EMPLOYMENT TRIBUNALS

Claimant: **Mr Scott Marshall**

Respondent: **Parkway Entertainment Company Limited**

Heard at: **Lincoln** **On:** **10 May 2018**

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

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

JUDGMENT

1. The Respondent is ordered to pay the Claimant a basic award of £5,269.00 (five thousand two hundred and sixty nine pounds).

2. The Respondent is ordered to pay the Claimant a compensatory award of £22,993.58 (twenty-two thousand nine hundred and ninety-three pounds and fifty-eight pence).

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. In a reserved judgment dated 30 August 2017 I concluded that the Claimant had been unfairly dismissed by the Respondent. I also concluded that, 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.

3. A remedy hearing then took place on 10 May 2018. At that hearing the Claimant was represented by Mr Searle. The Respondent was represented by Mr Kemp. Before the hearing the parties had agreed an additional bundle running from page 426 to page 552. At the hearing reference was made to that bundle and to the bundle from the liability hearing which ran to 425 pages. There was an error in the pagination of the bundle with the result that there were two pages with the numbers 532 to 537. All page references are to the hearing bundle. The Respondent also produced a bundle of authorities.

4. The Respondent provided witness statements for the following witnesses: Mrs

Denise Parkes (a director and the company secretary of the Respondent) ("DP"), Mr Gerrard Parkes (a director of the Respondent) ("GP"), Mr Richard Parkes (a director of the Respondent) ("RP") and Mr Antony Maggs ("AM"), the General Manager of the Parkway Cinema in Cleethorpes.

5. Until the beginning of the hearing the Claimant had been seeking a re-employment order. However, at the beginning of the hearing, Mr Searle explained that the Claimant no longer sought reinstatement or re-engagement. Instead he sought only compensation. The result of this was that DP did not give evidence at all. It was agreed that the relevant paragraphs of the other witnesses' statements were as follows: GP - paragraphs 19 to 30; RP 12-13; AM: 16. GP and RP gave oral evidence and were cross-examined briefly. AM was called but not cross-examined.

6. The Claimant gave evidence in support of his claim.

Issues and discussion at the beginning of the Hearing

7. After the witnesses had given their evidence Mr Kemp and then Mr Searle made brief oral submissions. At the end of the hearing I reserved my judgment.

8. The parties agreed at the beginning of the hearing that the following issues arose in relation to the issue of remedy:

   8.1. To what compensation was the Claimant entitled?

   8.2. If the Claimant was awarded compensation should this compensation be uplifted and, if so, by how much?

   8.3. Were there reasonable steps that the Claimant could have taken but did not take to mitigate his loss and did the Claimant act unreasonably in not taking them?

9. The parties agreed that the issue of Polkey and of whether the Claimant had contributed to his dismissal had been resolved by my judgment in relation to liability. The decision in relation to Polkey is set out above. So far as contribution is concerned, the Respondent conceded that in light of my judgment in relation to liability it could not argue that any compensatory award should be reduced pursuant to section 123(6) of the Employment Rights Act 1996 ("the 1996 Act") or that the basic award should be reduced pursuant to section 122(2) of the 1996 Act.

10. The Claimant had prepared a schedule of loss (page 441). Mr Kemp for the Respondent indicated that all the figures in it were agreed, subject to the issues set out at paragraph 8 above being determined by the Tribunal an to the relevant Polkey reduction being made. As such, it was agreed that what I needed to decide was (1) the period for which losses should be awarded (the Respondent contending that the Claimant should have found employment within six months); and (2) whether there should be any uplift to the compensation awarded.

The Law

11. An employee who is unfairly dismissed is entitled to a basic award. The basic award is calculated in accordance with section 119 of the 1996 Act.

12. An employee who is unfairly dismissed is in principle also entitled to receive a compensatory award. This should be calculated in accordance with section 123 of the 1996 Act, which provides so far as relevant:

    (1) 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.

(2) The loss referred to in subsection (1) shall be taken to include—

(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and

(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

(3) The loss referred to in subsection (1) shall be taken to include in respect of any loss of—

(a) any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or

(b) any expectation of such a payment,

only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122) in respect of the same dismissal.

