Appeal No. UKEAT/0356/13/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 16 January 2015

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

KERRY INGREDIENTS (UK) LTD — APPELLANT

MR G LITTLE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MICHAEL DUGGAN QC (of Counsel) Instructed by: Messrs Astons Solicitors The Stables Manor Road Staverton Northamptonshire NN11 6JD
For the Respondent	MISS ANGHARAD DAVIES (of Counsel) Instructed by: Messrs Thompsons Solicitors The St Nicholas Building St Nicholas Street Newcastle-upon-Tyne NE1 1TH

SUMMARY

UNFAIR DISMISSAL

Compensation

Polkey deduction

Having found that the Claimant had been unfairly dismissed and suffered discrimination arising in consequence of his disability, indirect disability discrimination, and discrimination by reason of a failure to make reasonable adjustments, the ET considered what compensation would be awarded to the Claimant for his pecuniary losses.

Finding that it was "… more likely than not that the Claimant would have continued to work more than 70% of his contractual hours because of his admitted medical condition", the ET utilised the figure of 70% of net pay as the multiplicand. Taking that sum, it made an award of loss from effective date of termination to the date of hearing and "accepted as just and equitable the claimant's calculation of 39 weeks for the period of future loss." From the total compensatory award, the ET then found that there was a possibility of the Claimant being fairly dismissed in the foreseeable future and considered it just and equitable to reduce the award by 20% on a **Polkey** basis.

The Respondent appealed the compensatory award, contending that the ET had erred in its approach; reached perverse conclusions and/or failed to address the evidence; and failed to give adequate reasons for its conclusions.

Held:

The assessment of loss is a matter for the ET, using its common sense, experience and sense of justice. It may involve element of speculation, and will depend on the impression the ET

forms. That said, the judgment it reaches must have regard to the material before it and the findings of fact it makes upon that material. Where the ET considers that the employment would have continued, it must provide a sufficient statement of its conclusions on the evidence to enable the parties to understand the reasons for its assessment of the loss. It will be rare for the EAT to interfere with an ET's assessment of loss but it will be bound to do so if the ET has erred in its approach or has failed provide adequate - **Meek**-compliant - reasons for its conclusions.

The ET here had to make an assessment of what was likely to have happened had the Respondent acted fairly and in compliance with its obligations to the Claimant as a disabled person. Having found that the Claimant would not return to full-time, shift working, it needed to form an assessment of what hours he would have been able to work, when, and on what basis. If the ET rejected the Respondent's evidence (that the Claimant was only working productively for 20% of his time; was engaged on a "non-job" and that the Respondent had to pay an agency worker to cover his other duties) it needed to clearly state that it had done so, otherwise this was part of the material before the ET and needed to be taken into account; something that was not apparent from the reasons given.

Further, the ET's finding that the Claimant would only be able to return to a 70% level of working fed into the **Polkey** finding and the question of future loss. If the Claimant could not return to full-time, shift working (as the ET found), what was the assessment of how that might impact upon the Claimant's future employment prospects with the Respondent? In carrying out this assessment, the ET would need to take into account the Respondent's obligations to the Claimant under the **Equality Act 2010**. The reasons provided did not, however, demonstrate that the ET had done this.

On the basis of the ET's reasoning, the conclusions reached as to loss from the effective date of termination to the date of hearing and thereafter for 39 weeks, and as to a 20% **Polkey** reduction were absent any evidential foundation. This was not to say that such conclusions were necessarily perverse but the EAT could not be satisfied that the ET had adopted the correct structured approach. It had certainly not given adequate reasons for the conclusions reached.

In the circumstances, the appeal would be allowed and the matter remitted to the same ET to consider afresh the question of compensation for pecuniary losses.

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimant and the Respondent as they were before the Employment Tribunal ("the ET"). The appeal is that of the Respondent against a Judgment of the ET sitting at Newcastle-upon-Tyne (Employment Judge Johnson sitting with members on 6 and 7 March 2013, and on 5 April 2013 in chambers), sent to the parties on 30 April 2013. The Claimant was represented both before the ET and me by Miss Davies of Counsel. The Respondent was represented before the ET by its solicitor but before me by Mr Duggan QC.

