EMPLOYMENT TRIBUNALS

Claimant: **Mr Scott Marshall**

Respondent: **Parkway Entertainment Company Limited**

Heard at: **Lincoln** **On:** **21 June & 5 July 2017**

Before: **Employment Judge Evans (sitting alone)**

Representation
Claimant: **Mr Searle (Counsel)**
Respondent: **Mr Kemp (Counsel)**

JUDGMENT

1. The Respondent unfairly dismissed the Claimant.

2. If the Respondent had not unfairly dismissed the Claimant with effect from 3 November 2016 there would have been a 50% chance that he would have been fairly dismissed by being given three months' notice of dismissal on that date.

REASONS

Preamble

1. The Claimant was dismissed by the Respondent with effect from 3 November 2016. Following his dismissal he brought a claim of unfair dismissal. The hearing of that claim took place on 21 June and 5 July 2017 in Lincoln.

2. The Claimant was represented by Mr Searle. The Respondent was represented by Mr Kemp. Before the hearing the parties had agreed a bundle of 425 pages. All page references are to the hearing bundle.

3. The following witnesses gave evidence on behalf of the Respondent: Mrs Denise Parkes (a director and the company secretary of the Respondent) ("DP"), Mr Gerrard Parkes (a director of the Respondent) ("GP"), and Mr Richard Parkes (a director of the Respondent) ("RP").

4. The Claimant gave evidence in support of his claim. So too did Mr Keith Edwards (the Accounts Controller and then Finance Director of the Respondent from 2009 until 30 June 2016) ("KE") and Mr Maurice Fuller (an independent business consultant of CMF Consultancy Services) ("MF"). The evidence of KE and MF was limited to adopting their written witness statements: they were not asked any supplemental questions and Mr Kemp chose not to cross examine them.

5. These reasons deal with liability and the reduction of any compensatory award under section 123(1) of the Employment Rights Act 1996 ("the 1996 Act") as a result of the application of the principle derived from the case of **Polkey v AE Dayton Services Ltd 1988 ICR 142**.

Issues and discussion at the beginning of the Hearing

6. The parties and Tribunal agreed at the beginning of the hearing that the following issues arose in relation to the issue of liability:

1) Was the Claimant dismissed for some other substantial reason of a kind such as to justify the dismissal of someone holding the Claimant's position?
2) If not, what was the reason for the Claimant's dismissal?
3) Did the Respondent follow a fair procedure in relation to the Claimant's dismissal?
4) Was the Respondent's dismissal of the Claimant fair or unfair by reference to section 98(4) of the 1996 Act?
5) If the Respondent failed to follow a fair procedure in relation to the Claimant's dismissal, would the Respondent have dismissed the Claimant in any event had it followed a fair procedure?

7. During the discussion at the beginning of the Hearing Mr Kemp indicated that the Respondent was not arguing that any compensation should be reduced under section 123(6) or section 122(2) of the 1996 Act as a result of the Claimant's conduct. However in this case the Claimant seeks an order for reinstatement and Mr Kemp indicated that (if necessary) the Respondent would argue that the Claimant had caused or contributed to some extent to the dismissal, that being a factor to be taken into account when the Tribunal considered whether to make an order for reinstatement under section 116(1)(a) of the 1996 Act.

8. I should note at this point that there was a misunderstanding (which only became apparent during oral submissions at the end of the second hearing day) about the issues to be decided. Mr Kemp had understood that it was agreed that I would deal with the issue of whether a reinstatement order should be made (in the event that the claim were successful) but not other remedy issues at the same time as dealing with issues of liability. That was not my understanding of what had been agreed; nor was it the understanding of Mr Searle. Consequently I made clear at the end of the second hearing day that this judgment would deal only with issues 1) to 5) as set out above.

9. In light of this misunderstanding Mr Kemp indicated that the Respondent might wish to call further witness evidence in relation to the issue of reinstatement at any remedy hearing because by the date of such a hearing the factual context for a reinstatement order might have changed. I indicated that the Respondent would be permitted to do this.

The Law

10. Section 94 of the 1996 Act gives an employee the right not to be unfairly dismissed.

11. Section 98(1) of the 1996 Act provides that when a Tribunal has to determine whether a dismissal is fair or unfair it is for the employer to show the reason for the dismissal and that such reason is a potentially fair reason because it falls within section 98(1)(b) or section 98(2). The burden of proof to show the reason and that it was a potentially fair reason is on the employer.

12. Section 98(1)(b) provides that a potentially fair reason for dismissal includes:

> *Some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

13. A reason for dismissal is a set of facts known to, or beliefs held by, the employer which cause it to dismiss the employee.

14. If the Respondent persuades the Tribunal that the reason for dismissal was a potentially fair reason, the Tribunal must go on to consider whether the dismissal is fair or unfair within the meaning of section 98(4) of the 1996 Act:

    Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

    (a) 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

    (b) Shall be determined in accordance with equity and the substantial merits of the case.

15. Section 98(4) applies not only to the actual decision to dismiss but also to the procedure by which the decision is reached. The burden of proof is neutral under section 98(4).