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

13. As I have noted, section 123(4) requires the employee to mitigate their loss. This duty can be summarised as follows:

> *… it is the duty of an employee who has been dismissed to act reasonably and to act as a reasonable man would do if he had no hope of seeking compensation from his previous employer.*

(Archbold Freightage Ltd v Wilson [1974] IRLR 10).

14. The operation of the principle of the duty to mitigate was clearly expressed as follows in AG Bracey Ltd v Iles [1973] IRLR 210:

> *The law is that it is the duty of a dismissed employee to act reasonably in order to mitigate his loss. It may not be reasonable to take the first job that comes along. It may be much more reasonable, in the interests of the employee and of the employer who has to pay compensation, that he should wait a little time. He must, of course, use the time well and seek a better paid job which will reduce his overall loss and the amount of compensation which the previous employer ultimately has to pay … [A] man who is dismissed from a £40 a week job may act unreasonably if he does not accept a job bringing in, say, £35 a week. If he does not do so, a tribunal is fully entitled to say, "We are going to take no account of any loss which he could have avoided by taking the £35 a week job". But that still leaves him with a loss of £5 a week, the difference between £40 and £35. A tribunal is fully entitled to take account of that loss, which could not have been avoided by taking the job which they think he should have taken.*

15. However the duty to mitigate does not arise until the employee has been dismissed and, if the Respondent seeks to argue that the employee has not mitigated their loss, the burden of proof is upon the Respondent making that allegation.

16. If a Tribunal concludes that a claimant has failed to mitigate his loss, the approach to be taken is as set out in Savage v Saxena [1998] ICR 357. It should:

16.1. Identify what steps should have been taken by the claimant to mitigate his loss;

16.2. Find the date upon which such steps would have produced an alternative income;

16.3. Reduce the amount of compensation by the amount of income which would have been earned.

17. The Claimant argues in this case that any compensatory award should be increased pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 ("the 1992 Act") which provides as follows where relevant:

> *(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.*
>
> *(2) If, in the case of proceedings to which this section applies, it appear to the employment tribunal that-*
>
> *(a) The claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,*
> *(b) The employer has failed to comply with that Code in relation to that matter, and*
> *(c) The failure was unreasonable*
>
> *the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.*

18. Schedule A2 lists unfair dismissal as one of the relevant jurisdictions. A relevant Code of Practice is defined in 207A(4) of the 1992 Act and includes the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) ("the ACAS Code of Practice").

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 Claimant claims losses for a period of 12 months from his effective date of termination on 3 November 2016. It is therefore necessary to consider whether he took reasonable steps to mitigate his loss in this same period and I make the following findings relevant to this issue.

21. The Claimant was employed under the terms of a contract of employment which imposed post termination restrictions ("PTRs") on him (clause 24 of his contract dated 2014 which was at page 295). The Respondent did not release the Claimant from those PTRs following his dismissal and Mr Kemp accepted that their effect was in practical terms to prevent the Claimant being involved in the cinema business for 6 months following the termination of his employment. I therefore find that the Claimant was to all intents and purposes unable to obtain employment in the cinema business until 3 May 2017 when the PTRs expired. The cinema business was the only business in which the Claimant had worked since the age of 16.

22. I find that soon after his dismissal the Claimant engaged with a management coaching programme. He attended meetings on 16 January 2017, 13 February 2017 and 8 May 2017 (pages 367 to 369). I find that during the management coaching programme the Claimant took steps preparatory to seeking other employment. However I also find that during this period the Claimant decided that he would not actively seek other employment pending the outcome of his employment tribunal claim. His note of the meeting on 8 May 2017 notes:

> *A decision on my future can be made as soon as the tribunal has concluded. Everything is in place and I now need to wait for the outcome so I know which direction I can take.*
>
> *Would like to meet as soon as possible in July to get myself back into work if not reinstated at Parkway.*

23. I find that the Claimant did not apply for or actively seek out other jobs in the six months following his employment terminating. Indeed he accepted in his evidence that he had not applied for any other jobs in this period.

24. I therefore find that in the first six months following his dismissal the Claimant did not actively seek alternative employment. I find that the reasons for this were that: (1) he could not seek alternative employment in the cinema business because of the PTRs; (2) he hoped to be reinstated; (3) his confidence had been badly affected by his dismissal and the effect that he felt this had had on his standing in the local community where he was well known; and (4) in light of his wish to be reinstated, he was not prepared to relocate, given that his wife was in full-time employment and relocating would also cause more general disruption to family life, and this inevitably limited the jobs for which he might have applied.