2. The ET upheld the Claimant's claims of unfair dismissal and unlawful disability discrimination and failure to permit him to be accompanied. It awarded him compensation as follows: £18,962.47 in respect of the unfair dismissal claim; £10,000 injury to feelings and £860 for the failure to permit the Claimant to be accompanied. The Respondent appeals as to the percentage reductions applied to the unfair dismissal compensatory award and as to the number of weeks' loss awarded. There is no appeal against the liability ruling.

3. On the papers it appeared there may be a preliminary issue as to whether the Respondent should be permitted to amend its Grounds of Appeal. That was not pursued but, in any event, the "amendment" was really simply setting out the Respondent's case on the Employment Judge's response to the **Burns/Barke** order (see below).

The Background Facts

4. The Respondent is a substantial food processing company which has a site in Hartlepool, where some 160 employees work and where the Claimant was employed as a Maintenance

Engineer with continuity of employment going back to 2007. It had a Human Resources ("HR") Department, but that was based at one of its other sites in Bristol. Production at the Respondent's Hartlepool site was on a 24-hour basis all year round, saving Christmas and Boxing Day. The engineers worked a three-shift system to enable them to deal with any breakdowns or resetting of machinery or equipment and the Claimant worked that shift pattern until he suffered a serious heart attack in January 2011. Immediately thereafter the Claimant was off work for an extended period. He returned to work in December, initially on a reduced hours' basis. The Respondent's position, as explained in its last meeting with the Claimant on this subject in January 2012, was that it wanted him to return to full-time working but there was no pressure as to when he should do so.

5. Subsequently an issue was raised with the Claimant over a period of absence, and he was invited to a review meeting on 25 April 2012, at which there would be a discussion relating to his phased return to work and his current role. Meanwhile the Respondent was reviewing its engineering staff and considering whether or not it could continue to support the Claimant in a role on reduced hours and, if so, for how long. Management felt that this could not be allowed to continue. The Claimant was only working 18 hours a week and then was only actually working productively for 20% of the time; the work he did could be done by other shift engineers; his temporary role was surplus to requirements. Further, he was being paid full salary while an agency worker was being paid to cover his other duties. The objective of getting the Claimant back to work on a full-time phased basis was not being achieved.

6. The ET found that the Respondent had arrived at those conclusions before meeting with the Claimant and then communicated its decision at what was characterised as an informal pre-meeting to the meeting on 25 April 2012 without prior notice. The Claimant sought to hand in

a letter he had prepared back in March 2012 - having then intended to send that to HR - raising his concerns about how he felt he was being treated and that the Respondent was in breach of its obligations to him as a disabled person. That, however, was simply handed back to him as being of no relevance. He was, further refused the right to have a trade union representative with him. In the formal meeting it was then confirmed that the Claimant's position was no longer available and, as he was no longer able to fulfil the terms and conditions for his role, his employment would be terminated. In its letter to the Claimant of 30 April 2012, the Respondent confirmed he had been dismissed as of 25 April 2012.

7. The Claimant sought to appeal against the decision that he should be dismissed. The appeal hearing on 22 May 2012 was conducted by the Respondent's General Manager, a Mr Close, who had been actively involved in the earlier decision to dismiss the Claimant. The decision was upheld but the ET found that the appeal process and hearing was equally unfair.

The ET's Reasons

8. In respect of the question of unfair dismissal the Respondent's case had been that the dismissal was for a reason relating to the Claimant's capability. The ET found that the Respondent had assured the Claimant that a phased return to full-time work, and a timetable for that, would be left to him. It further found that the decision to dismiss him was taken without any consultation or discussion, without the Respondent ascertaining the true medical position or carrying out any investigation as to how and, if so, when the Claimant might be able to continue to increase his hours and intensity of work. The ET was not satisfied that a proper investigation would have made no difference to the outcome. The Claimant had accepted, in the internal process, that he was unlikely to be able to return to working full-time during normal shifts, but the ET found there was inadequate evidence to satisfy a reasonable employer that the Claimant

was incapable of performing the duties for which he had been employed and insufficient evidence for the Respondent to conclude that he would never be able to reach a satisfactory level or even a level on a reduced basis which might have been acceptable. The dismissal fell outside the range of reasonable responses.