16. In considering this question the Tribunal must not put itself in the position of the Respondent and consider what it would have done in the circumstances. That is to say it must not substitute its own judgment for that of the Respondent. Rather it must decide whether the decision to dismiss the Claimant fell within the band of reasonable responses which a reasonable employer might have adopted.

17. Section 123(1) of the 1996 Act requires:

    Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

18. Consequently, if a tribunal finds a dismissal to be unfair, it must consider whether any compensation awarded should be reduced to reflect the chance that the Claimant might have been dismissed fairly at a later date or if a fair procedure had been used.

Findings of Fact

19. I am bound to be selective in my references to the evidence when setting out my findings of fact. However, I wish to emphasise that I considered all the evidence in the round when making these findings.

20. The Respondent is an independent cinema business. It was established by the late Mr Gerald Parkes (the father of GP and RP) and he managed it with his wife, DP, until his death in May 2013. The Respondent's first cinema was opened in rented premises in Worksop. Further cinemas followed in Scunthorpe and Louth. In 2004 the Respondent opened a new cinema complex in Cleethorpes.

21. GP and RP had both been involved in the Respondent's business as teenagers. RP went away to university and then moved to London in 1999 where he began to work in advertising. GP remained involved in the Respondent's business after the conclusion of his education and worked in it until November 2009 when he went to live in Australia. He lived in Australia until January 2015.

22. SM was employed by Mr Gerald Parkes in 2005 as the General Manager of the Respondent's business in Cleethorpes. Mr Gerald Parkes retained overall control and was also considerably involved in the day to day running of the business. KE was employed as the Accounts Controller in 2009 on the advice of the Respondent's accountants.

23. In late 2011/early 2012 Mr Gerald Parkes was diagnosed with cancer. After treatment the cancer went into remission but it returned in October 2012. It became clear that Mr Gerald Parkes was not going to recover and he died on 24 May 2013. This was just a few days after he had been awarded an MBE for services to the cinema industry.

24. GP returned to the UK in April 2013 before Mr Gerald Parkes died. He remained in the UK for three months and then returned to Australia until early 2015. RP became more involved in the Respondent's business from late 2012. However he remained employed in the advertising industry in London.

25. The Claimant as General Manager took on additional responsibilities during Mr Gerald Parkes' illness. Following Mr Gerald Parkes' death, the Claimant was appointed the Managing Director of the Respondent with effect from May 2013. There was some suggestion that this appointment was as a result of confusion by DP about Mr Gerald Parkes' wishes. Indeed that confusion seemed to continue up to the day of the hearing: DP said Mr Gerald Parkes had wanted the Claimant to be the "Chief Operations Manager", GP thought Mr Gerald Parkes had wanted the Claimant to be the "Operational Manager" and RP thought that Mr Gerald Parkes had wanted the Claimant to be the "Operations Director". Nevertheless the Claimant was appointed Managing Director. He became a member of the Board of Directors and was permitted to acquire (for a nominal sum) 10% of the Respondent's shares. Around the same time KE was appointed Finance Director and permitted to acquire 5% of the Respondent's shares. In July 2013 GP and RP were also appointed to the Respondent's Board of Directors. In addition, following Mr Gerald Parkes' death, DP, who was already a director, became the Chair of the Board.

26. As such, following the death of Mr Gerald Parkes, both the ownership and management structure of the Respondent were changed. There were, in effect, three executive directors: the Claimant (Managing Director), KE (Finance Director) and DP (Chair) who all owned shares in the Respondent. In addition, RP and GP became directors. They were not involved in the day to day business of the Respondent. Neither lived in Cleethorpes: RP was still working in the advertising industry in London and GP returned to Australia in mid-2013. RP and GP also had minor shareholdings in the Respondent: the bulk of the shares were owned by DP.

27. The Claimant was issued with a new contract of employment following his appointment as Managing Director and this had a job description attached to it [p299]. This stated:

> *Reporting to the BOARD, the Managing Directors [sic] role is to oversee the effective day-to-day running of PARKWAY ENTERTAINMENT COMPANY, comprising of [sic] multiple PARKWAY cinemas (specifically Louth, Cleethorpes and when open, Beverley).*

28. It further stated that:

> *The MD will report frequently to the Chair of the Board, (Denise Parkes) on the day to day running of the business…*

29. The fact that the Claimant was to have day-to-day management control was also reflected in the minutes of the Board Meeting on 27 June 2013 [p43], shortly following his appointment, and which was attended by the Claimant, DP, GP and RP:

> *It was agreed that Scott (SM) would be in charge of all 'day-to-day' decisions and "Housekeeping"… the general running of both Cleethorpes and Louth.*
>
> *Denise (DP) will be regularly on hand to share day-to-day issues and idea, and GP and RP will be available regularly for any 'bigger' considerations:…*

30. An example of the autonomy that the Claimant was expected to exercise is contained in the very same minutes which record (under the heading "Overall

Structure") [p45] that:

> *…it was agreed that SM has full authority to 'hire and fire'. The family would like to be kept informed of these decisions, but the authority and decision-making rests entirely with SM.*

31. For some time prior to his death Mr Gerald Parkes had been considering building a new cinema complex in Beverley. He had discussed these plans in some detail with his family before his death but the project was in its infancy when he died. Following his death, the Respondent continued with the Beverley project. However building a new cinema complex placed substantial demands on the Respondent's management team and was outside the Claimant's area of expertise – managing cinemas. At the end of 2014 DP asked RP to move back to Cleethorpes from London to help with the Beverley project. RP agreed to do this and gave up his job in the advertising industry in London. In early 2015 GP returned from Australia to help with the Beverley project.