25. Turning now to the six month period from 3 May 2017 to 2 November 2017, I find that in this period the Claimant took very limited steps indeed to seek alternative employment. I so find because:

    25.1. He accepted in his evidence that he had not made any job application in this period. The first job application he had made was for a role as a trainee train driver in January 2018. The application was unsuccessful;

    25.2. He noted in his witness statement at paragraph 10 in relation to training he had attended in relation to the "optical business" in October 2017 that "my desire to be reinstated has again held me back. I could not justify the expense of pursuing this option further (by taking further training, securing premises etc.) on the basis that I may be going back to work at the Respondent";

    25.3. I find his mind-set throughout this period was still very much that he wanted to await the outcome of his unfair dismissal claim before making decisions about the future, because he hoped to be reinstated. This attitude is seen as late as 10 April 2018 when he emailed a cinema industry colleague (page 486(a)) stating:

        I am just pleased that my Remedy hearing has finally arrived and I will then be able to get back into things with my name cleared of any wrong doing. It is best I sit tight until the conclusion and then I can update you when I know the outcome.

    25.4. I find he was also concerned that finding alternative employment in the cinema industry before the conclusion of his tribunal claim would jeopardise his chance of being reinstated (paragraph 17 of his witness statement and this was also a matter to which he referred on several occasions during his cross examination).

26. The position was also confirmed in his statement. In its paragraph 8, he noted that as of the date of the statement:

    As part of [the management coaching programme] I produced a Curriculum Vitae, the first time I had done so for 11 years, and extensively explored the different options open to me and my next possible steps. However, at the forefront of my mind throughout this time was the possibility that I could be reinstated, that this has always been what I wanted. The Coaching Programme has reached a stage where it cannot continue until I received a decision on my future employment with the Respondent through these proceedings has been made [sic].

27. I find that the reasons for the Claimant taking only very limited steps to seek alternative employment between 3 May and 2 November 2017 were that: (1) he hoped to be reinstated; (2) he was concerned that his chances of being reinstated would be reduced if he found alternative employment with a cinema industry competitor; (3) his confidence had been badly affected by his dismissal and the effect that he felt this had had on his standing in the local community where he was well known; and (4) in light of his wish to be reinstated, he was not prepared to relocate, given that his wife was in full-time employment and relocating would also

cause more general disruption to family life, and this inevitably limited the jobs for which he might have applied.

Submissions

28. Neither Mr Kemp nor Mr Searle provided written submissions. A full record of the oral submissions they made is contained in the Record of Proceedings on the Tribunal's file. However those submissions may reasonably be summarised as follows.

29. Mr Kemp began by dealing with the uplift point. He said that the EAT's decision in Phoenix House Ltd v Stockman & Anor UKEAT/0264/15/DM provided a complete answer to this point. There was no dispute that the Claimant had been dismissed for "some other substantial reason". Phoenix House Ltd was authority for the proposition that the ACAS Code of Practice did not apply to dismissals which were for "some other substantial reason". Consequently, the Claimant could not satisfy the requirements of section 207A(2) and, as a result, there could be no uplift.

30. More generally, Mr Kemp explained that the Respondent's position was that the Claimant should have found work by the end of the period of six months following his dismissal. Whilst it was true that he had PTRs which prevented him from working in the cinema business in this period, and whilst his hope that he would be reinstated at that point meant that it was perhaps reasonable for him to decide that he would not relocate pending the determination of his claim for unfair dismissal, there were other jobs both inside and outside the cinema trade that he could have applied for and, taking things in the round, if he had taken reasonable steps to mitigate his loss he would have obtained alternative employment extinguishing his ongoing losses by May 2017.

31. However the reality was that the Claimant had not taken reasonable steps to find employment. In the period since his dismissal – eighteen months – he had applied for just one job and that was as a trainee train driver. The reason he had not taken reasonable steps to find alternative employment had been that he was holding out for the possibility of reinstatement, a possibility that he had only abandoned on the morning of the remedy hearing.

