



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No 4102633/2016 held at Edinburgh on 1 and 2 November 2016, 23, 24, 25, 26, 27 and 30 April and 1 May 2018, 10, 11, 12, 13 and 14 December 2018, 18, 19, 20, 21 and 22 March 2019 and 29 and 30 April and 1, 2 and 3 May 2019**

**Employment Judge: W A Meiklejohn  
Members: Ms M Fisher  
Ms G Powell**

**Mr Christopher Purnell**

**Claimant  
Represented by Mr D  
McFadzean, Solicitor**

**The Edinburgh Mela Limited**

**Respondent  
Represented by Mr G  
Ridgeway, Consultant**

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The unanimous Judgment of the Employment Tribunal is as follows –

- (a) the Claimant's claim of automatically unfair dismissal (in terms of section 103A of the Employment Rights Act 1996) succeeds and the Respondent is ordered to pay to the Claimant the sum of FIFTY TWO THOUSAND AND TWENTY NINE POUNDS AND THIRTY FIVE PENCE (£52029.35);
  
- (b) the Claimant's claim of unfair dismissal (in terms of sections 94 and 98 of the Employment Rights Act 1996) succeeds but no separate award of compensation is made; and

(c) the Claimant had been subjected to detriment by the Respondent (in terms of section 47B of the Employment Rights Act 1996) and the Respondent is ordered to pay to the Claimant an award of compensation in the sum of FIFTEEN THOUSAND POUNDS (£15000).

## REASONS

### Heads of claim

1. The Claimant in this case was pursuing claims of (a) constructive unfair dismissal, (b) automatically unfair dismissal for making a protected disclosure and (c) detriment as a consequence of making a protected disclosure. The Respondent resisted these claims and asserted that in the event of any of them being successful, it would not be just and equitable to award compensation to the Claimant because of his conduct which, the Respondent contended, constituted gross misconduct.
2. The first head of claim, constructive unfair dismissal, engaged sections 95(1)(c) and 98 of the Employment Rights Act 1996 ("ERA"). Section 95(1)(c) ERA provides as follows -

"...an employee is dismissed by his employer if....the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

Section 98 ERA provides as follows –

"(1) In determining ....whether the dismissal of an employee is fair or unfair, it is for the employer to show –

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and
  - (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
- (2) A reason falls within this subsection if it –
- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
  - (b) relates to the conduct of the employee,
  - (c) is that the employee was redundant,
  - (d) is that the employee could not continue to work in the position which he held without contravention ...of a duty or restriction imposed by or under an enactment.
- (3) In subsection (2)(a) –
- (a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality....
- (4) 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.”

3. The second head of claim, automatically unfair dismissal for making a protected disclosure, engaged sections 103A and 43A-43C ERA (and potentially also section 43G ERA). Section 103A ERA provides as follows –

“An employee who is dismissed shall be regarded ....as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.”

Sections 43A-43C ERA provide as follows –

“43A Meaning of “protected disclosure”

In this Act a “protected disclosure” means a qualifying disclosure (as defined by section 43B) which is made by a worker within any of sections 43C to 43H.

43B Disclosures qualifying for protection

(1) ....a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject....

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

43C Disclosure to employer or other responsible person

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure –

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to –

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility,

to that other person....”

4 The third head of claim, detriment as a consequence of making a protected disclosure, engages section 47B ERA which provides as follows –

“(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure...

(2) This section does not apply where -

(a) the worker is an employee, and

(b) the detriment in question amounts to dismissal...”

### **Alleged protected disclosures**

4. At the Preliminary Hearing held on 19 August 2016 an application was made on behalf of the Claimant to amend the ET1 claim form in terms of an amended paper apart. This was not opposed by the Respondent and the application to amend was granted. The amended paper apart referred to the following matters as alleged protected disclosures made by the Claimant –

- That the Respondent's Vice Chair Mr Foysol Choudhury has represented himself to the Respondent as representing a member organisation of the Respondent namely GSC Scotland, and had presented documents to the Respondent purporting to show that he represented GSC Scotland, when he did not. The Claimant asserted that he had made this disclosure (a) by telephone to the Respondent's Chair Mr Shami Khan and to Mr Choudhury on 16 January 2016 and (b) in person to the Respondent's Board of Directors on 25 January 2016.
- That the Respondent's controlling Board members were not acting in the best interests of the Respondent in relation to its corporate governance including in relation to rotation of Board members and in relation to the issue raised by the first disclosure. The Claimant asserted that this disclosure was made repeatedly to the Respondent's Board and was disclosed to Ms Maggie Maxwell of Creative Scotland in person on 4 February 2016 and to City of Edinburgh Council and Creative Scotland in person on 1 March 2016.

### **Alleged detriments/breaches of contract**

5. The Claimant's amended paper apart alleged the following detriments which the Claimant asserted also amounted to breaches of implied terms of his contract of employment with the Respondent –

- Being subjected to threatening comments by Mr Choudhury that the Claimant should watch himself and that he should remember who pays his wages.
- Being subjected to the accusation by Mr Rajnish Singh, the Respondent's Secretary, of going against the Board's wishes at the Respondent's Board meeting on 20 October 2015.
- Being subjected to angry and aggressive telephone calls from Mr Khan from 22 October 2015 onwards.
- Being subjected to accusations of disrespecting and insulting Board members, in particular Mr Khan and Mr Choudhury, from 22 October 2015 onwards, including at the Board meeting held in the Claimant's absence on 29 October 2015 and at the Board meeting held on 1 December 2015.
- Being excluded from meetings from October 2015 onwards including the Board meetings held on 29 October 2015 and 10 March 2016.
- Being subjected to allegations of trying to introduce elements of a new constitution without authorisation at the Board meeting held on 29 October 2015.
- Being accused of interfering unduly in Board matters at the Board meeting held on 29 October 2015 with Mr Choudhury aggressively suggesting that the Respondent should consider all staff contracts because he was unhappy with the Claimant.
- Being informed in relation to a suggestion by Board member Ms A Holmes that the Board had a duty of care to staff at the Board meeting

held on 1 December 2015 that Mr Khan and Mr Choudhury felt that it was enough that the staff were paid their wages.

- Being subjected to repeated accusations that the Claimant was exceeding his authority by Mr Choudhury in person and at Board meetings including the Board meeting held on 1 December 2015.
- Being subjected by Mr Choudhury at the Board meeting held on 1 December 2015 to criticism of his body language and being told that Directors come and go and that he should not be taking credit for the success of the Respondent's festival and acting as if he was doing the Board a favour.
- Being lied to and provided with contradictory explanations of the first disclosure detailed in the preceding paragraph by Mr Choudhury at the Board meeting held on 25 January 2016, and being accused of conducting a witch hunt against Mr Choudhury with Mr Khan participating and acquiescing in this behaviour.
- Being subjected to criticism and being accused of causing problems with the Respondent's funders and being involved in a conspiracy to undermine the Board following a meeting with the Respondent's funders on 1 March 2016 at which the Claimant was required to give his views to the funders.
- Receiving an email from Mr Khan on 11 March 2016 requiring the Claimant to justify in writing points which he had made in writing for the basis of which the Respondent's Board were entirely aware and for which in some cases those controlling the Board were responsible. The Claimant asserted that this email was entirely disingenuous and illustrated a determination not to simply deal with the concerns facing the Respondent in an open manner in line with the interests of the



organisation, along with a determination to criticise the Claimant without foundation.