32. The Chair of the Respondent, DP, did not at this point imagine that the day-to-day involvement of the GP or RP in the Respondent's business would last beyond the building phase of the Beverley project. DP commented in her evidence "I thought [GP] would go back to Australia with his family when the Beverley cinema was complete". She also assumed that RP would return to his career in advertising (as indeed he did in May 2016 when he took up a role in Nespresso which required him to divide his time between London and Geneva). GP and RP were as such regarded as the cavalry coming to assist with the building of the new cinema complex in Beverley.

33. I find that the seeds of the conflict which have resulted in these proceedings were sown at the point when GP and RP began to work on a day-to-day basis in the Respondent's business in early 2015. Although the intention of DP, the Chair of the Respondent, was that they would "focus on Beverley", with the Claimant continuing with the day-to-day management of the Respondent's business, neither GP nor RP was issued with a job description or given a clearly defined role and consequently there was a very considerable lack of clarity about the border between the responsibilities of GP and RP on the one hand and those of the Claimant on the other. I find that DP as the Chair and majority shareholder was responsible for this failing.

34. The consequences of this lack of clarity were amplified by various matters. First, the Respondent is a family-owned business. RP and GP were minor shareholders and directors in it and anticipated in due course owning nearly all of its shares, once their mother's involvement in the business ended. Secondly, they had both worked in the Respondent's business as teenagers and subsequently, and had grown up surrounded by it. As such they both had strong views about how things should be done. These matters made it far more likely that they would seek to involve themselves in the Respondent's business beyond the Beverley project than would have been the case if they had simply been two employees/contractors brought in specifically to work on it.

35. I find that GP (and to a lesser extent RP) interfered in a piecemeal way with the Claimant's responsibilities as Managing Director following their involvement in the business in early 2015. They involved themselves in a way which had not been envisaged by DP when they returned because their involvement went beyond the building of the new cinema complex in Beverley.

36. Examples of this included:

    a. GP sending the Claimant a detailed note on 27 March 2015 of day-to-day issues concerning the management of the cinema complex in Cleethorpes;

    b. RP involving himself in mid-2015 with confectionery deals that might be favourable to the Respondent generally;

c. GP believing that he should have been involved in the recruitment of the Manager for the Beverley cinema complex;

d. GP seeking to involve himself in the minutiae of the coffee shop at the Beverley cinema complex: the coffee machine that should be purchased and the kind of coffee that should be used;

e. GP seeking to involve himself in the recruitment of cleaners at the Beverley cinema complex.

37. I find that DP generally backed the Claimant in relation to these matters. I find that she agreed the recruitment of the manager of the Beverley cinema complex with the Claimant. She agreed with the decision of the Claimant in relation to the coffee machine and the cleaners at the Beverley cinema complex. Further, the Board Meeting minutes [p90] record a board decision not to proceed as RP was suggesting in relation to confectionery deals.

38. I find that DP as Chair agreed with the Claimant that GP, and to a much lesser extent RP, were seeking to involve themselves in areas of the Respondent's business that were not properly their concern given the Claimant's position as Managing Director and the contents of his job description and this was reflected in her backing of him in relation to matters such as the recruitment of cleaners. It was also reflected in the behaviour of GP. In late November 2015 he prepared a document [p120] which he titled "The elephant in the room – no pun" ("the elephant in the room document"). It was addressed to all board members but in the event it was only seen around the end of November by RP and DP, who decided not to circulate it further. In the document GP vents his frustration about the decision in relation to the coffee machine/coffee and cleaners, and the recruitment of the manager for the Beverley cinema complex. The note then moves on to a scatter-gun criticism of various minutiae concerning the running of the business (for example, the sale of child size popcorn boxes in the evening when they should not be available). It ends as follows:

> *These issues combined with our recent meeting ending so badly have been very difficult for me, and I'm sure for you too.*
>
> *Therefore because of this I intend not to attend the directors [sic] meetings over the next few weeks as I want to concentrate on the most important thing – getting the new site open.*
>
> *I will of course fully and openly engage in all correspondence and be forthcoming with any and all information requests.*
>
> *At the moment I do not find myself able to 'just trust' either Scott or Denise when it comes to making decisions, as I feel that my input and opinions are being ignored, and I do not think that a lot of these decisions are correct.*
>
> *I would really like to find a way to build and have this trust.*

39. I find that it is clear that GP was seeking to involve himself in a variety of matters which were outside his intended role in relation to the Beverley build. He was seeking a hands-on role across the whole of the business. I accept the evidence of MF that was unchallenged in cross-examination that GP "had stated on several occasions to numerous people including myself that it was his intention to take over as Managing Director and to be totally in charge of the business". In so doing I prefer MF's unchallenged evidence to that of GP who denied making such statements. I prefer MF's evidence for reasons including the following: (1) I find that in principle MF was a neutral witness with no axe to grind whereas quite clearly GP was not; and (2) GP was an unimpressive witness. He expressed himself with a singular lack of clarity when giving oral evidence and on more than one occasion sought to "joust" with Mr Searle rather than answer the question being put to him.

