the more pity that the amendments to the *1996 Act* have not been brought into force. All that we can do in these circumstances is to dismiss the appeal on ground 1, and we shall hear submissions in due course as to whether we should ourselves grant permission for the matter to go to the Court of Appeal, if that is the course that Miss Seymour wishes to pursue, or whether the issue of permission to appeal on this point would be best left for decision by the Court of Appeal itself.

[22] Grounds 3 and 4 of the Notice of Appeal, as we have already suggested, are really different ways of looking at the same problem, and certainly, so far as ground 3 is concerned, the arguments of Miss Seymour rest on the premise that the decision being made about reasonable adjustments, which, it will be remembered, was the subject of the appeal from the Liability Judgment to this Tribunal and subsequently the remission back on that issue, dealing with whether or not the Tribunal had misdirected itself as to what might constitute a reasonable adjustment, involves the same factual matrix and analysis as the subsequent question: what compensation arises as a result of the disability discrimination by failing to make the reasonable adjustment?

[23] Mr Harris accepted in the course of his submissions that the two questions may be conceptually similar and may involve consideration of a similar if not the same factual matrix, but he did not accept that the two questions are the same. In order to understand the first question - that is, whether there had been a misdirection about reasonable adjustments and, if so, what the correct approach to a reasonable adjustment should be - it is necessary to consider only a little of the Judgment of a division of this Tribunal in this case presided over by HHJ Peter Clark. At para 20 the Employment Appeal Tribunal identified the PCP. With that PCP in mind, the Employment Appeal Tribunal then considered at para 28 of the Judgment what might amount to a reasonable adjustment. This reads as follows:

> *"28. Ms Thomas, we think, puts the point too high when she submits that unless the Employment Tribunal finds that the deceased would have been fit for safety critical duties (also forming part of the CSA role) after the four-week shadowing period then it cannot amount to a reasonable adjustment. However, there must be a real prospect that the proposed shadowing period would have put him sufficiently on the road to recovery to make it reasonable to expect the Respondent to retain him with a view to his returning to work, if not as a station supervisor then as a CSA, a role he was prepared to take."*

[24] What that division of the Employment Appeal Tribunal had considered was a series of decisions on the question of how one approaches identifying what is a reasonable adjustment. One of them, a decision of this Tribunal also presided over by HHJ Peter Clark, was *Romec Ltd v Rudham* UKEAT/0069/07. At para 40 of that Judgment it had been said by the Employment Appeal Tribunal that the error made by the Employment Tribunal in that case had been to think:

> *"40. ... it sufficient that an extended programme would give the Claimant an opportunity to prove himself or otherwise. ..."*

The Employment Appeal Tribunal then observed:

> *" ... That is the wrong approach. It was for the Tribunal to ask itself and answer the question, to what extent would an extended rehabilitation programme allow the Claimant to return to full time work as an engineer? Only after that question is answered can the Tribunal go on to answer the principal question, is that a reasonable step to take to remove the disadvantage suffered by the Claimant?"*

[25] Miss Seymour took us to those two observations to emphasise her submission that this was essentially the same question as asking: if the employee had not been unlawfully dismissed by reason of disability discrimination, what would the future have held? We do not accept that the above quotations illustrate that proposition; indeed, on the contrary, we think they illustrate the fact that a decision on reasonable adjustments is an entirely different decision to that being made in relation to the causation and extent of damage. This is, as para 40 of the *Romec* Judgment shows, an issue as to what is reasonable. This is an adjustment. If it is an adjustment that can have no practical effect on the employment of the disabled person, then it plainly cannot on any objective view of it be regarded as a reasonable adjustment. That is the conclusion that the division of this Tribunal in *Romec* arrived at, and that is what was being implemented, in our judgment, by the division of this Tribunal presided over by HHJ Peter Clark in the first appeal in this case. The issue was whether there was a real prospect that shadowing would put him "sufficiently on the road to recovery", to quote the precise words used at para 28 of the first Employment Appeal Tribunal Judgment in this case. If it would not, then it could not be a reasonable adjustment. If it would, then it was a reasonable adjustment. The question at that stage of the analysis does not answer the issue of, that adjustment having been made, how long the employee would have remained in employment. That is a different question.