- Being subjected to repeated defamatory and negative public statements by the Respondent's controlling Board members following the Claimant's resignation which sought to paint a picture of the Claimant leaving the organisation under a cloud and in which they sought to suggest that the Claimant was being investigated by the police for financial irregularity, this being a false accusation made in press releases which the Claimant believed were made specifically in an attempt to damage his reputation and career.

### **Evidence**

6. For the Claimant we had evidence from the Claimant himself and, on his behalf, from the following witnesses -

- Ms Breige Swift – the Respondent's General Manager at the time the Claimant's employment ended
- Ms Celia Dean – the Respondent's bookkeeper at the time the Claimant's employment ended
- Councillor Adam McVey – a member of the Respondent's Board nominated by City of Edinburgh Council at the time the Claimant's employment ended
- Ms Jay McAllister – the Respondent's Engagement Manager at the time the Claimant's employment ended
- Ms Ali Jarvis - who designed and delivered a one day seminar for the Respondent

- Ms Maggie Maxwell – Head of Equalities and Diversity at Creative Scotland at the time the Claimant’s employment ended
- Ms Jo Navarro – Cultural Development Officer employed by City of Edinburgh Council and the Council’s link officer for the Respondent at the time the Claimant’s employment ended
- Ms Lindsay Robertson – Culture Manager (Arts, Festivals and Events) employed by City of Edinburgh Council at the time the Claimant’s employment ended
- Ms Agnes Holmes – member of the Respondent’s Board at the time the Claimant’s employment ended
- Mr Steve Cardownie – Mr Khan’s predecessor as the Respondent’s Chair
- Ms Lyndsey Jackson – Head of Operations at Edinburgh Festival Fringe Society

7. For the Respondent we had evidence from –

- Mr Khan - the Respondent’s Chair
- Mr Singh - the Respondent’s Secretary
- Mr Choudhury - the Respondent’s Vice Chair

8. We had witness statements from each of these witnesses and a supplementary witness statement from the Claimant all of which were taken as read at the Hearing. We also had a witness statement from Mr G Williams who had been employed as Interim Festival Director following the Claimant’s resignation. When the Respondent chose not to call Mr Williams, the Claimant sought and

was granted (on 30 April 2019) a Witness Order but, following contact between Mr Williams and Mr McFadzean when Mr Williams indicated that he would be unable to attend having recently been in hospital, the Claimant did not insist on his attendance.

9. We had three bundles of documents –

- A main bundle to which we will refer by page number
- An additional bundle to which we will refer by page number prefixed by “A”
- A bundle containing minutes of meetings to which we will refer by page number prefixed by “M”

### **Timescale of Hearing**

10. The protracted nature of the Hearing was the result of a number of factors –

- In the course of the second day of evidence on 2 November 2016 it became apparent that there was an ongoing police investigation involving the Claimant. In these circumstances we decided that we had no option but to sist proceedings until the outcome of this investigation was known. The Tribunal was advised on 15 November 2017 that this investigation had been concluded and that there were to be no criminal proceedings involving the Claimant. The case was then listed for dates in April/May 2018.
- It was not possible to complete the Hearing on those dates and accordingly further dates were allocated in December 2018 with some delay attributable to the availability of those participating in the proceedings.

- It was not possible to complete the Hearing in December 2018 as virtually all of the available time was taken up with the cross-examination of Mr Khan.
- Similarly it was not possible to complete the Hearing in March 2019 and further dates were allocated in April/May 2019.
- We comment further on this in our Comments on Evidence below.

### **Findings in fact**

#### ***Respondent's constitution***

11. The Respondent is a company limited by guarantee. It is a Scottish charity registered with the Office of the Scottish Charity Regulator ("OSCR"). Throughout the period of the Claimant's employment by the Respondent, the Respondent's articles of association were those adopted by special resolution on 12 July 2010 ("Articles", pages 38-59).
12. The Articles set out the Respondent's objects in these terms –

#### **"2 PURPOSES**

The Company's purposes are:-

- 2.1 the advancement of arts, heritage and culture;
- 2.2 the advancement of education;
- 2.3 the advancement of religious or racial harmony;
- 2.4 the advancement of citizenship and/or community development; and

2.5 the promotion of equality and diversity.

2.6 the foregoing charitable purposes being particularly furthered through the provision, organisation, promotion, facilitation and encouragement of a cultural organisation that has at the centre of its activities and ethos a festival, "The Edinburgh Mela". As the central objective is the delivery of a successful mela, it is recognised that the manner in which the charitable purposes will be furthered will reflect the South East Asian origins of melas. Notwithstanding the cultural roots of The Edinburgh Mela and melas generally, in furthering the charitable purposes there will be an emphasis on maintaining and increasing the quality of performances as well as embracing other ethnic minority groups, communities and cultures. In furthering the purposes, while the festival is the central activity, the Company may undertake developmental and other activities outwith the festival that further encourage participation (at all levels as appropriate) in arts and culture as well as engagement with cultural diversity issues."

13. The Articles defined "Member" in these terms – "means a member of the Company whose name is entered in the Register in respect of such membership" - ("Register" being defined as the Company's register of members kept pursuant to the Companies Act 2006) and provided for membership of the Respondent in the following terms –

"8 MEMBERS

8.1 There shall be no maximum number of Members. The minimum number of Members shall be three.

8.2 The subscribers to the Memorandum, members as at the date of the adoption of the Articles and such other persons as are admitted to membership from time to time in accordance with these Articles shall be the Members of the Company.

8.3 Directors of the Company are not required to be Members.

## 9 APPLICATIONS FOR MEMBERSHIP

9.1 An application for membership of the Company shall be in writing in the form set down by the Board from time to time and shall be signed by or on behalf of the applicant and delivered to the registered office of the Company.

9.2 As a minimum, a Member must have the following characteristics:-

9.2.1 be a body corporate or such unincorporated (including for the avoidance of doubt a statutory local authority but excluding individuals);

9.2.2 have a written constitution;

9.2.3 hold at least one general meeting of its members per annum;

9.2.4 have individuals holding positions similar to that of a director of a company limited by guarantee registered in the United Kingdom;

9.2.5 the purposes of the Member must be set out in its written constitution ;

9.2.6 the purposes must be compatible and continue to be compatible with those of the Company;

9.2.7 the purposes of the Member must show a real and genuine connection with black and ethnic minority arts, culture and community issues; and

9.2.8 is supportive of the criteria for and qualifications of board members set out in the Company's "Governance Guide" document or such similar document as may be produced from time to time.

9.3 The Directors shall place an application for membership before the Board at the next meeting thereof to be held after receipt of said application.

9.4 No person shall become a Member of the Company unless he is approved by the Board.

9.5 The Board may in its absolute discretion and without assigning any reason therefore [sic] admit or refuse an application for membership.

9.6 The Directors shall within seven days of the decision of the Board in relation to an application for membership notify their decision to the applicant in writing and if that decision is to admit him/her to membership shall enter the name of that person in the Register of the Company whereupon that person shall become a Member.

9.7 The rights of a Member or Members shall not be transferable or transmissible. For the avoidance of doubt, membership shall cease on the dissolution of a Member.

9.8 Where an unincorporated body is admitted to membership the rights of membership of such body shall be exercisable by such individual as may be nominated from time to time by the management committee or the other governing organ of that body."

14. The Articles provided for Directors in the following terms –

“15 DIRECTORS

15.1 For the purposes of these Articles:

“Member Director” means a Director appointed or re-appointed by the Members under Article 18 or who is a Director as of the date of adoption of these Articles and was appointed by the Members under the provisions of the Company’s articles of association prior to the adoption of these Articles.

“Appointed Director” means a Director appointed or re-appointed by the Directors under Article 18 or who is a Director as at the date of adoption of these Articles and was appointed by the Directors under the provisions of the Company’s articles of association prior to the adoption of these Articles.