40. Further, I find that when thwarted in this respect by the decisions of the Claimant, who was backed by DP, GP reacted petulantly. The elephant in the room document ends with the GP saying he does not trust the Claimant or DP to make good decisions and by him saying that he is taking his bat home – by not attending Board Meetings. I also find that this is how DP saw his behaviour: this is reflected in the message accompanying the £200 gift voucher that DP gave the Claimant at the end of 2015:

    Happy Christmas. I appreciate all that you have done, particularly this last year, I know it's not been easy…

41. There was a board meeting on 19 January 2016. During that meeting GP made significant criticisms of how the Respondent was being run and alleged that its finances had deteriorated. He referred to the elephant in the room document (which had still not been circulated). DP subsequently forwarded the document to the Claimant, KE and RP on 8 February 2016.

42. The Claimant was displeased with the elephant in the room document, which he did not accept as accurate. Further, the elephant in the room document upset KE enormously. He subsequently resigned on 31 March 2016 and, in his letter giving his reasons for his resignation dated 16 May 2016 [p209], the first reason he gives is the document. He describes it as "defamatory" as well as "extremely inaccurate and offensive".

43. I find that subsequent to this DP decided that it was in the best interests of the Respondent for GP to return to Australia as soon as possible and no longer be involved in the day-to-day running of the business. She spoke to MF, an external consultant working with the Respondent, about this. She sent a check list of issues to address with GP to MF for discussion on 3 March 2016 [p178]. This included items such as "cannot afford salaries", "no actual role available", "return to Australia". She said in the email "any additional pointers welcome". MF replied on the same day with some further thoughts on how DP should handle the conversation with GP. I find that DP had conversations with the Claimant, who had on various occasions expressed his dissatisfaction with the way in which GP and, to a lesser extent, RP were interfering with his role in which she said that RP would be returning to the world of advertising and GP would return to Australia.

44. Shortly after 3 March 2016 DP met with GP at his house. I find (in accordance with her oral evidence) that DP had gone with the intention of asking GP to return to Australia. GP, however, did not wish to return to Australia. He told his mother he would take any course that might be deemed beneficial to the Respondent's business, that he would like to learn more about accounts, etc. DP decided that she could not ask GP to return to Australia. She would leave the matter to him, and he decided not to return. I find that at this point DP let family loyalties and maternal affection trump what her business sense suggested was necessary: she thought it was in the interests of the Respondent for GP to return to Australia but, as his mother, she felt unable to request him to do so once he had made plain that he wished to remain in the UK working for the Respondent.

45. There was then a "family meeting" before the next Board Meeting on or around 16 March 2016. It was attended by DP, RP, GP and Ian Pounder, an accountant and longstanding adviser to the Parkes family and the Respondent. Ian Pounder understood that it had been agreed that he would Chair future Board Meetings and that GP would be the Vice Chair of the Board. He acted accordingly at the Board Meeting on 16 March 2016. The Claimant was dissatisfied that neither matter was dealt with at the board meeting itself and subsequently DP wrote to Mr Pounder [p184] saying that in fact it had been her intention that the Claimant would continue to chair Board Meetings and that the Board should have voted on the appointment of GP as Vice Chair.

46. I find that DP felt under considerable pressure at this time. She decided she did not wish to have a substantial day-to-day role in the business and would step down from

her role as Chair. She and Mr Pounder went to see the Claimant on 19 April 2016. The Claimant was told that DP would step down as Chair with immediate effect and that DP's shares would be divided between GP and RP. She indicated to the Claimant that GP would be a permanent fixture at the Respondent. This completed the reversal of her position that GP should return to Australia and that it would thereafter be business as usual for the Claimant.

47. The next Board Meeting took place on 26 April 2016. At that meeting DP confirmed she was stepping down, KE said that he had resigned and RP explained that he would be starting a full-time role with the Nespresso group a week later. There was also discussion of the roles going forward of GP and the Claimant. I find that it was decided that going forward GP would be the Chair and that the Claimant would remain the Managing Director. I find that this was not a decision with which the Claimant agreed. I further find that nothing was agreed about their respective areas of responsibility. I find that the position was left as set out in RP's corrections to the minutes [p203]: "Roles: Scott and Gez to talk and agree structure and decision process going forward." I find that it was clearly understood, however, that GP's role would be one involving day to day management. Mr Pounder is recorded as saying that "GP and SM will effectively be Joint Managing Directors".

48. I find that the Claimant was in an extremely difficult position following this Board Meeting. His role and reporting lines were clearly described in his contract of employment but the result of the Board Meeting was that he was in effect meant to agree a new "job description" with GP which would almost certainly reduce his executive autonomy. Further, he had already found it difficult to work with GP and GP had already made his views of the Claimant plain in the elephant in the room document.

