# EMPLOYMENT TRIBUNALS

## BETWEEN

| Claimant | | Respondent |
|---|---|---|
| STEPHEN PENNY (C1) | AND | SWANSEA CITY ASSOCIATION |
| DONALD KEEFE (C2) | | FOOTBALL CLUB (R1) |

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**HELD AT: CARDIFF ON: 5TH JULY 2018**

**EMPLOYMENT JUDGE MR P CADNEY (SITTING ALONE)** **MEMBERS:**

**APPEARANCES**:-

**FOR THE CLAIMANTS:-** **MR J MILFORD (COUNSEL)**

**FOR THE RESPONDENT:-** **MR J JENKINS (COUNSEL)**

## JUDGMENT

The judgment of the tribunal is that:-

**1.** The first claimant is awarded:-

a) A basic award of £10,059.00

b) A compensatory award of £30,000.00

**2.** The second claimant is awarded:-

a) A basic award of £10,059.00

b) A compensatory award of £78,962.00

# Reasons

1. At an earlier hearing the panel determined that both claimants had been unfairly dismissed by the respondent. The case comes before me today to determine the issue of remedy. There are two issues of principle which need to be determined. The first whether there should be a Polkey deduction, that is to attempt to decide if, and if so when, the claimants would have resigned in any event had they not been unfairly dismissed, and secondly whether there should be a deduction for the failure to mitigate their losses in the case of either or both.

## Polkey Deduction

2. The issue of any Polkey deduction is based solely on the proposition that the claimants would have resigned in any event whatever consultation or discussion had taken place. As is set out in the liability decision it is the respondent's case that whilst they wished to remove the claimants as directors, they wanted to retain their services at the same level of remuneration so that even had they been dismissed they would have suffered no loss.

3. There is a dispute between the parties as to whether the findings of the tribunal in the liability decision are or are not determinative of the Polkey issue. The respondent submits that they are not and, as it is correct that Polkey is not explicitly addressed in the earlier decision I will determine the Polkey issue today subject only to the caveat that I will necessarily not go behind the earlier findings.

4. The respondent's position is that there should be a Polkey reduction of 100% in the case of Mr Keefe, and something of the order of 50% in the case of Mr Penny. The basis for that is that Keefe in the earlier hearing gave explicit evidence that unless the respondent was prepared to allow him to continue as a director that he would have resigned; and in the case of Mr Penny, that whilst he was not quite so forthright in his evidence that as the essential basis of both claimants' claims was that their proposed removal as directors was the fundamental breach on which they relied that there is a high probability that he too would have resigned in any event.

5. The respondent's submissions are based essentially on two propositions. The first is that had there been consultation the respondent would not have altered its position that it required directors to possess at least a five percent shareholding in the company; and secondly that if the respondent had not altered its position that the claimants would have resigned irrespective of any methods that may have been discussed to ameliorate the harshness of the consequence of the respondents position.

6. The respondent submits that the conclusions we drew at paragraphs 20, 21 and 40 of the original decision, that we accepted the respondent's evidence that it had a business model which required a five percent shareholding for an individual to

become a director effectively disposes of the first question. As summarised in the decision and from the evidence of Mr Levein in particular, the requirement for a director to have “skin in the game” was one that would not have been altered.

7. The claimants points to the fact that a part of the respondents case was that the Swan’s Trust had pushed for the adoption of the 5% shareholding provision, and that it follows that had there been consultation and had the Swan’s Trust understood the consequences for the claimant’s that it may have altered its position, at least in relation to them and that in turn may have informed any decision of the respondent as to whether an exception could be made for the claimants.

8. In my judgement had there been discussion or consultation, given the history of the claimants’ involvement with the club and their contribution to its success, that it is irrefutable that they had made a contribution perhaps beyond that of a financial contribution reflected in a shareholding; and it is not beyond the bounds of possibility that the respondent could in the very unusual circumstances of this case have been persuaded to allow them to remain as directors for the balance of their fixed term appointments to July 2018. Certainly in my judgement such a proposition should have at least been considered.

9. Even if the respondent maintained its stance, in my judgement any consultation or discussion would then have moved onto the question of whether there was some other way of reflecting the contribution the claimants had made to the club over the years before the takeover. There are many ways that professional sports clubs can reflect the contribution of former players, coaches and others to the club including honorary or ambassadorial roles amongst other means, all of which could have been discussed so as to reflect the claimants’ contribution even if they were not to be retained as directors.

10. It follows that in my view it was not inevitable that the claimant’s would have resigned whatever the outcome of any consultation. That leads to the question of whether it is possible to make an assessment of the possibility of the claimants resigning in any event. I have been referred to a number of authorities but in particular the well known cases of **King v Eaton** (paragraphs 13 and 19) and **Software 2000 v Andrews**. In **King v Eaton** the Court sought to draw a distinction between mere procedural errors and what it termed "errors of substantive importance" which go to the heart of the case (para 19)

**"**If there has been a 'merely' procedural lapse or omission, it may be relatively straightforward to envisage what the course of events would have been if procedures had stayed on track, rather than briefly leaving the track in this way. If, on the other hand, what went wrong was more fundamental, or 'substantive', and seems to have gone 'to the heart of the matter', it may well be difficult to envisage what track one would be on; in the hypothetical situation of the unfairness not having occurred. *It seems to us that the matter will be one of impression and judgment, so that a tribunal will have to*

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

11. The EAT in **Software 2000 v Andrews** went on to consider how the tribunal should assess that task and stated at paragraphs 52 and 53:

*52 This case emphasises that the task is for the Tribunal to identify and consider any evidence which it can with some confidence deploy to predict what would have happened had there been no unfair dismissal. To fail to do this could lead to over compensating the employee, which would not be a just outcome. In this context we would caution against taking the phrase "constructing the world as it might have been" too literally.*

*53. The question is not whether the Tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed. For example, there may be insufficient evidence, or it may be too unreliable, to enable a Tribunal to say with any precision whether an employee would, on the balance of probabilities, have been dismissed, and yet sufficient evidence for the Tribunal to conclude that on any view there must have been some realistic chance that he would have been. Some assessment must be made of that risk when calculating the compensation even though it will be a difficult and to some extent speculative exercise*.