15.2 The number of Directors shall be not less than three and not more than sixteen (or such other number as the Company may by ordinary resolution set as the maximum number of Directors), of whom a maximum of ten (or such other number as the Company may by ordinary resolution set) shall be Member Directors and a maximum of six shall be Appointed Directors.”

15. The Articles provided for appointment and retiral of directors in the following terms –

“18 APPOINTMENT AND RETIREMENT OF DIRECTORS

18.1 Subject to the remaining provisions of this Article 18.1 up to ten individuals may be appointed by the Members to act as Directors. As at the date of adoption of these Articles all such Member appointed Director positions are filled. Where a vacancy or vacancies for any such appointment(s) arise(s) (for whatever reason) each Member, other than



each Represented Member (as hereinafter defined), shall be entitled to nominate one individual to be appointed to fill any such vacancy as a Director. Where there are more nominations than vacancies the Board shall hold an election of the Members to decide, on the basis of most votes cast, which of the nominees is to be appointed to fill the vacancy or vacancies (as the case may be). Any election to be held in pursuance of this article shall be conducted in accordance with rules made by the Board for such purpose or as otherwise may be determined by ordinary resolution of the Company. Where the number of nominations is the same as or less than the number of vacancies the Company may by ordinary resolution appoint all or any such nominated individuals to the vacant Director positions. The Board shall be entitled to seek nominations from Members (other than the Represented Members) for any unfilled vacancy on such frequency as it shall, in its discretion, determine appropriate. "Represented Members" shall, at any given time, be the Members that nominated any of the Directors then in office (whether under this Article 18.1 or any provision of the articles of association of the Company prior to the adoption of these Articles) and "Represented Member" shall be construed accordingly.

18.2 The Directors may appoint up to six persons who are willing to act to be a Director either to fill a vacancy or as an additional Director, provided that the appointment does not cause the number of Directors to exceed any number fixed by or in accordance with the Articles of Association as the maximum number of Directors. The Directors should seek to appoint individuals who can bring expertise in areas such as finance, fundraising, arts, culture, Marketing and public relations and charity governance and management.

18.3 Subject to these Articles, a person may be appointed or reappointed or removed from office as a Director by the unanimous agreement of the other Directors.

18.4 Subject to these Articles, each Director shall retire at the general meeting following the third anniversary of the retiring Director's appointment or reappointment (or, if applicable, the general meeting on the third anniversary of the retiring Director's appointment or reappointment).

18.5 A Director who is due to retire at the end of a three year term in accordance with Article 18.4 ("a retiring Director") (provided he/she or she has not served two three year terms in total) shall be eligible for re-appointment as a Director. Subject to Article 18.6, a retiring Director shall be deemed to have been re-appointed if his/her vacancy is not filled at the general meeting at which they would, but for this provision, have retired and he/she is willing to act as a Director unless it is resolved not to fill his/her vacancy or it is resolved that he/she should not be so re-appointed or any resolution for his/her appointment is not carried or he/she is not successful in any election held in pursuance of Article 18.1.

18.6 If a Director has served two consecutive three year terms he/she shall not be eligible for appointment as a Director for a period of one year commencing on the expiry of the second consecutive term and ending on the second anniversary thereof.

18.7 For the avoidance of doubt, Articles 18.5 and 18.6 apply to a Director in their capacity as an individual and not connected to the Director's relationship (of whatever nature) with a Member. Accordingly, a Director shall not be eligible for re-appointment following two consecutive three year terms by virtue of appointment as a Director representing another Member in terms of Article 18.1."

***The Claimant's appointment***

16. The Claimant was appointed to the position of Director of the Respondent and took up that position with effect from 7 November 2011. He succeeded Stephen

Stenning who had been in post for a relatively short time and who left to take up a post with the British Council. A Statement of Particulars (of employment, pages 161-164) was, according to its terms, issued to the Claimant on 29 February 2012 and signed on 26 April 2012. This stated that the duties of the post were those stated in the attached Job Description (pages 158-160). The Statement of Particulars included the following provisions –

“14 EXTRA MURAL EMPLOYMENT

If you are employed on a full-time basis then you will give your whole time to the duties of the post and will not engage in any other business or private practice or accept any other appointment or commission without written approval from The Chair and/or The Edinburgh Mela Board.

16 TRAVEL ON EDINBURGH MELA BUSINESS

Travel and subsequent reimbursement of expenses on behalf of Edinburgh Mela business will require to be approved and authorised, by the Chair and/or the Edinburgh Mela Board.”

17. The Claimant's Job Description (pages 158-160) included the following provisions –

- The Director is accountable to the Board for the performance of all aspects of the organisation within the policies and business plan agreed by the Board.
- Job Purpose
  - To provide effective leadership to the Edinburgh Mela and its staff
  - To manage the balance between artistic, access, financial, operational and management objectives

- To ensure the activities of the organisation are achieved within a balanced budget

#### Organisational Relationships

- The Director reports to the Board and attends all Board meetings
- The Director leads and manages staff including freelance practitioners , artists and contractors as agreed within the management structure
- The Director is the key point of contact for relationships with funders and partners such as City of Edinburgh Council, Creative Scotland and Festivals Edinburgh

#### Financial

- To give regular financial reports to the Board at agreed times throughout the year
- Overall financial planning and control and responsibility for meeting income targets for all aspects of The Edinburgh Mela

#### Legal

- Overall responsibility for ensuring compliance with all legal and policy requirements including Health and Safety, Equal Opportunities etc

***Claimant's authority to incur expenditure***

18. The Claimant reported to the Board on the Respondent's financial position regularly at Board meetings. This would routinely include a separate document - examples are the reference to "up to date draft budget (separate document)" under Finance and Budget Update at the Board meetings held on 3 June 2015 (page M97) and 11 August 2015 (page M101). These documents contained details of income and expenditure. The Claimant did not seek Board approval for such expenditure before it was incurred and was not challenged by the Board for having incurred such expenditure without approval from the Chair or the Board.
  
19. At the Respondent's Board meeting held on 30 January 2012 there was discussion under "Company Financial Management" about the Claimant having "more control over the budget and making payments of up to £5000.00". The minutes of this meeting record (page M5) an action item "CP to prepare a formal set of proposals for a revised financial management system to be presented and agreed at the next meeting".
  
20. The minutes of the Respondent's Board meeting held on 19 March 2012 include the following (at page M7) –
  - "5. Director's Finance Management Report
  
  - Hand out circulated and talked through by Chris.
  
  - Key points
    - All regular bill payments to be put on Direct debit system.

- Book keeping to be done in house and book keeper has been appointed by the Treasurer
  - Chris to have authority to make bill payment online banking system of up to £5000 as discussed previously was agreed by the board.”
21. At the time of these meetings Mr Cardownie was the Respondent’s Chair. Mr Khan succeeded Mr Cardownie as Chair at the Respondent’s AGM held on 18 November 2013. Mr Cardownie remained a member of the Respondent’s Board until March 2014. Ms Holmes joined the Respondent’s Board in November 2012. Councillor McVey joined the Respondent’s Board in June 2015. Mr Cardownie, Ms Holmes and Councillor McVey all confirmed in the course of their evidence that they were aware that the Claimant was incurring expenditure on behalf of the Respondent in the normal performance of his duties as Director. We preferred their evidence to that of Mr Khan and Mr Choudhury who initially asserted that such expenditure was unauthorised but eventually accepted that expenditure/expenses which were provided for within the Respondent’s annual budget did not require the prior approval of the Chair or the Board.
22. Throughout the period of his employment with the Respondent, the Claimant lived in London and met the cost of travel to/from Edinburgh and accommodation in Edinburgh himself. He did however agree with Mr Cardownie, at the time when Mr Cardownie was the Respondent’s chair, that additional costs which he incurred as a result of having to change his travel arrangements to accommodate the Respondent’s business, for example if a meeting date or time was changed, could be charged to the Respondent. Such costs were paid by the Claimant using the charge card provided to him by the Respondent. The Claimant continued to operate on the basis of this arrangement after Mr Khan succeeded Mr Cardownie as Chair of the Respondent’s Board in 2013. Mr Khan and Mr Choudhury were unaware of this arrangement.