9. On the question of disability discrimination, the ET was not satisfied that the Claimant was dismissed directly because of his disability, not least because the dismissing manager, Mr Luke, had not believed him to be disabled. Rather, he had been dismissed because the Respondent required him to work his full contractual hours on a shift basis and, after a 20-week phased return period, he had not shown he could do that. That was not direct disability discrimination but it was unfavourable treatment because of something arising in consequence of the Claimant's disability. The requirement that the Claimant worked full-time on a three-shift pattern was a PCP which put him at a particular disadvantage when compared to persons who did not share his disability and thus gave rise to indirect discrimination. As for objective justification, although the Respondent's business needs might have constituted a legitimate aim, it had been unable to demonstrate that dismissing the Claimant was a proportionate means of achieving that aim. His claims of discrimination arising from disability and indirect discrimination were accordingly made out.

10. As for reasonable adjustments, the ET accepted the Respondent had made some adjustments but there was no evidence that it was reasonable to limit the phased return to work to a period of 20 weeks and the Respondent had simply not turned its mind to the possibility of accommodating the Claimant on any other than a full-time three shift pattern basis. The complaint of a breach of obligation to make reasonable adjustments was well-founded.

11. As the Respondent had failed to permit the Claimant to be accompanied by his trade union official to the meeting on 25 April 2012, that claim was also made out.

12. On remedy the ET took into account the Claimant's net wage, assuming that he working his full weekly contractual basis. At the date of dismissal he was not doing so. The ET (see paragraph 32) found it more likely than not that the Claimant would have continued to be unable to work more than 70% of his contractual hours because of his admitted medical condition, allowing that "he had in fact been working approximately half of his contractual hours during his phased return to work". On that basis the ET utilised a figure of 70% of the net pay as the multiplicand. Taking that sum, the ET made an award of loss from the effective date of termination to the date of hearing and accepted as just and equitable the Claimant's claim for a period of 39 weeks as constituting his future loss. From the total compensatory award, the ET then found that there was a possibility of the Claimant being fairly dismissed in the foreseeable future and considered it just and equitable to reduce the award by 20% on a **Polkey** basis to reflect that risk. The ET made other findings on remedy which do not concern me at this stage.

The Appeal

13. The Grounds of Appeal were essentially fivefold. First, the ET had awarded 70% of salary for the Claimant's periods of loss from the EDT to the date of hearing and for 39 weeks further without reasons or rationale. It had further reduced the award by only 20% on a **Polkey** basis without reasons or rationale. Second, the decision was not **Meek**-compliant (**Meek v City of Birmingham District Council** [1987] IRLR 250 CA): the ET failed to set out its analysis of the issues with any clarity or at all (see **Whitehead v the Robertson Partnership** EAT/ 0031/01). Third, the decision was perverse and/or the ET misdirected itself on the facts. As the

evidence was that the Claimant worked for just less than 50% of the time on a trial basis there was no reason or rationale why 70% should have been adopted as the multiplicand. Fourth, the ET failed to address the evidential point that the Claimant only spent 20% of his time on productive work and/or the evidence of Mr Luke that the job that had been given to the Claimant was essentially a "non-job". Fifth, the ET failed to properly address the central issue: given the Claimant's admission (and, indeed, the ET's finding) that he would never work full-time on shifts, the ET needed to find what date the Respondent could or would have dismissed the Claimant, if a fair procedure had been followed, without discrimination.

14. Having considered the Grounds of Appeal on the papers HHJ Peter Clark considered that this matter should be set down for an Appellant-only Preliminary Hearing (allowing for the Claimant, as the Respondent to the appeal, to make written submissions) to consider whether this would be a case appropriate for a **Burns/Barke** direction. At that Preliminary Hearing, before Langstaff J, an order was made under the **Burns/Barke** procedure asking four questions of the Employment Judge. Those questions, and the Employment Judge's responses, can be summarised as follows:

> 14.1 What was the evidential basis as to why the ET considered that the Claimant could work up to 70% of his full-time hours?
>
> Answer: having regard to parts of the Claimant's witness statement and to the fact that during an agreed phased return to work the Claimant was gradually increasing his hours, the ET found it was more likely than not that the Claimant would have gradually increased his hours of work but he would not have been able to do so to a full 40-hour working week. The ET found it more likely than not that he would be able to work no more than 70% of his normal hours.