[26] The Tribunal have given the appearance of having conflated these two matters by some of the language used, particularly in the Remittal Judgment. At para 6 the Tribunal say this:

> *"6. ... there was a real prospect that the four week shadowing of a CSA would have put the Claimant sufficiently on the road to recovery to make it reasonable to expect the Respondent to retain him with a view of his returning to work ..."*

[27] In those words themselves, it seems to us, the Employment Tribunal was doing no more than indicating what the start of a process might be. Unhappily, they decided then, as the first of their reasons for that conclusion, to state a proposition of law relating to how much of a prospect there needs to be for an adjustment to be a reasonable adjustment. At the start of para 7 they say this:

> *"7. Firstly, the threshold for 'real prospect' in the test as set out by the EAT Judgment is relatively low. It does not amount to a 51% likelihood or a balance of probabilities. It must however be real and not fanciful and based on a common sense objective assessment of the evidence and the various factors ..."*

[28] The Tribunal then sets out what it considers to be the factors. Miss Seymour, in her powerful, clear and attractive submissions, accused the Employment Tribunal of conflation, and she suggested that they must be taken at their word and have included this as one of the factors. If so, what the Tribunal must be taken to have found, submitted Miss Seymour, was that this was a less than 51 per cent likelihood case. That, of course, is entirely inconsistent with a subsequent finding of a 80 per cent likelihood.

[29] The first point to make about that is that the two matters are not at all the same. We have made that point already. The second point to make is that made by Mr Harris, with which we agree: that the fact that the Employment Tribunal chooses to express a threshold test does not involve a finding that the threshold rests at any particular place. Indeed, it is, in our judgment, when one reads the whole of para 7, clearly a separate part. The factors are set out second. This is an observation at the outset. It is perhaps an observation that had been better not made, but it does not, in our judgment, give rise to the inferential conclusion that Miss Seymour relies upon, namely that here the Employment Tribunal have reached the conclusion that this was less than a balance of probabilities, or less than a 51 per cent

likelihood, or however one wishes to express the matter. The Tribunal were in any event considering the starting point; they were not considering what might happen after the four week period. It seems to us, for all those reasons, the essential premise of Miss Seymour's argument is not made out.

[30] In many respects one might be able to terminate this Judgment at that point, given that the argument we have just rejected is such a fundamental support for all her arguments. But she also submitted that the Remedy Judgment was truly perverse because, as she put it, the Employment Tribunal had plucked a figure of 25 per cent from the air in para 14.2. There, the Employment Tribunal said this:

> *"14.2. On the basis of all of the evidence before it during these proceedings, the Tribunal concluded unanimously, on a balance of probabilities, that the 4 week shadowing period would have brought about a sufficiently marked improvement in his condition - say 25% - so as to have made it clear that he was on the road to a steady recovery, including a reduction and/or change in his medication under GP supervision. ..."*

[31] That use of the expression "say 25%" is, again, perhaps not the best way that the Employment Tribunal could have put it. If it had been left at the phrase that they used earlier, as "sufficiently marked improvement", then it would, in our judgment, have been entirely unexceptionable. But even the use of figures does not mean they were expressing themselves in precise mathematical terms. The use of the expression "say" in front of "25%" is an indication that they were merely seeking a numerical quantification of a "sufficiently marked improvement". It does not seem to us that the fact that they put the matter in that way can be said to be an incorrect approach on the part of the Employment Tribunal.

[32] It is then said that it is really a perverse conclusion and one that no reasonable Tribunal properly directing itself on the evidence could have arrived at for them to say in the next sentence:

> *"14.2. ... The OH doctor who saw him on 18 March 2010 had advised him to see his GP for a review of his medication, which in the light of his opinion that "his condition was much improved", could only have meant a reduction. ..."*

[33] When one examines the factual situation, submitted Miss Seymour, one can see quite clearly it was the late Mr O'Sullivan who, contrary to his doctor's wishes and advice, wanted to reduce the level of his medication. That is undoubtedly correct, but it does not seem to us that the Employment Tribunal must therefore be regarded as having approached this matter from an unreasonable evidential standpoint. The Occupational Health Doctor may well have meant that the late Mr O'Sullivan should see his GP to discuss his improvement, and it may well be an inference that should be understood as an opportunity to suggest a reduction. What the evidence really demonstrates, as it seems to us, is that the late Mr O'Sullivan was very determined to try his best to present himself as being in a situation to undertake the CSA work shadowing. We think that Miss Seymour is reading too much into that sentence.

[34] Nor does it seem to us that the points made by her in relation to the lack of any definitive medical diagnosis and prognosis made by an expert witness is a deficit of such a fatal kind as Miss Seymour would characterise it. The Employment Tribunal really did have no medical evidence in this case. That is a position in which many Tribunals find themselves. It is a difficult position - it sometimes occurs when deciding whether a person is disabled or not - but in the end medical evidence is no more than a specific kind of factual evidence. The Employment Tribunal in this case was entitled, in our judgment, to deal with the medical question. They had outlined their approach to Dr Morgans' evidence, and it is quite clear that they stuck to it. In our judgment, this was not a purely medical question; it was a question that needed to be decided as a question of fact by the Employment Tribunal but by reference to the totality of the evidence.