***Book-keeping and accounting arrangements***

23. The Respondent's Treasurer was Ishrat Sharif. Because Ms Sharif lived and worked in London she was not able to attend Board meetings. On her recommendation the Claimant appointed Ms Dean to train the Respondent's staff on the operation of Sage book-keeping software. She suggested book-keeping procedures including carrying out monthly bank reconciliations and obtaining documentary evidence for all items of income and expenditure. Ms Dean visited the Respondent's premises once a month to prepare their payroll and she also checked that the bank and wages paid figures in Sage matched the bank statement closing balance and payroll records. She posted the accrual for wages and PAYE/NI figures from the payroll software into Sage each month for the purpose of the Respondent's management accounts.
24. Ms Dean prepared the Respondent's annual accounts following each year end which included checking that the bank figure in Sage matched the bank statement figure and that the wages paid to staff matched the payroll records. She printed off the detailed Sage postings for the year and asked the Claimant to review these for any entries which had been mis-posted. She then made any changes that were required and passed her file to the Respondent's auditors.
25. The Claimant was an authorised signatory on the Respondent's bank account. Mr Khan was also an authorised signatory. From time to time Mr Khan would sign a number of blank cheques which the Claimant would then countersign when they came to be used. The Claimant was able to use online banking to make payments from the respondent's bank account. These arrangements reflected the position as recorded in the minutes of the Board meeting held on 19 March 2012 (see paragraph 20 above).
26. The Claimant did not seek approval from the Chair or the Board before incurring expenditure on behalf of the Respondent because he understood that he did not require to do so. In our view that understanding was correct.

***Identity of office bearers***

27. Immediately prior to the Respondent's AGM held on 18 November 2013, Mr Cardownie was Chair, Mr Choudhury was Vice Chair and Mr Singh was Company Secretary. At that AGM, Mr Khan was elected as Chair in place of Mr Cardownie. Mr Choudhury and Mr Singh remained in their posts.
28. At the Respondent's AGM held on 25 November 2014, after a discussion about Board membership and a proposed (by Mr Choudhury) EGM to which we will refer later, the minutes record as follows (at M84) –

“RK proposed that the full board be re-elected unless anyone would like to stand down. This was agreed. RK proposed that the officers are re-elected to their current positions unless there are any objections. No objections were raised and this was agreed subject to review at the EGM. AQ seconded this.”

RK was Richard Kerley and AQ was Azra Qayyum, both Board members.

29. Mr Khan was first appointed as a director of the Respondent in or around 1998. Mr Choudhury was first appointed as a director of the Respondent in or around 1995 (and was one of the founders of the organisation). Mr Singh was first appointed as a director of the Respondent in or around 2006. Each of them had served continuously as a director since being first appointed at the time of the events described below.

***Arrangements for Board meetings/Ms Swift's appointment***

30. Meetings of the Respondent's Board were held at intervals of 6/8 weeks. These were attended by the Claimant and also by the General Manger.
31. From the time of her appointment in 2013 the General Manger was Marlous Larg-Peterse. When she was on maternity leave from September 2013



Ms Swift acted as General Manager, and on the return of Ms Larg-Peterse from maternity leave, they job shared for a period of 14 months. When Ms Larg-Peterse was again on maternity leave from July 2015, Ms Swift once more provided maternity cover. Ms Larg-Peterse chose not to return to work after her second period of maternity leave and the Claimant appointed Ms Swift as General Manager in February 2016. Mr Khan and Mr Choudhury said that the Claimant had appointed Ms Swift without their and the Board's knowledge. The Claimant denied this.

32. Mr Choudhury described Ms Swift's appointment as "totally illegal" because the position had not been advertised, reflecting the risk of a discrimination claim against the Respondent by a person denied the opportunity to apply for the post. We regarded that risk as minimal and we noted that the Claimant's job description included "overall management of people" (page 159). We did not believe that the Claimant had acted improperly in appointing Ms Swift as General Manager when she was already performing that role (a) as a job share with Ms Larg-Peterse and (b) as maternity cover for Ms Larg-Peterse.
33. We preferred the evidence of the Claimant on the question of whether he had told Mr Khan and Mr Choudhury about Ms Swift's appointment. He had no reason to withhold that information. The Claimant did not attend a Board meeting after 25 January 2016 and so there was no opportunity for him to inform the Board (at least face to face) about Ms Swift's appointment.
34. From September 2013 onwards, Ms Swift took the minutes at virtually all of the Respondent's board meetings.
35. The Respondent's Board meetings were also regularly attended by the Link Officer assigned to the Respondent by City of Edinburgh Council. This was Ms Navarro between January 2013 and March 2015, and again from late 2015 onwards. Ms Navarro reported to Ms Robertson. Copies of the Respondent's Board minutes were provided to their principal funders, City of Edinburgh Council and Creative Scotland.

36. There were two sub-committees of the Respondent's board. These were the HR Committee and the Finance Committee. Mr Choudhury chaired the HR Committee. At no time during the Claimant's employment did the Finance sub-committee question the expenditure the Claimant was incurring on behalf of the Respondent.
37. The minutes of Board meetings were drafted by Ms Swift and reviewed by the Claimant. It was normal for the Board meeting agenda to pick up on action points arising from the previous Board meeting.

***Background to governance issues***

38. Pirnie Limited were engaged by the Respondent to provide a report (the "Pirnie report", pages A1-50). This was based on consultations which took place between 14 January and 10 February 2010. The Pirnie report is dated February 2010 and is stated to be written for the Board of the Respondent, its director and representatives of the two main funders – City of Edinburgh Council and the Scottish Arts Council (now Creative Scotland).
39. One of the "Six Key Themes" emerging from the consultations related to "The Board – Constitution and Governance" and was expressed in the following terms –

"This is complex territory but, based on perceptions shared during the consultation process, it is clear that the present Board needs to reflect deeply on how it is perceived and ask itself why this (generally unfavourable) view persists. The Constitution itself will shortly come under detailed review – and its fitness for purpose. There are however strong indications that those who have doubts about the present Board are referring to what they believe (suspect – know – have observed) to be failings of governance as much as (or rather than) inherent weaknesses of the Constitution itself. Either way, there is clearly a sufficient groundswell

of concern (criticism and dissatisfaction) that the Board cannot ignore – including and specifically, the recent failure of Members to stand-down at the last AGM to permit (constitutionally - required) election of new members to take place. Should the Board persist with this, there is a danger that the organisation could be regarded as operating outwith what is expected (and required) by its legal status; further, that its two main funders could conclude that it is failing to meet the standards expected by their own respective compliance protocols. The Board would be unwise to let these matters lie, un-addressed, as they are.”

40. Later in the Pirnie report, under the heading “The Board: Membership, Performance, Succession” questions posed were –

“What is your impression of the membership and performance of the Board to date? Is the organisation prepared for succession – in respect of both members of the Board and office bearers (for example, the Chair and the Director)?