14.2 What were the ET's Reasons for saying there would be a reduction from full pay to 70% for someone who had been receiving full pay throughout his sick leave?

Answer: the ET had found no contractual obligation of the Respondent to pay the Claimant for a full 40-hour week of working; it was only obliged to pay him for the hours he attended work. The ET found the Respondent would have paid the Claimant only for the hours worked once it became clear that he was not able to return to full-time working.

14.3 What were the ET's Reasons for the 20% reduction in the compensatory award as set out at paragraph 36?

Answer: both parties had addressed the ET on **Polkey**. The Respondent said the Claimant would have been dismissed within a very short period in any event; the Claimant that the ET could not say with any degree of certainty that he would have been dismissed if there had been a fair process. The ET found there was a possibility that the Claimant could have been fairly dismissed in the future, assessing that risk as such to make it just and equitable to reduce the award by 20%.

14.4 As to future loss, what was the evidential basis for estimating that it should last for, or be calculated on, the basis of 39 weeks?

Answer: The Claimant had given that period in his Schedule of Loss:

> **"It is asserted that given the current economic climate and the claimant's personal needs and limitations, the claimant will have difficulties in finding alternative employment, to the extent that he had with the respondent and therefore claims his losses for a period of 39 weeks."**

He was not cross-examined in respect of that assertion, and the Respondent made no counter-submissions as to the length of the period of future loss. In those circumstances the ET had accepted the Claimant's evidence.

15. Having received those answers, the EAT (Langstaff J) directed that the Grounds of Appeal could proceed to a Full Hearing as they stood: it was reasonably arguable that there was, in effect, no proper evidential basis for the conclusions reached.

Submissions

The Respondent's Case

16. The ET awarded 70% of salary for the Claimant's losses, first from the effective date of termination to the date of hearing and then for a further 39 weeks to represent future loss, without providing adequate reasons or rationale. The same could be said for its reduction of the award by 20% on a **Polkey** basis. The ET had failed to demonstrate that it had grappled with the issues raised and the evidence on those points, and the decision was not **Meek**-compliant, the ET having failed to set out its analysis of the issues with any clarity or at all.

17. Further, the decision was perverse. The ET had misdirected itself as to the facts. The evidence was that the Claimant worked for just less than 50% of the time. There was no reason or rationale why 70% should then have been used as the multiplicand. On this point the response by the Employment Judge to the EAT's order under the **Burns/Barke** procedure merely demonstrated that the ET's approach was fundamentally flawed. First, because the finding was simply based on supposition; there was no evidence from the Claimant that he thought he could increase his hours to 70% and the paragraphs of the Claimant's witness statement referred to by the Employment Judge did not support such a finding. The most that

could be said was that the Claimant had stated he could not work full time on shifts. The ET had failed to take into account the fact that there was no productive work for the Claimant even if the work was increased to 70%. Similarly the ET had failed to address the evidential point that the Claimant only spent 20% of his time on productive work; the Respondent had to pay an agency worker to cover his other duties; and Mr Luke's evidence had been that the job that had been given to him was essentially a non-job.

18. Generally the ET had failed to properly address what might be seen as the central issue in the case. Given the Claimant's admission that he could never work full-time or on shifts (and the ET's finding to that effect), the ET needed to find at what date the Respondent could or would have dismissed the Claimant, if a fair procedure had been followed, without discrimination. Had the ET addressed this point (the Respondent contended) it would have found there was an 80% chance that the Claimant would have been fairly dismissed without discrimination within a further 20-week period during which the Claimant would have earned 50% of his salary at the latest.

19. The Respondent accepted the findings on liability, but the ET did not properly get to grips with the issues and/or the evidence on the question of remedy as set out above and further, in terms of the consequences of the ET's decision, that the Claimant's compensation should be based on a reduced salary at 70% of his contractual salary. The Respondent's primary submission was that there was no rationale for setting the salary at that level, but the further point arose that, by that finding, the ET was implicitly saying the Claimant could and would not return to full-time shift working. It needed to then consider and make a reasoned finding as to how that would impact upon any **Polkey** argument and any assessment of proved and future loss. The answers given by the Employment Judge to the EAT did not assist.