49. On 12 May 2016 GP sent the Claimant a document that he described as "the barebones of the decision making process within the company" which he and the Claimant had been asked to agree at the Board Meeting on 26 April 2016. The document is badly written, unstructured, disjointed and ends with a specific gripe about how in GP's view the Claimant had undermined him in an email relating to work involving the removal of asbestos. In broad terms, the document suggests that decisions should still "come through" the Claimant (unless otherwise agreed). The document is not clear in relation to which decisions will be taken by the Claimant and which by GP. Further, its statement that "Each other's council [sic] should only be sort [sic] when the question arose 'Would the other have an opinion, advice or experience to offer the decision' [sic]" is vague in the extreme. The Claimant did not reply to this document.

50. It was around this time that the Claimant decided that he would raise a grievance with DP. I find that he did this as a consequence of the decision of DP that GP would remain with the Respondent, of the April Board Meeting and the document that GP sent to him after it, and of the resignation letter of KE [p209]. The grievance was dated 17 May 2016 and raised a variety of matters [p216]. He complained, amongst other things, about decisions that should have been made by the Board being made outside its meetings and of restrictions being placed on his decision making powers as managing director. He stated that such matters had resulted in breaches of his contract of employment and:

> *The breakdown of my role as a Managing Director…*
> *The Managing Director position becoming untenable.*

51. DP stated in her witness statement that the Claimant had attended her house on 19 or 20 May 2016. She stated that he had given her the grievance at the end of the meeting telling her to read it after he had left. She stated that during the meeting he had said that he could not work with GP. She believed it was clear that a deal had to be reached on terms for the Claimant's departure. She said that he told her that he did not wish to "raise the grievance with all the board and address it with all the directors". She said she "got the impression" from this and from his reference to the value of his shares that he did not wish the grievance to be dealt with formally by the

board if an agreement could be reached on the value of his shares.

52. The Claimant's witness statement did not include a detailed account of the meeting at which he handed over the grievance. However in cross examination he denied having said that he did not want the grievance addressed by the Board.

53. I find that at the meeting where the Claimant handed over the grievance or shortly afterwards the Claimant gave DP the impression that he was content for the grievance not to be progressed if terms for his departure could be agreed. I so find because: (1) from his perspective, progressing the matters he complained of to the full board (i.e. to have involved GP and RP) would have been unlikely to produce a satisfactory resolution of the issues he raised; (2) this would have been consistent with his comments in the grievance that his role as Managing Director had broken down and his position as Managing Director was untenable; (3) there is no further correspondence from him to the Respondent in relation to his grievance prior to his dismissal; and (4) it is accepted that there were subsequent negotiations for the terms of his departure.

54. I also find that the Claimant told DP *at this point* that he could not work with GP. I so find because it is: (1) consistent with the opening of negotiations for his departure once it is confirmed that GP is not returning to Australia; and (2) consistent with the terms of the written grievance. Consequently, to the extent necessary, I prefer DP's evidence to that of the Claimant on this point.

55. There were initial discussions between the Claimant and DP about possible terms for his departure. Both parties waived 'without prejudice' privilege in relation to these initial discussions. Clearly, no agreement was reached. DP subsequently involved Mr Pounder. He thought the Claimant was being unreasonable in his demands and informed RP and GP of the negotiations. They were furious that the Claimant had sought to negotiate with their mother alone. GP stated that a decision to dismiss the Claimant was taken because his position was "untenable". RP stated that a decision was taken to "avoid any further interaction and to protect the business in the light of his expressed desire to leave". The Respondent gave the Claimant three months' notice of the termination of his employment by a letter dated 3 August 2016 [p241]. It stated that the decision to terminate was due to:

> *(i) an irretrievable breakdown in relations between you and your fellow directors and shareholders; and*
> *(ii) a complete loss of trust and confidence in you as Managing Director.*

56. I find that the reason for the dismissal was the belief by DP, RP and GP (who between them had a majority on the Board) that there had been a breakdown in relations between, on the one hand, themselves and, on the other, the Claimant. I find that by the time the Claimant submitted his grievance to DP relations between himself and RP and GP had become very strained as a result of their becoming involved in the business in a way which he believed they should not be, given his role as Managing Director. I find that what caused DP, RP and GP to believe that relations had broken down was the failure of the negotiations between the Claimant and DP and the consequent discovery of those negotiations and the grievance by RP and GP.

57. I reject the Claimant's varying assertions that the reason for his dismissal was that the Respondent wished to remove his shares from him or that it was because he had raised a grievance. As to the former point, the Claimant's shareholding was a limited one and he would only have been entitled under clause 6.1 of the Shareholders' agreement [p308] to "Fair Value" rather than the repayment of the amount subscribed on death, retirement at nominal retirement age or if the Board agreed. There was no significant evidence before me which suggested that the Claimant's shareholding prompted the Respondent to dismiss him. As to the latter point, in light of my findings of fact above, I find that the grievance was simply part of the chain of events that led to the Claimant being dismissed, not its cause.