The reported responses were as follows –

- This Board is characterised by weak membership and poor performance. Frankly, people are struggling. The issues are complex including a structural problem arising from the Constitutional requirement for the Council to nominate the Chair.
- Run like a community body rather than a Board of directors/trustees. Members do not know how to behave. The Board must be managed effectively; inappropriate behaviour is tolerated encouraging an unhelpful culture.
- Directors are eligible to serve for two terms of 3 years then must stand down. The last AGM failed to observe this.”

41. The Articles were adopted by special resolution on 12 July 2010. Mr Khan, Mr Choudhury and Mr Singh regarded this as “resetting the clock” in terms of their own tenure as directors so that they did not require to stand down until the 2016 AGM – see Article 18.6 at paragraph 15 above.

***Funding arrangements***

42. The Respondent received funding to deliver the annual Mela, principally from City of Edinburgh Council and Creative Scotland. This was based on Service Level Agreements between the Respondent and its funders. The Respondent had to comply with its funders’ requirements as a condition of its receipt of their funding.
43. The funders’ requirements included compliance by the Respondent with legal obligations to which it was subject – including the terms of the Articles – and also observance of OSCR guidance. This was highlighted in an email (page 307) from Mr P Deverell of Creative Scotland to Mr Khan of 7 March 2016 (following the meeting held on 1 March 2016 – see paragraphs ---below) where Mr Deverell said –

“The constitutional issues with the Mela Board, discussed at the meeting with both yourself and the Mela Director, relate to governance and procedures. We would encourage you to provide us with the requested action plan to address governance procedures, and rotation in particular; a skills audit; and a timeframe for implementation – to ensure us, as public funders, that the Mela Board is compliant with your own Articles of Association and thus OSCR guidance.”

***Claimant raising governance concerns and proposed new Articles of Association***

44. When the Claimant took up his post in 2011 he became aware of the Pirnie report. He raised the issue of governance with the Respondent’s Board on a

number of occasions. In the minutes of the Board meeting held on 28 April 2014 the Claimant is recorded (at page M65) as follows –

“CP added that there is enormous pressure on the Mela to prove that it’s organisational structure is still fit for purpose. The 2009 Business Plan laid out plans to undertake a full constitutional review which was never put into action, resulting in an even greater need to do so now.”

45. This need for review was supported by Mr Choudhury and Mr Singh. The minutes of the Board meeting held on 9 June 2014 record (at page M66) as follows –

“FC added that their [sic] should be a constitutional review and a plan for how to recruit new people to the Mela board and as membership organisations. RS agreed that the organisation’s structure needs an in depth review.”

46. The minutes of the Board meeting held on 5 August 2014 record the Claimant (at page M70) as follows –

“CP warned the board that there are a few amongst Creative Scotland who are sceptical and that we have to convince them in particular[ly] that our governance is in order. CP has informed Creative Scotland that this is something we are reviewing as a matter of urgency....”

47. At the Board meeting held on 21 October 2014 the Claimant referred to the issue of rotation. The minutes record (at page M78) as follows –

“SK suggested the idea of having a more formal system for ensuring greater rotation of board members. FC explained the way ELREC rotate their board members, suggesting that the system could be replicated within the Mela. CP says that member rotation is a big concern and is something that will be on the agenda at the AGM.”

48. At the Respondent's AGM held on 25 November 2014 Mr Choudhury spoke to a proposal from the HR Committee to reduce the size of the Board from 15 to 12 and to introduce a system whereby 4 directors would be elected for a 3 year term, 4 directors would be elected for a 2 year term and the remaining 4 directors would be elected for a 1 year term. The minutes (at page M83) record the ensuing discussion as follows –

“FC took issue with the fact the proposal being presented required a board member to step down for two years, as he claimed this was not discussed and felt that any member stepping down should be eligible for immediate re-election. TS said that this is what had happened for a number of years and was preventing any real change from happening. CP agreed with this and suggested that any member stepping down would have to take at least a year out in order to allow for effective rotation and refreshment of the board.

FC restated that the current constitution is not up to standard and suggested this is the most pressing issue. CP read [said?] that the current constitution reads that members may serve for up to 3 years, after which they should step down. Technically, members are allowed to stand for a further 3 years if there is no alternative representative to replace them. The problem is that nobody is nominating others and so there is now stagnation. After 6 years board members would be obliged to step down for at least 12 months. AH felt that the constitution is clear, but that it needs to be implemented. The board needs to be seen to be refreshing itself and this is very important; CP felt that it would not send the right message for someone to be able to be re-elected automatically and without break after stepping down....”

49. After further discussion at the AGM about the need to change the constitution and rotation (and also about payment of expenses to board members) the minutes record (at page M84) as follows –

“RS believes that a timeline would be beneficial in setting out what needs to be achieved and by when in order to affect change at the next AGM. FC agreed that this is something that should be discussed and set out properly. He suggested that an EGM could be called in around 4-6 months time, before which 4 representatives of the board should work with CP to present the requirements of the organisation to a professional company who can rewrite the constitution. It was agreed that SK, FC, TS, RK would meet with CP to discuss these issues....”

50. At the special Board meeting held on 23 February 2015 the Respondent’s Board was due to discuss proposed new Articles of Association (which had been circulated for comment) and also applications from potential new members (in excess of 20 applications having been submitted). The minutes record (at page M87) as follows –

“FC stated that the board are all currently individual members. SK disagreed and said that they are representatives of different organisations. RK agreed with Foyso [Mr Choudhury] and said that because the board were all re-elected by each other they are all in fact classed as individual members. FC added that they cannot accept any applications while this the membership criteria is in limbo and while loopholes exist.”

The minutes later record (at page M88) as follows –

“FC concluded that they should vote to reduce board membership to 12 at the next meeting. He also suggested that the majority of comments suggest many directors feel that a gap between standings is not necessary. CP disagreed as many more members were happy with the draft [Articles] and did not suggest the change, only criticisms were placed in the notes. CP expressed the fact that the Mela must have a board which was voted for by its membership, and that the current suggestions are not going to create so.”

51. The proposed new Articles of Association were discussed further at the Board meeting held on 2 March 2015. The minutes record (at page M89) as follows –

“FC thanked the board for good attendance at last week’s special meeting which was called to consider the re-writing of the mem and arts. He reported that it was unanimously felt that number of board members should be reduced from 15 to 12 and that this would be done by voting process at the next AGM. He also suggested that it was felt that a majority supported the motion that board members should be eligible for immediate re-election without having to step down for a year. CP disagreed and pointed out that real rotation cannot occur without having a prescribed gap, also raising the current concern that the board are being elected by each other as there is no wider membership and that this is unconstitutional. FC disagreed by saying that as the majority feel they are representing an organisation, then that organisation could replace their representative at any time, he suggested that this was an issue for the board to determine how to move forward. TS reiterated a concern that there must be a wider membership pool who vote for the board in order that the process is democratic and fair. FC said that by opening up membership this could be achieved but that first membership must be defined.”

Mr Choudhury’s final comment related to earlier Board discussion about possible membership categories.

52. The meeting went on to cover the applications for membership. The outcome was that Mr Choudhury was to call a sub-group meeting at which the applications would be considered. The minutes of the Board meeting held on 20 April 2015 recorded (at page M94) that the membership applications had been dealt with. Only 6 of more than 20 such applications were approved.