[35] Nor do we think that there was anything wrong in the next part of para 14.2, where the Employment Tribunal described a hypothetical reasonable employer with the size and resources of the Respondent and concluded that it "would have retained the Claimant on a progressive recovery programme". It then added to that generality a list of possible ways in which the matter could be dealt with:

"14.2. ... continued shadowing, the partial resumption of certain safety critical duties, some form of tailored supervision, or otherwise, in close consultation between OH and the Claimant's GP. ..."

The Tribunal goes on to say in the last sentence:

"14.2. ... The Tribunal formed the view that the shadowing period would in all probability have been the crucial catalyst in getting the Claimant to turn the corner and engage on a path of progressive recovery."

[36] What, in our judgment, the Employment Tribunal needed to do, having accepted that the Respondent acted unlawfully by not implementing a reasonable adjustment of four weeks' CSA shadowing, was to decide what loss flowed from its unlawful dismissal of the late Mr O'Sullivan and whether, had it behaved as a reasonable employer, he would still have been employed in September 2010. At para 14.3 the Employment Tribunal say this:

"14.3. ... On a balance of probabilities, on the basis of all the evidence before it, the Tribunal was unanimously satisfied that there would have been an 80% chance that the Claimant would still have been employed by the Respondent at the date of his death, 4 months after the end of the shadowing period, allowing for all contingencies."

[37] What the Tribunal was engaged upon was the difficult but routine task facing Employment Tribunals and courts of deciding what might happen in the future. Miss Seymour, both in her opening submission and more clearly and pointedly in her reply, submitted that the Employment Tribunal had erred in directing itself that it could approach this in a general way instead of ascertaining over the succeeding four to five month period what further adjustments might be needed, whether each one of those would amount to a reasonable adjustment and whether in the circumstances each of those would have led to a continuation of employment up until 27 September 2010. We cannot accept that as a proposition, whether it is put in terms of principle or it is put in secondary terms as being an example of the Tribunal having reached a decision without any proper evidential support. This approach would impose, in effect, the burden upon an Employment Tribunal at the end of a case of now constructing a yet further case and examining it in great detail. This is not the exercise that an Employment Tribunal, or for that matter any court, should have to face when ascertaining what the right amount of compensation is in respect of an unlawful act.

[38] Indeed, the issue here is somewhat similar to issues that arise in the context of compensation under the so called *Polkey v A E Dayton Services Ltd* [1987] IRLR 503 principles and under cases about for how long future loss should be calculated, cases that may be described as supervening event or subsequently supervening event cases. In paras 19 to 21 of his Judgment in *King and Ors v Eaton (No. 2)* [1998] IRLR 686 Lord Prosser described this process in these memorable terms: that what is to be undertaken is making the world as it might have been and necessarily embarking upon a sea of speculation. That is not, as it seems to us, an approach that supports the submission put forward by Miss Seymour that what has to be undertaken is a very detailed analysis.

[39] One of the *Polkey* cases that springs to mind is *Gover v Propertycare Ltd* [2006] ICR 1073, a Judgment of the Court of Appeal, where what was at issue was perhaps the opposite of the situation here, namely whether at some future point and relatively shortly after the dismissal there would have been a supervening subsequent event that would put an end to the compensation. At para 22 of his Judgment in *Gover*, citing with approval the last sentence of para 21 of Lord Prosser's Judgment in *King*, Buxton LJ says this:

"22. ... "...the matter will be one of impression and judgment, so that a tribunal will have to decide whether the unfair departure from what should have happened was of a kind which makes it possible to say, with more or less confidence, that the failure made no difference, or whether the failure was such that one simply cannot sensibly reconstruct the world as it might have been." ..."

He goes on to say that in his view all of that:

"22. ... indicates very strongly that an appellate court should tread very warily when it is being asked to substitute its own impression and judgment for that of the tribunal. ..."

[40] Now, we should say straightaway that Miss Seymour has not asked us to approach the matter in that way, but it does seem to us that when she invites us to say that the Employment Tribunal has gone wrong in the last two sentences of para 14.2 by not constructing a detailed enough analysis what she is actually submitting comes pretty close to us saying, "Well, this is how it should have happened, this is what should have been done, and the Employment Tribunal has made an error by not analysing it step by step". Whether or not we would have reached the same conclusion as this Employment Tribunal is an irrelevant consideration, and for that reason we do not propose to disclose what our own views might have been of this matter. We take the view, however, having analysed the evidence in this case and having considered Miss Seymour's submissions, that we must stop short of interfering with what is the exercise of their discretion without, as we see it, any error on the part of the Employment Tribunal. For those reasons, we shall dismiss this appeal.

APPLICATION TO APPEAL TO THE COURT OF APPEAL

[41] We think that it is really a matter for the Court of Appeal to decide whether they wish to hear this case. We cannot deny that this is a matter of general interest and of some importance, but in the circumstances we think that the Court of Appeal is the appropriate body to decide whether to grant permission to appeal, and we shall not do so.

Judgment accordingly.