32. Mr Searle for the Claimant argued that the burden of proof was on the Respondent to show that the Claimant had not taken reasonable steps to find fresh employment and it had failed to discharge this. The documents included in the bundle of supposed job opportunities for which the Claimant had not applied was a "shoddy, clumsy attempt to hoodwink" the Tribunal. The jobs adverts it contained were for jobs which were not appropriate, either by virtue of their location or by virtue of the skills required.

33. The Claimant accepted as of the date of the hearing that, having abandoned his hope that he would be reinstated, he would now have to consider relocating in order to obtain further work. However it had been reasonable for him to take the view up until the morning of the remedy hearing that he would not take employment which would require him to relocate his family.

34. The Claimant had been concerned that seeking other employment prior to the remedy hearing would jeopardise his possible reinstatement. Further, his confidence had been knocked by his dismissal, these and other factors meant that it was reasonable for him not to have found fresh employment in the 12 months following his dismissal. It was clear that he had taken reasonable steps towards finding fresh employment in that period: he had undergone career management training and prepared a CV. The fact that he had been dismissed and did not have a reference counted against him in the job market.

35. Overall, the Claimant had been unable to seek employment in the Cinema sector in which he had worked for 16 years for six months following his dismissal because of the PTRs. Further, his seniority – he had been the Respondent's managing director – meant he was entitled to some "buffer room" to look for jobs at a similar level before looking for more junior roles. He had therefore taken reasonable steps to mitigate his losses.

36. So far as the uplift issue was concerned, Mr Searle did not make any specific submissions in relation to Phoenix House Ltd. Rather he noted that it was not in dispute that the Claimant had brought a grievance in the course of events which had resulted in his dismissal and that that grievance had never been dealt with. It was also not in dispute that he had brought an unfair dismissal claim. In those circumstances he submitted that it was open to me to uplift the compensatory award by 25%.

Conclusions

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

The uplift issue

38. I conclude that the Claimant is not entitled to an uplift of his compensatory award under section 207A of the 1992 Act. This is because Phoenix House Ltd makes plain that the Code of Practice does not apply to dismissals for "some other substantial reason" and the Claimant's dismissal was for this reason (see paragraph 72 of the liability judgment).

39. As a result of this, the Claimant cannot satisfy the requirements of section 207A(2) and so I have no power to increase his compensatory award under that section. The fact that the Claimant raised a grievance which was not dealt with is nothing to the point. That is because section 207A(2) requires that "The claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies". "The claim to which the proceedings relate" in this case was the unfair dismissal claim – no other claim was brought. Consequently because no "relevant Code of Practice" applies to it (because the dismissal was for some other substantial reason), the fact that the Respondent failed to deal with the Claimant's grievance is simply irrelevant.

Mitigation

40. I conclude that the Claimant took reasonable steps to mitigate his loss in the period to 2 May 2017 when he was in effect prevented by his PTRs from seeking alternative employment in the cinema industry. The Claimant had held a senior position – that of Managing Director – with the Respondent in the cinema industry and had worked in no other industry since the age of 16. It was reasonable in all the circumstances for him to limit himself in this six month period to preparatory steps aimed at helping him find further employment in the cinema industry in the event that he was not reinstated. I find he took such steps by following the management coaching programme.

41. So far as the period from 3 May 2017 to 2 November 2017 is concerned, I find that the Claimant failed to take reasonable steps to mitigate his loss in this period. I so conclude in light of my findings above that the Claimant took very limited steps indeed to seek alternative employment in this period and, indeed, did not apply for a single job.

42. I find that during this period the Claimant should have looked for employment within a commutable distance of Grimsby where he lives. I find that it in light of his desire to be reinstated it was reasonable of him not to look for employment outside that area in that six month period.

43. I find that in light of the restrictions imposed upon him by the PTRs until early May 2017, and all the circumstances of the case as found above, it would have been reasonable for him to initially limit his search for a period of 3 months from 3 May 2017 to jobs of comparable seniority in the cinema industry but that for the second 3 months he should have broadened his search to jobs in other industries and at lower rates of pay.