53. An updated draft of the Respondent's proposed new Articles of Association was discussed at the Board meeting held on 7 July 2015. Mr Choudhury and Mr Singh voiced some concerns which the Claimant sought to address (page M98) , for example what the position would be if a member organisation decided to remove as its representative a serving director.
54. At the Board meeting held on 22 September 2015 the Claimant proposed that an EGM should take place on 20 October 2015 with a view to adopting the new Articles of Association which would allow time for implementation prior to the AGM scheduled for 1 December 2015. The minutes record the discussion of this matter (at page M104) as follows –
- “There was a discussion about the staff's suggestion to call an EGM on Tuesday 20<sup>th</sup> October before the Mela AGM on Tuesday 1<sup>st</sup> December. A discussion was had as to whether the board's decision to reduce the size of the board to 12 members would be valid under the current mem and arts. It was decided that it would not be necessary to call an EGM at this stage at [and?] that elections at the AGM would be held under the current mem and arts. SK confirmed that the board reduction from 15 to 12 members will take place at the AGM on Tuesday 1<sup>st</sup> December.”
55. The Claimant regarded this as a “complete reversal” by Mr Khan, Mr Choudhury and Mr Singh. His evidence was that they had suggested that there was no need to hold an EGM on 20 October 2015 as they had decided that the process was being “rushed through”. The Claimant could not understand this given the length of time that the proposed adoption of new Articles of Association had been under discussion. He also could not understand how the reduction in the size of the Respondent's Board could be achieved when the existing Articles of Association made no provision for this.

***Member information forms***

56. In preparation for the AGM scheduled for 1 December 2015 the Ms Swift prepared a form with a view to updating the Respondent's member records. She did so because she was concerned that the Respondent's member records were out of date, and no new member information had been gathered since 2008. This was Ms Swift's initiative, of which the Claimant was supportive. We accepted Ms Swift's evidence that this exercise was not done "to catch anyone out".
57. It was done against a background of funders' due diligence requirements increasing. The form requested details of the Board member and the organisation which they represented, and also requested a second contact. The forms were sent out by Ms Swift. In the cases of members who returned the form having inserted their own name as the second contact, the office followed up with a telephone call to request a different second contact.
58. The Claimant reported to the Respondent's Board at the meeting of 20 October 2015 about the member information forms. The minutes record (at page M106) as follows –

"CP advised that the office is undertaking the relevant administration procedures in preparation for the upcoming AGM. The office will be gathering up to date information on all members and clarifying their membership status and collecting contact details for the community organisations board members represent. CP urged all members to send their completed details forms to BS as soon as possible if they had not done already."

We were satisfied that this exercise was an entirely reasonable activity for the Respondent's staff to undertake and did not require prior approval from the Board. It was consistent with the Claimant's responsibility within his job description (see page 159) for "ensuring compliance with all legal and policy

requirements". The Respondent could be subject to audit by its funders whose requirements included legal compliance. Updating the Respondent's member records and checking for compliance with the Respondent's existing Articles of Association were appropriate steps for their staff to take. When the Claimant raised the matter at the Board meeting on 20 October 2015 the minutes (at page M106) disclose no contrary views being expressed and the action points included "All board members to return their Board Member Details form to BS at the office ASAP".

59. Some of the Respondent's directors were happy to provide the information requested but others were unhappy. A number of the directors, including Mr Choudhury and Mr Singh, contacted Mr Khan about the forms and the follow up telephone calls. Mr Khan and Mr Choudhury said that the Respondent's office staff had been contacting member organisations suggesting that where their representative was long serving they should consider a change. The only example they gave was ELREC (Edinburgh and Lothians Racial Equality Council) of which Mr Choudhury was the Chair and Mr Khan was the representative on the Respondent's Board. It seemed to us implausible that this had happened – if it had, it would have been inappropriate and we would have expected some investigation and/or follow up action but there was none.

***Special Board meeting on 29 October 2015***

60. According to the Claimant, Mr Khan contacted him on 22 October 2015 and said that he wanted to call a Board meeting the following week to discuss the forms. Mr Khan's evidence was that the purpose of the meeting was to discuss the AGM. We considered that the Claimant's version was more accurate in that Board members' concerns had been the catalyst for the meeting, although it was clear from the discussion at the special Board meeting that some Board members saw these issues as connected.
61. The Claimant told Mr Khan that he would be on annual leave the following week and would be in India the week after that as part of a British Council delegation.

The Claimant suggested to Mr Khan that the meeting should be arranged for when he returned. Mr Khan indicated that he would meet informally with those concerned. However, on 26 October 2015 the Claimant was (while on leave) advised by Ms Swift that she had been asked by Mr Khan to call an “emergency” Board meeting for 29 October 2015.

62. There followed some telephone calls between the Claimant and Mr Khan during which the Claimant sought unsuccessfully to persuade Mr Khan that the meeting should not take place before his return. The Claimant said that the tone of these became increasingly aggressive, and that Mr Khan accused him of “disrespecting the Chair”. Ms Swift was uncomfortable about attending alone (ie being the only member of staff present) to minute the meeting. The Claimant sent a text message to Mr Khan on 27 October 2015 (page 212) in these terms –

“Hi Shami the meeting on Thursday cannot be an official board meeting I’m afraid as it is too short notice for many members. As such no decisions made will be binding on the rest of the board and I have instructed Breige not to minute it officially. Please call me. Chris”

63. Mr Khan was concerned at the Claimant’s message as he felt the Claimant was being obstructive and was not following his request for an emergency Board meeting. Mr Khan interpreted the Claimant’s text message as meaning that the Claimant had instructed Ms Swift not to take the minutes of the emergency Board meeting. That was not what the Claimant intended by “not to minute it officially” but we could understand why Mr Khan interpreted it as he did.
64. We identified this as the point at which the relationship between the Claimant and the Respondent began to deteriorate. We believed the Claimant’s evidence that he was thereafter subjected to “angry and aggressive” calls from Mr Khan.
65. The Board meeting arranged for 29 October 2015 went ahead. Ms Swift attended and took the minutes (pages 213-218, also M107A-107F). The

minutes are lengthy and detailed and it was not suggested by any of the Respondent's witnesses, all of whom were in attendance at the meeting, that they are not accurate.

66. The following extracts from the minutes provide a flavour of the discussions at the 29 October 2015 meeting –

“...the staff tried to put forward something of the new constitution”  
(Mr Singh)

“...undue interest from office staff in board matters and this is not acceptable” (Mr Singh)

“...not happy that Chris said....there would not be a staff member available to [take] the minutes. The meeting was called by the chair and there should be some respect and courtesy shown to the chair by the staff....” (Neena Agarwal)

“if anyone doesn't respect the chair then they are no use to anyone.”  
(Ragbir Singh)

“...it is an insult to say that the board is no good when the Mela is successful.” (Mr Choudhury)

“...the form circulated was not in keeping with the current constitution.”  
(Mr Singh)

“...this situation will cause lots of mistrust....anything coming from the office will have to be read line by line....” (Mr Singh)

“...it is an insult to be asked for this information.” (Mr Choudhury)

“...the tone of the emails circulated is not healthy...feels insulted with the way they have been written...as if Chris is questioning the boards authority to organise a meeting...” (Mr Choudhury)

67. The Claimant alleged that around this time Mr Choudhury had told him off the record that he “should watch himself” and “remember who pays your wages”. Mr Choudhury denied this but we believed, on balance, that this did happen. However we were not convinced that the Claimant was correct, in hindsight, to regard these comments as a threat by Mr Choudhury. The events narrated below which poisoned the relationship between the Claimant and Mr Choudhury had yet to happen. The 2015 Mela had been successful. While the Claimant did not agree with Mr Choudhury’s position on immediate re-election of directors (see paragraph 58 above), criticism of the Board’s governance was perceived as coming principally from the Respondent’s funders rather than from the Claimant at this stage. The Board’s belief that the Claimant had instructed Ms Swift not to take the minutes of the meeting on 29 October 2015 was based on a misunderstanding of the Claimant’s text message of 27 October 2015.