58. I find that the belief of DP, RP and GP that there had been a breakdown in relations caused a loss of trust and confidence in the Claimant by DP, RP and GP. However, I find that DP, RP and GP had not collectively lost faith in his abilities as Managing Director in such a way that a decision would have been taken to dismiss him but for the breakdown in relations. I find that the preference of DP throughout would have been to retain him in employment. She had worked with him for years and, I find, had a high opinion of his abilities. When asked in cross examination whether he was a good business-man she answered "I have no evidence that proves otherwise in that the accounts were satisfactory, the running of the business was smooth". Further, I find that although RP's witness statement takes issue with a variety of details concerning the Claimant's performance, the reality is that these issues were not raised as such in any substantial way by RP. Further, RP offered to mediate between GP and the Claimant, suggesting that he was keen to keep him on board. In an email to the Claimant on 13 May 2016 he describes the figures as "looking great". Taken as a whole the contemporaneous documents do not suggest that RP had lost faith in the Claimant as Managing Director. The position of GP might well have been different. However I find that he would have been in a minority on the Board if prior to August 2016 he had tried to have the Claimant removed because of a loss of trust and confidence in him. In making these findings I have taken into account the high regard which both MF and KE had for the Claimant's professional abilities which was, I find, well known in particular to DP.

Submissions

59. The parties' oral submissions can reasonably be summarised as follows. Mr Searle's submissions were brief. He said that the Respondent had failed to prove a reason for dismissal such as to justify the dismissal of an employee holding the position which the Claimant held.

60. The Claimant was the Managing Director of the Respondent. The reality was that DP had not known what to do. When GP and RP had arrived they should have been given roles and job descriptions. This has not happened. They had stepped on the Claimant's toes as Managing Director and interfered in his role in a way that was impractical and undermining. It was telling that MF, who had no axe to grind, had attended to give evidence on behalf of the Claimant. The evidence of the former Finance Director, KE, had also supported the Claimant and had also gone unchallenged.

61. There had been no breakdown in trust. Rather GP was angry that the Claimant had raised a grievance. There had been no criticisms of the Claimant's performance. It had not occurred to the Respondent to follow its capability procedure. There was no substantial reason for the dismissal.

62. Mr Searle further submitted that the law of unfair dismissal was intended to avoid "no fault dismissals". The Respondent was seeking to avoid all its obligations under the law of unfair dismissal. The dismissal had come as a bolt from the blue. On any view the dismissal was unfair.

63. Mr Searle submitted that the Claimant had withstood cross-examination easily, had appeared honest and credible and had made concessions where appropriate. Mr Searle contrasted the Claimant to GP. Mr Searle submitted that GP had been petulant and childish when giving evidence and had not treated the proceedings seriously.

64. Mr Searle handed up an extract from Harvey on Industrial Relations ("Breakdown of trust and confidence" paragraph 1915) and copies of **Leach v The Office of Communications (OFCOM) [2012] IRLR 839** and **Z v A UKEAT/0203/13**. The Harvey extract refers to **Governing Body of Tubbenden Primary School v Sylvester** UKEAT/0527/11.

65. Mr Kemp had prepared a written skeleton argument which is on the Tribunal's file

which he supplemented by oral submissions.

66. In his oral submissions Mr Kemp submitted that the starting point was the letter of dismissal. It was clear that GP, RP and DP believed both that they had lost trust and confidence in the Claimant and also that there had been a breakdown in relations between him and them (and so the Respondent). Their evidence in this respect had not been challenged.

67. Mr Kemp submitted that if I accepted that GP, RP and DP held such a belief then the reason for dismissal was some other substantial reason falling within section 98(1)(b) of the 1996 Act. The case law made plain that a breakdown in relations can be such a reason.

68. Turning to section 98(4)(a), Mr Kemp submitted that the reason was sufficient reason. The dismissal was not for conduct or capability so there was no need to follow any particular procedure. The reality was that the Claimant's relationship with the other board members (GP, RP and DP) had completely broken down. The reality was that the parties were discussing exit terms for the Claimant. The dismissal was fair.

69. If, however, I found the dismissal was unfair because the Board should have held a meeting to discuss the grievance submitted by the Claimant, Mr Kemp submitted that I should find that there was a 100% chance that the outcome would have been the same given the breakdown in relations which had occurred. As such there should be a 100% "Polkey" reduction to any compensation awarded.

70. Mr Kemp handed up copies of **Perkin v St George's Healthcare NHS Trust** [2005] IRLR 934, **Ezsias v North Glamorgan NHS Trust** [2011] IRLR 550, **Port of London Authority v Payne** [1994] IRLR 9, **United Lincolnshire Hospitals NHS Foundation Trust v Farren** UKEAT/198/16 and **Coleman and Stephenson v Magnet Joinery Ltd** [1974] IRLR 343.

Conclusions

71. I return now to the issues identified at the beginning of the Hearing.

Was the Claimant dismissed for some other substantial reason of a kind such as to justify the dismissal of someone holding the Claimant's position?

72. I conclude that the Claimant was dismissed for some other substantial reason of a kind such as to justify the dismissal of someone holding his position. For the reasons set out in the findings of fact above, I conclude that that reason was the belief of DP, RP and GP that there had been a breakdown in relations between the Claimant and themselves.

If not, what was the reason for the Claimant's dismissal?

73. n/a.

Did the Respondent follow a fair procedure in relation to the Claimant's dismissal?

and

Was the Respondent's dismissal of the Claimant fair or unfair by reference to section 98(4) of the 1996 Act?