20. In making these submissions Mr Duggan QC made it clear that the Respondent accepted that any assessment of loss would have to take on board its obligations under the **Equality Act 2010**, including the obligation to make reasonable adjustments for the Claimant as a disabled person. That said, an employer was not bound to create a job for an employee, and it was the Respondent's case that there was simply no job for the Claimant given the constraints upon his ability to work. On that basis the ET needed to reconsider its decision fully on remedy, but there was a danger in sending this matter back to the same ET given that the Employment Judge had already had two opportunities to explain the reasoning. Inevitably the Respondent had a concern that remitting the matter to the same ET would simply give rise to the same finding.

The Claimant's Case

21. On behalf of the Claimant, Miss Davies made first the overarching submission that it was only in rare cases that the EAT should intervene in matters of compensation (see **Britool Ltd v Roberts** [1993] IRLR 481, at paragraph 24). The calculation of future loss is a necessarily speculative exercise. Here it was clear that the ET had taken into account relevant factors regarding the Claimant's state of health and, in so doing, it had the benefit of input from the industrial members. As for what an ET was bound to do in terms of the evidence, that was as set out at paragraph 34 of the case of **Thornett v Scope** [2007] ICR 236:

> **"Having regard to those authorities, I am unable to accept Mr Blake's first three submissions. The employment tribunal's task, when deciding what compensation is just and equitable for future loss of earnings, will almost inevitably involve a consideration of uncertainties. There may be cases in which evidence to the contrary is so sparse that a tribunal should approach the question on the basis that loss of earnings in the employment would have continued indefinitely but, where there is evidence that it may not have been so, that evidence must be taken into account."**

22. She further relied on the well-known guidance set out at paragraph 54 of **Software 2000 Ltd v Andrews & Ors** [2007] ICR 825, as to which see below.

23. As to the decision whether the Judgment was **Meek**-compliant, it contained sufficient reasons, allowing that Rule 30(6) of the ET Rules provided a guide and not a straitjacket (**Balfour Beatty Power Networks Ltd v Wilcox** [2007] IRLR 63 at paragraph 25 per Buxton LJ). What was required by the rule could be reasonably discerned from the ET's reasoning.

24. Turning to the specific findings. Starting with the finding that the multiplicand should be set at 70% of the Claimant's salary, the Respondent having conceded that there was a PCP which placed the Claimant at a substantial disadvantage there was an obligation upon it to consider different working arrangements other than full-time shifts and/or to make reasonable adjustments. It was relevant to note in this respect that the Respondent had been able to introduce an additional part-time engineering role (see paragraph7.24 of the ET's Judgment). That would have relevance to the assessment of how much longer and on what basis the Claimant ought to have been engaged by the Respondent.

25. The ET had to reach a decision on remedy and to do the best with the facts before it. It correctly directed itself to the two factors necessary. First, it had to take a view as to what would have happened but for the unfair dismissal; and second, it had to calculate the actual loss for the period considered appropriate. As for the Respondent's case that the ET failed to address the point that the Claimant only spent 20% of his time on productive work, that was the Respondent's evidence not a finding of the ET. The Claimant would argue that the ET's Reasons suggest it preferred the Claimant's evidence to that of Mr Luke, although Miss Davies conceded that there was not an obviously clear finding on this point.

26. On the period of loss point (the multiplier rather than the multiplicand) the Respondent failed to put forward any evidential basis for its assertion that a fair dismissal could have taken

place within 20 weeks. The ET had recorded that the Claimant had made clear on 25 April that he was not ready to return to work full-time or to work shifts, but that was different to an admission that he would never be able to work full-time or work shifts. The ET was bound to award what was just and equitable. That gave it a broad discretion. The case-law allowed that there may be a degree of speculation. The ET had found there was no basis for the Respondent to conclude that Occupational Health had advised it was not possible for the Claimant to return to his previous role working nights. It had criticised the Respondent for the lack of evidence to support its contention that it could not be expected to wait any longer. The Respondent had not even considered the Claimant to have been disabled and so had no regard to its obligations to him as a disabled person and thus had no evidential basis for saying what would have happened if it had complied with its duties under the **Equality Act**. The onus was on the Respondent to show dismissal would have occurred in any event. The ET's reduction by only 20% was entirely within its discretion.