***Special Board meeting on 1 December 2015***

68. At this meeting the minutes of the Board meeting held on 20 October 2015 were approved but the minutes of the Board meeting held on 29 October 2015 were not approved. There was discussion about style of the minutes of the 29 October 2015 meeting. The Claimant said that, as he was not able to attend, he had “requested a transcript style of minutes so that there was complete transparency on the discussions had”. Mr Singh referred to there being a “trust deficit between the staff and the board”. He said that the minutes should summarise the key points of the meeting and he asked the Claimant to take note “as this might help him to do his job properly in the future”.
69. The minutes then record that, after Mr Khan as Chair had requested that the HR committee look at the issues and the Claimant had asked if any other Board members would like to add something to the discussion, Mr Singh and

Mr Choudhury “asked who is chair and asked CP to let the chair do his job”. Shortly thereafter, the minutes record Ms Holmes expressing concern that the Board’s duty of care to the staff was “currently not being satisfactorily met”.

70. Mr Khan’s response was that they (the Board) did care about the staff and “they pay our wages every month” (meaning that the Respondent paid the staff’s wages every month). He added that the Board would not be treated as “second class citizens” and that this was “a main reason for the mistrust”. Mr Choudhury was critical of the Claimant’s body language. The minutes record him as disputing that the Board had failed in their duty of care to the staff and stating that the staff had a duty of care to the Board, and that the staff could not “be allowed to just insult the board”.
71. The minutes then record the Claimant seeking to explain the background to Ms Swift sending out the forms on 6 October 2015 by reference to “lapses in administration including the fact that the current register of members is not up to date with all the relevant contact information for member organisations”. The Claimant said that Mr Khan had misinterpreted the form as relating to “renewal of memberships and nominations” whereas it was “simply a due diligence exercise”. This was patently correct as there was a separate form which dealt with Board members’ intention to seek re-election or to nominate someone else from the organisation they represented. Page 233 was an example of this, being the form submitted by Mr Choudhury dated 18 November 2013 (identifying the organisation which he represented as “GSC”).
72. After further discussion about the 29 October 2015 Board meeting and the timescale for the adoption of new Articles of Association, the Claimant referred to the Pirnie report and, according to the minutes, “stated that the issues identified in this report all remain relevant today, the organisation has failed to address any of their failings and has not moved on at all”. A little later, the minutes record the Claimant saying that the Respondent had “an overwhelming responsibility to funders to ensure that the house is in order” and encouraging all

Board members to attend the Strategic Board Development Day on 23 January 2016.

73. The minutes record Mr Choudhury responding in these terms –

“FC reminded CP that he [the?] Mela has been around for 21 years and that other Directors have come and gone before him and that it is not only in the past 4 years that CP has been here that the Mela has been successful – adding that the Mela will continue and that he cannot take the credit as he is being paid to be here and so he should not act as if he is doing the board a favour.”

74. After some initial reluctance from Mr Khan and comment from the Claimant that the Respondent’s funding position for 2016 made it “very vulnerable”, Ms McAllister was permitted to speak. She said the fact that the office did not currently hold the correct governance documents was preventing her from applying to several funders. The minutes record her as saying “Many funding bodies now stipulate that applicants are able to provide member details and prove watertight procedure on the way members and directors are recruited.” She highlighted the risk that Creative Scotland would withdraw their support.

75. There was then discussion about the need for an HR committee meeting so that the committee could look over staff contracts. Mr Choudhury told us that the Claimant had refused to provide copies of these contracts but we did not accept this. We believed that the true position was as recorded in the minutes, that is that the Claimant suggested that the HR committee meeting should await the outcome of the Strategic Board Development Day on 23 January 2016 and that copies of the staff contracts could be supplied to Mr Choudhury at any time.

***Mr Choudhury’s Board member details form***

76. Ms Swift told us that Mr Choudhury did not respond initially to the request for information. He then came to the office, asked Ms Swift to print off the form and



filled it in by hand (page 235). He inserted his own personal details at section A of the form including what we understood to be his home address. He left blank the membership status (individual or community member representative) part of section A. He inserted his own name again at Section B – community membership details – giving his business address. At the “name of organisation” part of section B Mr Choudhury wrote “SBCC & GSC”.

77. Ms Swift did not know what SBCC stood for. She discovered it was a company which had been set up by Mr Choudhury to promote business links between Bangladesh and Scotland. It was not a member of the Respondent. Ms Swift recognised that GSC stood for Greater Sylhet Welfare and Development Council – see paragraph 71 above.
78. The provision by Mr Choudhury of his own business address for GSC was queried by Ms Swift as she was aware that it was a well established organisation. She checked the GSC website which contained a list of their members. Mr Choudhury’s name was not on that list. According to Ms Swift, the Claimant then contacted GSC and was advised that they knew of Mr Choudhury but he had not been a member for some time. This led to the submission of a letter dated 29 December 2015 to the Respondent (page 234). This letter bore the heading “Greater Sylhet Welfare & Development Council in UK (Scottish Region)”. It stated that Mr Choudhury had not been a member of GSC for five years.
79. The Claimant brought this matter to Mr Khan’s attention in an email dated 18 January 2016 (pages 225-226). Mr Khan told the Claimant to discuss the matter with Mr Choudhury before taking any steps. The Claimant and Mr Choudhury spoke by telephone on 19 January 2016. Mr Choudhury was attending a conference in Newcastle at that time. Mr Choudhury alleged that the Claimant had called him a liar during this call. We considered this unlikely but we did believe that the Claimant would have conveyed to Mr Choudhury that he (the Claimant) did not believe that Mr Choudhury had acted honestly when

completing his Board member details form. Both alleged that the other had ended the call abruptly.

80. Mr Choudhury said that he had heard the words “got you” and some “giggling” in the background during this call. We did not regard this as credible evidence.
81. The Claimant sent an email to all of the Respondent’s Board members on 19 January 2016 (pages 249-250) attaching the GSC letter. There was an issue in evidence as to whether Mr Choudhury had received this directly from the Claimant or whether it had been forwarded to him by Mr Khan. This arose because Mr Choudhury alleged that the email address used by the Claimant was not the one he was then in the habit of using. We did not regard this as material. Mr Choudhury responded to his Board colleagues by email on 21 January 2016 (pages 254-255) referring to the terms of the Claimant’s email of 19 January 2016 as “libellous and slanderous”. An emergency Board meeting was arranged for 25 January 2016.

***Strategic Board Development Day***

82. In November 2015 the Claimant contacted Ms Jarvis with a view to her designing what she described as “an intervention on governance” for the Respondent. The cost of this was covered by transitional funding provided by Creative Scotland “to deliver Board and organisational development so that the shape and structure of the organisation could be more aligned to its changing needs and purpose”. We have quoted these words from Ms Jarvis’ witness statement because we believe they are a fair reflection of Creative Scotland’s perception of the Respondent at this time. This is confirmed in Ms Maxwell’s witness statement when she refers to the Respondent’s Transitional Plan 2015/16, submitted to meet conditions of Creative Scotland funding, stating that “The Mela membership and board recognise the need for the organisation to update its practices regarding governance....”.

83. Ms Jarvis properly recognised that she owed to the Respondent a duty of client confidentiality and her evidence did not go into the details of the Board Development Day which she facilitated on 23 January 2016. She did however make the following observations –

“I was not persuaded from the event that the Board as a whole either understood the seriousness of the governance issues being raised or had the capacity/experience to address the demands facing the organisation. I felt some Board members prioritised their own personal or group issues over the needs of the Mela as an organisation.”