74. Because this was not a dismissal for conduct or capability there was no clear procedure that the Respondent was required to follow, whether by reference to its own Employee Handbook (which was included in the Hearing bundle) or otherwise.

Consequently, I have found it more convenient to consider the issue of "procedure" as part and parcel of the issues that are relevant to my determination of whether the dismissal was fair or unfair by reference to section 98(4) of the 1996 Act.

75. In **Governing Body of Tubbenden Primary School v Sylvester** UKEAT/0527/11, referred to in the extract from Harvey provided by Mr Searle, Mr Justice Langstaff (as he then was) observed:

> *37. … We do not see the Tribunal in **Ezsias** as having been concerned with the question that arises in the present case, which is whether it is relevant to the fairness of a dismissal to pay regard to the development of the breakdown in trust and confidence. So far as **McAdie** is concerned, it too was a quite remarkable case. That was a case in which the dismissal was for capability. Capability of its nature does not lend itself as easily as does a conduct case to issuing a warning. Ill health is not as easily regulated by the warning of the consequence of continued ill health as misconduct is to be regulated by the warning of continued conduct said to be wrongful; that is obvious. So far as dismissal there was concerned, too, we note that if there were responsibility in law for the state of health of the claimant, she would not be without a remedy. That cannot so easily be said in the context of a claim in respect of some other substantial reason. Where the substantial reason relied upon is a consequence of conduct (and in this case it can be no other), there is such a clear analogy to a dismissal for conduct itself that it seems to us entirely appropriate that a Tribunal should have regard to the immediate history leading up to the dismissal. The immediate history is that which might be relevant, for instance, in a conduct case: the suspension; the warnings, or lack of them; the opportunities to recant and the like; the question of the procedure by which the dismissal decision is reached. It cannot, in our view, always and inevitably be trumped simply by the conclusion that there has been a loss of confidence without examining all the circumstances of the case and the substantial merits of the case, as section 98 would require.*
>
> *38. We are not at all unhappy, as a matter of principle, to reach the view that that is so, because as a matter of principle if it were to be open to an employer to conclude that he had no confidence in an employee, and if an Employment Tribunal were as a matter of law precluded from examining how that position came about, it would be open to that employer, at least if he could establish that the reason was genuine, to dismiss for any reason or none in much the same way as he could have done at common law before legislation in 1971 introduced the right not to be unfairly dismissed. Lord Reid in **Ridge v Baldwin** [1964] AC 60 observed that the law of master and servant was not in doubt; that an employer could dismiss an employee for any reason or none. It was to prevent the injustice of that that the right not to be unfairly dismissed was introduced. The right depends entirely upon the terms of the statute, but there is every good reason, we think, depending upon the particular facts of the case, for a Tribunal to be prepared to consider the whole of the story insofar as it appears relevant and not artificially, as we would see it, be precluded from considering matters that are relevant, or may be relevant, to fairness.*

76. I have concluded that this is a case in which I should be prepared to consider 'the whole of the story insofar as it appears relevant'. I have so concluded because, for the reasons which I will now set out, I have concluded that the belief in the breakdown in relations between, on the one hand, DP, RP and GP and, on the other hand, the Claimant, which led in turn to a loss of trust and confidence in the Claimant by DP, RP and GP, was the fault of DP, GP and RP (that is to say the other directors, save KE) and not of the Claimant.

77. In these circumstances, to ignore the rest of the story – that is to say that part of its which relates to the period prior to the grievance, the breakdown of the settlement negotiations and the decision to dismiss – would mean that I would not be determining the claim "in accordance with equity and the substantial merits of the case".

78. I have concluded that the belief in the breakdown in relations was the fault of DP, RP and GP for the following reasons:

    a. The Respondent (in this case in reality DP) failed to delineate clearly the responsibilities of, on the one hand, the Claimant and, on the other, GP and RP when GP and RP became involved substantially involved in the business. In light of the matters that I have identified in paragraph 34 above, such a failure was always likely to result in RP and GP interfering in matters which were properly the preserve of the Claimant.

    b. Once it had become clear that GP in particular would not limit himself to matters relating specifically to the building of the new cinema complex in Beverley, but would demand to be involved in day-to-day decision making across the business, and so interfere with the Claimant's role as Managing Director, the Respondent failed to deal with this. The position of GP was clear once the elephant in the room document had been prepared. DP chose initially to sit on the document but then, once the document had been circulated in February 2016, she and other directors failed to deal with it in a reasonable manner. Instead a decision was taken to make GP the Vice Chair without consulting the Claimant and a decision was taken that GP should have an executive role that would quite clearly overlap with the responsibilities assigned to the Claimant by his contract of employment and job description. However no efforts were made to sort out how this might work on a practical level. GP and the Claimant were told to agree matters between themselves. It must have been abundantly clear to DP and RP that this would not work. The document which GP sent to the Claimant on 12 May 2016 in relation to which I have made findings of fact at paragraph 48 above demonstrates beyond any doubt that GP had neither the self-awareness nor clarity of thought necessary to recognize the difficulties of the situation that he and the Claimant found themselves in following the decision that he should be Chair and to enable them to find a way to deal with it.