27. If, contrary to those submissions, the EAT was minded to allow the appeal, it should remit this matter to the same ET. This was an Employment Judge sitting with members; all three would be aware of their obligations to approach any remitted hearing without being blinded by the previous findings on remedy. The factors were intertwined with the liability findings and a fresh ET would have to hear a great deal of evidence because it had not determined liability. Although it was fair to say that the same ET might also wish to hear further evidence, it would necessarily be less than if an entirely new ET was charged with hearing this matter on remission.

The Appellant in Reply

28. On the case of **Thornett v Scope** that was a case involving the question whether the evidence was so sparse that there should have been a finding that loss would have continued indefinitely. Where that was not the case, however, Pill LJ had, at paragraph 39, warned:

> **"It is important, however, that, when a conclusion is reached as to what is likely to have happened had the employment been allowed to continue, the reasons for that conclusion and the factors relied on are sufficiently stated. …"**

29. In relation to reasonable adjustments the ET had not engaged with the detailed possibilities suggested on the Claimant's behalf. The finding was negative rather than positive on that issue and did not assist in bridging the gaps in the ET's reasoning on remedy. On the question of disposal, if it was not reasonably practicable to remit to the same ET, justice could still be done as between the parties: the new ET would be approaching the questions of remedy on the basis of the existing findings on liability. There was no reason why it should not be done in any event, and that would allow for greater confidence in the remission.

The Legal Principles

30. There is no disagreement between the parties as to the relevant legal principles. Mr Duggan QC does not dissent from the applicability of the guidance set out in the case-law relied on by Miss Davies. The approach to the assessment of compensation in unfair dismissal cases is set down in the well-known passage from the Judgment of Elias J (as he then was) in **Software 2000 Ltd v Andrews** [2007] ICR 825:

> **"(1) In assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.**
>
> **(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future.)**

(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

(4) Whether that is the position is a matter of impression and judgment for the tribunal. But in reaching that decision the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

(5) An appellate court must be wary about interfering with the tribunal's assessment that the exercise is too speculative. However, it must interfere if the tribunal has not directed itself properly and has taken too narrow a view of its role.

(6) The section 98A(2) and *Polkey* exercises run in parallel and will often involve consideration of the same evidence, but they must not be conflated. It follows that even if a tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely. …"

31. The assessment of loss is plainly a matter for the ET using its common sense, experience and sense of justice. In many cases the assessment will inevitably involve a degree of speculation. That said, the ET is still obliged to have regard to all the evidence before it. The impression it forms, and the judgment it reaches, must have regard to the material before it and to the findings of fact that it makes upon that material. Where the ET considers that the employment would have continued, it must provide a sufficient statement of its conclusions on the evidence to enable the parties to understand the reasons for its assessment of the loss. It will be rare for the EAT to interfere in questions of the award of compensation, but it will do so - and is bound to do so - if an ET has erred in its approach or has failed to provide adequate (that is **Meek**-compliant) reasons for its conclusions.

Discussion and Conclusions

32. I start by reminding myself the ET is entitled to expect that its Judgment is taken as a whole and viewed overall. Doing so, it is here, it seems to me, tolerably clear that the ET did not accept that the Claimant was likely to return to full-time shift work, although the Claimant's

evidence before the ET had allowed for the possibility that he might have been able to return to full-time work within 16 weeks.

33. Having reached that conclusion, it then had to make an assessment of what was likely to have happened had the Respondent acted fairly and in compliance with its obligations to the Claimant as a disabled person. So, if the Claimant would only have been able to work reduced hours, what would those hours have been and on what basis would he be working? On the Respondent's case he was only working productively for 20% of the time and it was having to engage an agency worker to cover his other duties. The Claimant was suggesting - at least before the ET - that he would at some point have been able to return to full-time working. The ET concluded that the Claimant would have been able to increase his hours to a 70% basis. That was the ET's somewhat speculative assessment of what was likely to have happened in the future given that the Claimant had already been able to increase his hours from 8 to 18, a 55% increase over the initial period of his phased return. Engaging in speculation - founded in what had happened in the past - was not wrong but the ET still had to have regard to all the evidence before it, which included the Respondent's evidence that the Claimant was only working productively for 20% of the time. It may be that the ET rejected the Respondent's evidence on that point, but that is not made clear. Given that was part of the evidential material before the ET, the parties needed to be able to understand why it felt the Claimant would then have been able to return to a 70% level of working so quickly.