At paragraph 54 the EAT summarised the principles to be applied: "*The following principles emerge from these cases:*

> *(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.*

The question for me is whether on the evidence this case falls within that outlined in paragraph 54(3), and that it is so riddled with uncertainty that no sensible prediction can be made, or whether it falls within the last sentence of paragraph 54 (4) and that some assessment can be made despite the significant degree of speculation involved. Turning back to our original conclusions in the liability decision there was a complete failure to consult or discuss any of these matters with the claimants. It appears to me that in those circumstances what the respondent is effectively inviting me to do is to attempt draw reasonable conclusions as to the likely destination of a ship which has not only not yet left harbour but whose crew have not even embarked. In my judgement this case falls squarely within the 54 (3) above and the exercise is so riddled with uncertainty that no sensible prediction can be made and it follows that in my view it is not possible to assess, or therefore make, any Pokey deduction.

Mitigation

12. Moving on to the question of mitigation it is not essentially in dispute that neither Mr Penny nor Mr Keefe have made any attempt to mitigate their losses in the circumstances set out in the supplemental witness statements produced for this hearing. The respondent submits that in the case of Mr Keefe that the consequence should be that he should be limited to six months loss on the basis either that he would have been able to fully mitigate his loss of £100,000 per annum within that period, or alternatively that he could have obtained less well remunerated employment at a much earlier stage. In the case of Mr Penny the respondent relies on the fact that his losses from employment were £30,000 per year and assert that he should have been able to replace that income within one to two months or three months at the very most.

13. The respondent essentially relies upon the fact that Mr Penny and Mr Keefe are highly qualified professional men in their respective fields and have held positions of very considerable seniority and responsibility, not least in the respondent itself as directors of a Premier League football club, and should not therefore have had any difficulty in finding equally well remunerated alternative employment within a reasonable time, and work at a lower salary level very quickly.

14. As a general principle, whilst there is obligation to mitigate, a claimant who has been unfairly dismissed is entitled initially to seek work at a reasonably comparable salary and status, and within a reasonable geographical range of that in which they previously worked. If they are unsuccessful there comes a point at which they can reasonably be required to seek work at a lower salary, or lower status, or in a wider geographical range. Those questions rest on findings of fact; in order for it to be reasonable for a claimant to be required to accept such work it must as a matter of fact have been available for them to obtain. The difficulty I have is that there is no evidence at all of what work, at what salary and where such employment should have been available to them. There is no evidence of the existence of any jobs at a lower salary in or about Swansea or in any wider area. In effect I am being asked simply to assume that such jobs existed. Despite the fact that it is undoubtedly true that both Mr Keefe and Mr Penny are highly qualified professional men, there is simply no evidence that wold allow me to draw any conclusion as to when, if they had sought to mitigate their loss that they should have been able to do so, and if so to what extent. Accordingly it appears to me to be impossible to make any finding that there has been any failure to mitigate their losses.

Awards

15. Following my earlier decision the parties are in agreement as to the awards. In the case of Mr Penny there is a basic award of £10,059.00 and a compensatory award of £30,000. In the case of Mr Keefe the basic award is the same and there is a compensatory award of £78,962.00.

Costs

16. Following my earlier decision the claimants seek the costs of today's hearing on the basis that by a letter date 16th May 2018 they made of offer to settle for the statutory maximum subject to a 10% discount in each case. The amounts awarded are greater than the amounts for which they were prepared to settle. The claimants accept that the fact that they have received more than they offered to settle for does not automatically give them any right to their costs in the tribunal. However the claimants contend that the respondent has behaved unreasonably in that there was simply no response to that offer or any attempt to engage in the process of attempting to settle the claims.

17. Mr Jenkins submits that that is not sufficient to constitute unreasonable behaviour so as to engage the tribunal's powers to award costs, and cross the threshold for an award of costs. The failure to engage with this specific offer should be seen in the wider context that there are concurrent High Court proceedings and that the respondent has engaged in the process of attempting to settle both sets of proceedings. He submits that in the absence of the parties being able to settle both sets of proceedings it is not necessarily unreasonable not to settle the clams individually.

18. It appears to me that the success or failure of the application rests upon one question, which is whether there was no reasonable or arguable prospect of either of the respondent's submissions as to a Polkey reduction and/or reduction for failure to

mitigate being successful and the awards being reduced. It would be nice were I able to conclude that my judgment was not only reasonable but the only reasonable conclusion that could have been reached. However it appear to me that the arguments advanced by Mr Jenkins were not unarguable or entirely without merit and the fact that I have concluded in the final analysis that the claimants are right does not allow me to conclude that it was unreasonable for the respondent to advance them. If it was not unreasonable to advance them it follows that it was not unreasonable to fail to agree a settlement with the claimants. Whilst I am to an extent sympathetic to the claimant's position it does not appear to me that the threshold for an order for costs has been met in this case.

**Judgment entered into Register**
**And copies sent to the parties on**

**.....9 July 2018.....**

**.....**
**for Secretary of the Tribunals**

**EMPLOYMENT JUDGE CADNEY**
**Dated: 8 July 18**