    c. As such by mid-May 2016 the Respondent had put the Claimant in a practically impossible position: it was requiring him to share his executive role in an undefined way with GC despite the very obvious difficulties that that that would entail.

    d. It was in these circumstances that the Claimant raised his grievance. In light of the matters set out in paragraphs (a) to (c) above, I have concluded that the issues raised by the Claimant in his grievance were largely objectively justified. He had been treated badly by the Respondent and the grievance set out matters in respect of which he might reasonably complain and in reasonably measured terms.

    e. Negotiations for the possible departure of the Claimant then began. I have concluded that there was nothing reprehensible or underhand about the Claimant seeking to negotiate with DP and not with GP or RP. I have so concluded for the following reasons: (1) DP was (and indeed remained as at the date of the Hearing) the Chair of the Respondent; and (2) it was within DP's power to inform the Respondent's advisers, RP and GP of the negotiations whenever she wished (and indeed in due course she did involve Mr Pounder who in turn informed RP and GP). I find that DP found the situation upsetting, but I conclude that she found it upsetting because it involved conflict between on the one hand her son, GP, and on the other the Claimant, for whom she clearly had considerable affection and respect, which threatened the business, not for any other reason. I also find that DP would have been quite capable of involving GP or RP in the negotiations at an earlier stage if she had so wished.

79. I have concluded that the Respondent did not act reasonably in treating the breakdown in relations (and consequent loss of trust and confidence) as a sufficient

reason for dismissing the Claimant because: (1) the breakdown in relations which DP, RP and GP believed had occurred was their fault (and they were three individuals holding the majority of the votes on the board and also the majority of the Respondent's shares); and (2) because the Claimant did not act unreasonably either when he presented his grievance or when he began negotiations for the possible terms of a possible departure. I have so concluded because no reasonable employer would conduct itself in such a way that it gave an employee legitimate grounds to raise a grievance and begin settlement negotiations and then rely on those matters to form a belief that there had been a breakdown in relations which justified the employee's dismissal.

80. I have concluded that any reasonable employer would have taken steps to see if it were possible to deal with the matters in the grievance. I do not accept that the fact that the Claimant had said to DP on one occasion that he could not work with GP was sufficient reason not to attempt to resolve matters. That was not what his grievance said. Equally, I do not accept that the fact he had declined RP's offer to mediate between him and GP was sufficient reason not to attempt to resolve matters. RP was obviously not an impartial third party. Further, throughout the Claimant had been careful to be conspicuously measured in his communications with GP. He had not burned his bridges. I reach this conclusion taking into account my conclusion that the belief that there had been breakdown in relations was not the fault of the Claimant but was the fault of DP, GP and RP.

81. I have therefore concluded that the dismissal of the Claimant by the Respondent was unfair.

If the Respondent failed to follow a fair procedure in relation to the Claimant's dismissal, would the Respondent have dismissed the Claimant in any event had it followed a fair procedure?

82. What I am required to consider is whether any compensation awarded should be reduced to reflect the chance that the Claimant might been dismissed fairly at a later date or if a fair procedure had been used.

83. I conclude that if the Respondent had tried to resolve matters as any reasonable employer would in order that the Claimant and GP might agree a sensible division of responsibilities between GP as Chair and the Claimant as Managing Director and, also, a sensible way of working together, then this would have involved a process lasting until the date when in fact the Claimant's notice period expired. That process might well have involved an external coach or mediator working with the Claimant and GP as well as further and detailed discussions of their respective roles at Board level and a consideration by the full Board of all matters raised by the grievance.

84. I conclude that there would have been a 50% chance that such steps would have succeeded in resolving the situation with the result that the Claimant would have remained employed by the Respondent. I have reached this conclusion in light of the fact that DP as the Chair quite clearly had more confidence in the Claimant's ability to contribute to the well-being of the business than in that of GP and would have tried to push the Claimant and GP towards a successful conclusion of the process. I have also reached this conclusion in light of the Claimant's comment on one occasion to DP that he could not work with GP: whilst he did say this, I accepted his evidence that he could work with GP again if the matters raised in his grievance were dealt with. Further, I find that as at the date of his dismissal the Claimant's preference would have been to remain with the Respondent.

85. However, if the process had not reached a successful conclusion, and so the majority of the Board had reasonably concluded that the relationship between the Claimant on the one hand and DP, GP and RP on the other really had broken down irretrievably, then I conclude that the Respondent would at that point have dismissed the Claimant. In the end the Respondent is a family controlled business. If it were clear that the relationship between directors who were members of the family and the

Managing Director had irretrievably broken down (and so trust and confidence lost) after reasonable attempts to remedy the problems which family members had caused to arise in that relationship, then I also conclude that a dismissal of the Claimant would have been fair.

86. I therefore conclude that if the Claimant had not been unfairly dismissed when he was there would have been a 50% chance that he would have been fairly dismissed by being given notice on what was in fact the Effective Date of Termination.

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Employment Judge Evans

Date: 30 August 2017

JUDGMENT SENT TO THE PARTIES ON

12 September 2017

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FOR THE TRIBUNAL OFFICE