34. I am not satisfied that the reasons given enable the parties (or this court) to derive that understanding. Moreover, the finding that the Claimant would only have been able to return to a 70% level of working feeds into the **Polkey** finding and also the question of loss to the date of hearing and future loss thereafter. If he could not return to full-time shift working - as the ET

found - then what was the ET's assessment of how that might impact upon his future employment prospects with the Respondent given that it operated a 24/7 shift working basis?

35. The answer to that question might be that the ET had taken into account the fact that the Claimant was disabled and any view as to the likelihood of his continued employment would need to take on board the Respondent's obligations to make reasonable adjustments or address the indirect discrimination that he otherwise faced from the PCP of full-time shift working. I can certainly see that those matters would be relevant but, equally, I cannot see that the ET's reasoning was actually based on such an assessment. The ET would have needed to make findings as to the basis of the Claimant's future employment with the Respondent. Accepting that the Respondent was not obliged to create a job, which if any of the reasonable adjustments suggested by the Claimant before the ET did it conclude would have had to have been introduced? How would that have impacted on the Claimant's employment?

36. It is possible that the ET did take those matters into account in reaching the finding that he would be working 70% of the time and, if so, I can allow that might indeed be a legitimate conclusion to reach. It would, however, have needed to spell out those findings and that simply cannot be discerned from the reasons that have been given.

37. Similarly a 20% reduction for the possibility of a fair dismissal might be an entirely permissible finding, given the positive obligations upon the Respondent under the **Equality Act**. On the ET's Reasons, however, it cannot be said that it did base its conclusion on findings relevant to the Respondent's obligations under the **2010 Act**; those reading the Judgment are simply left with the statement of the conclusion apparently absent any evidential basis.

38. The same point also goes to the question of loss from the effective date of termination to the date of the hearing and for the future, albeit limited to 39 weeks. The starting point should have been for the ET to assess what it was that the Claimant would be doing, the hours he could work and - given the constraint that he could not work full-time (on the ET's own finding) - in what capacity he would be working. In making that assessment the ET would need to make findings (and explain those findings) as to any obligations upon the Respondent under the **Equality Act** (the Respondent accepting that any assessment of how it would have acted fairly must imply that it would act lawfully and in a non-discriminatory fashion). There would then be some basis for the ET's assessment of the amount of the Claimant's loss, which might well justify a finding that he would have been entitled to something like 70% of his former pay but equally might well lead to the conclusion that he would be entitled to something less than that. The ET would further then be in a position to assess whether the Claimant would indeed have been employed from the date of termination to the date of the hearing and thereafter, thus to assess the period of loss and the possible chance that he would in fact have been fairly dismissed (the **Polkey** finding) in any event.

39. I am not saying that the conclusions reached are necessarily perverse but I am saying that I cannot be sure from the ET's reasoning - either as provided in the original Reasons or as added to under the **Burns/Barke** procedure - that the ET adopted the correct, structured approach to its assessment. On that basis I conclude that the ET's Judgment on remedy on pecuniary losses cannot stand and the appeal must be allowed.

Disposal

40. During the course of argument I heard from both parties on the question of disposal should I be minded to allow the appeal. Both agreed the matter would need to be remitted but

disagreed as to whether it should be the same ET: the Claimant suggesting it should; the Respondent suggesting it needed to go to a fresh ET.

41. I have considered the factors set out in the guideline case of **Sinclair Roche Temperley v Heard and Fellows** [2004] IRLR 763. I am not entirely convinced that a different ET, bound as it would be by the existing ET's findings of fact on liability, could not adjudicate on questions of remedy without unduly adding to time and cost. I do, however, allow that I am entitled to trust to the professionalism of the Employment Judge and lay members. There is no question here of bias or partiality or of a complete mishandling of the case below; indeed, both parties accept the ET's findings and reasoning on liability in its entirety. I can also see the advantage of remitting this matter to the same ET, given its familiarity with the case and the fact it made the earlier findings of fact on liability. In those circumstances, to the extent it remains practicable, I remit this case to the same ET for re-hearing of the questions of remedy in terms of the pecuniary losses, and it should consider those matters afresh.