44. The question for me, therefore, is by what date such steps would have produced an

alternative income and how much that income would have been. Turning first to the evidence produced by the Respondent and included in the bundle:

44.1. The General Manager job at the Odeon in Hull (page 443). I accept the Claimant's evidence that this would have represented a substantial demotion for him, because it was a general manager job (he had worked for the Respondent as its managing director) and because it was a job he had in fact held some 15 years previously. I accept his evidence that it would have been a "massive step back for [him]". Notwithstanding this, if the job had come up in August 2017 or later, I would have concluded that the Claimant if he had been acting reasonably would have applied for it. However, I find that the Respondent has failed to prove that the Claimant acted unreasonably in failing to apply for it for two reasons. First, it is not clear that the job came up outside the period of the PTRs. The job advert included in the bundle (page 443) is undated. Mr Kemp suggested that the advert was from May 2017 because that was what the index said. The date in May might have been before or after the PTRs expired, if Mr Kemp is correct, but he might not be. Secondly, even if the job came up in May but outside the period of the PTRs and so the Claimant could have applied for it, it was reasonable for the Claimant to have taken the view that he would not apply for what was in effect the first cinema job to come along (post the expiry of the PTRs) but rather would wait longer to see if a job more similar in terms of seniority to the one he had held with the Respondent became available.

44.2. The Area Manager job for Provident (page 448). This was a job in the financial services industry which was available in June. The Claimant had no experience of this industry. In light of my conclusion at paragraph 43 above, and the fact that Doncaster would have been at very much the limit of a reasonable daily commute (about 70 miles each way), the Claimant acted reasonably in not applying for it. Further I find that he would have had little prospect of obtaining the job if he had applied, given that his background was in the cinema industry.

44.3. The Business Manager role in Wakefield (page 445). The advert is unclear – no salary details are provided. The employer appears to be Interserve Healthcare – so presumably the job would have been in the healthcare sector, of which the Claimant had no experience. Wakefield would have been at or beyond the limit of a reasonable daily commute (about 75 miles each way). The job was advertised in June. In light of these matters and my conclusion at paragraph 43 above, the Claimant acted reasonably in not applying for this job.

44.4. The possible job at Wetherby (page 451). I accept the Claimant's evidence that the work concerned was actually voluntary work. Further, Wetherby would have been at or beyond the limit of a reasonable daily commute (75 miles or more each way). The Claimant acted reasonably in not accepting the role, such as it was.

44.5. The other roles included in the bundle in relation to which Mr Kemp cross-examined the Claimant were the DFS Facilities Manager role (page 464) in Doncaster and an Operations Manager role (page 474). They are both undated but the date on the print outs suggest that they were available in March 2018. I therefore find that these were not jobs for which the Claimant could have applied during the period in question (May to November 2017).

45. The reality is that the Respondent has only been able to identify a handful of jobs for which it argues the Claimant could reasonably have been expected to apply in the period from May to November 2017. My conclusions above are that he did not act unreasonably in failing to apply for these jobs. Overall, although, the fact remains that the Claimant did not take the reasonable steps to mitigate his loss that I have identified in paragraph 43 above because he did not make any real effort to look for work in the period to 2 November 2017, I conclude that if he had done so he would still not have found employment before 2 November 2017. Rather I find he would have found employment at some point between that date and the date of the hearing in May this year.

46. Turning to the compensation to which the Claimant is entitled, as stated at paragraph 10 above, the figures relevant to its calculation were agreed.

47. I therefore conclude that the Claimant is entitled to a basic award of £5269.00, the amount shown in the schedule of loss.

48. So far as the compensatory award is concerned, the Polkey conclusions referred to in paragraph 9 above mean that the Claimant is entitled to the full amount of his loss at £698.40 plus pension contributions at £3.71 a week for three months. The period 3 November 2016 to 2 February 2017 is 13 weeks so the amount due is £9,127.43. This amount does not fall to be reduced by 50%: he would have received his notice monies in full whether he was fairly or unfairly dismissed. (There was no argument by the Respondent that it could have fairly dismissed him summarily and this was reflected in my Polkey conclusions.)

49. The remaining 39 weeks of the twelve month period produce a figure of (£698.40 + £3.71) x 39 = £27,382.29 plus loss of statutory rights at the agreed sum of £350 giving a total of £27,732.29. This amount is to be reduced by 50% in light of my Polkey conclusions. As such the amount due in respect of this 39 week period and in respect of the loss of statutory rights is £13,866.15.

50. The total compensatory award is therefore £22,993.58.

Employment Judge Evans

Date: 11 June 2018

JUDGMENT SENT TO THE PARTIES ON

15 June 2018

FOR THE TRIBUNAL OFFICE