“I observed some surprising and concerning behaviour from some attendees that I would not expect to have seen tolerated within a well-functioning Board. Throughout the event I felt Chris Purnell and the other staff members acted professionally and courteously under significant pressure from some quarters.”

***Emergency Board meeting on 25 January 2016/GSC issue***

84. In advance of this meeting the Claimant prepared documentation (pages 229-248) which included a summary of his conclusions regarding Mr Choudhury’s representation of GSC as a member of the Respondent’s Board. His assertion was that Mr Choudhury’s membership of the Respondent’s Board was invalid.
85. After the Claimant had referred to the GSC letter, the minutes record Mr Choudhury responding in these terms –

“FC stated that he was very saddened and angry to see the current communication from the office. As a founding member of the board since 1995, he feels that the way this has been done without consultation is a personal attack, and that he will take the matter to lawyers. FC asked the board to know that this a personal attack resulting from questions raised in documentation. FC stated that over the years, from time to time, the Mela

has had to bring in different organisations to make sure they get proper representatives, but stated that he was never brought in as a representative as he is a founding member and he is very angry about the correspondence going on, as it presents a confidentiality issue. FC said that he was the former Chair of GSC, he was elected General Secretary in 2002 and held the position for 2 years before becoming Chair. 3 years ago, FC split from that organisation and set up another organisation, also called GSC. FC stated that he has the paperwork to back this up and feels humiliated by this personal attack. FC added that there is a second organisation called Greater Sylhet Council and that the letter presented from the GSC was not true. FC added that as we cannot see the passport details or have home addresses for the signatories on his nomination form, then this evidence cannot be verified. How would anyone know if it was the same person? FC stated that the situation was out of order and asked who gave the staff authority to go back through any paperwork as this presents issues around data protection and confidentiality. FC asked the board to take this matter seriously as the staff are sending out information without permission and said that as the Mela is a public organisation, it is nobody else's business.

FC suggested that this issue could be a personal attack resulting from FC's suggestion to look at staff contracts in a previous board meeting. FC stated that as the chair was not made aware of nor did he approve any enquiry then the whole accusation is totally invalid and suggested he would take the matter to the police. FC stated that he was elected Chair of the Bangladeshi council, SBCC, and that he brings that organisation in to help whenever the Mela needs support. FC added that membership status of board members has not been clear for some time as Steve Cardownie had suggested that they are all individual members at the 2012 AGM and stated he was advised by CP that he could tick "individual member" on the 2015 form. FC suggested that there were many board members around the table that do not have an organisation, or whose organisations have dissolved and that this was going to be sorted in the

next constitution. FC asked why he had been targeted in particular as someone who had given his life to the organisation he is very angry to be treated in this way. FC suggested that CP had shown his attitude in other meeting and had accused him of corruption on the phone.”

86. The reference by Mr Choudhury to passport details/home addresses related to an issue about the authenticity of the signatures on the form nominating him as a director on behalf of Greater Sylhet Welfare & Development Council dated 1 December 2008 (page 232) and particularly that of Labas Miah. We did not regard this as material in relation to the issues we had to decide.
87. We heard evidence from Mr Choudhury about the GSC issue and on more than one occasion he confirmed to us that our understanding of the position was correct. That understanding was and is as follows. Mr Choudhury was from 2008, and possibly earlier, the representative of Greater Sylhet Welfare & Development Council in UK (“old GSC”) on the Respondent’s Board. The Scottish members of old GSC became unhappy that they were sending their membership fees to old GSC but events were always held in England rather than Scotland. They broke away and set up their own organisation using the GSC name (“new GSC”) in 2010. From that point onwards Mr Choudhury represented new GSC on the Respondent’s board. In 2013 old GSC had established a Scottish regional office in Edinburgh. The letter of 29 December 2015 had come from that office stating correctly that Mr Choudhury had not been a member of old GSC for five years. Mr Choudhury had submitted a copy of new GSC’s constitution to the Respondent’s office in 2010 and had left it to the office to take whatever action was required.
88. The constitution of new GSC was not included in the joint bundle of documents and was only produced to us, at our request, on the twenty second day of the Hearing. Mr Choudhury’s explanation for this constitution not being readily available within the Respondent’s office was that it had been “disposed of”.

89. At the Board meeting on 25 January 2016 there ensued what appears from the minutes to have been a lengthy discussion. Mr Choudhury offered to provide the paperwork to prove the existence of new GSC. Two proposals were put forward. Councillor McVey proposed that an independent third party should investigate and report back to the Board. Although not entirely clear from the minutes, we understood Mr Khan to have proposed that Mr Choudhury should present to the Board paperwork to validate his GSC representative status. The matter was put to a vote and a majority supported Mr Khan's proposal.
90. We heard evidence from Mr Khan and Mr Choudhury that, following the 25 January 2016 Board meeting, Mr Choudhury had referred Mr Khan to the secretary of new GSC who had provided whatever information Mr Khan had requested, including a copy of the constitution of new GSC. No paperwork was presented to the Respondent's Board but at the Board meeting held on 24 March 2016 the minutes (pages M118-120) record as follows –

“SK noted that he has investigated this issue and discussed this with the Director and concluded that no action should be taken. SK said he sees no case to take this to the board and is satisfied by the explanation offered by FC that his board membership is legitimate. He stated that there was no change of organisation and that the organisation which raised the concern came into existence in 2013 and therefore did not exist when the concern was raised. SK said that no one can challenge who signed the paperwork, he is satisfied that the member is legitimate and can remain on the board. SK requested that this matter be closed from today and that the member's name is not mentioned again as it could bring the individual and the organisation into disrepute.”

We did not regard Mr Khan's statement that he had “discussed this with the Director” as credible, at least in so far as it implied that the Claimant had agreed that no further action should be taken.

91. Ms Navarro was in attendance at the Board meeting on 25 January 2016 in her role as Link Officer. Her view was that the Claimant's concern about Mr Choudhury's representative status had been a reasonable matter for him to have raised. She stated at the meeting that it was a serious concern and that she would have to report it to her manager (Ms Robertson) and the Director of Culture. She referred to Mr Choudhury's "challenging behaviour" and to the Claimant being met with "confrontation and aggression". She said that it was "an intimidating environment to be present in".

***Dialogue between Claimant and Ms Maxwell***

92. Being aware of the Respondent's Strategic Board Development Day on 23 January 2016 which utilised funding from Creative Scotland, Ms Maxwell emailed the Claimant on 4 February 2016 seeking an update on the transitional funding process. The Claimant then arranged a telephone call with Ms Maxwell during which he outlined his concerns. Ms Maxwell asked for this in writing and received a report from the Claimant on 11 February 2016 confirming that rotation of Board members remained an issue "with several board members having sat for considerably longer than the Mem & Arts allow. Several consider themselves "founding members" and have difficulty understanding the distinction between being members of the organisation and being board members."
93. Ms Maxwell also received a report from Ms Jarvis which stated that "the board is currently not performing particularly effectively, but there seemed to be limited understanding of...the implications of this."
94. Ms Maxwell's witness statement went on to say –

"CP was raising reasonable issues. These issues had previously been highlighted in the Pirnie Report, and were articulated by the consultant who facilitated the board training in January 2016. CP was correct to inform Creative Scotland of these issues and, by doing so, was fulfilling the duty of an organisation in receipt of public funds.

Creative Scotland notified City of Edinburgh Council (core funders) and it was agreed that CP and the Mela Chair would be invited to a meeting to discuss the ongoing governance issues with both funders.”

***Balfour & Manson advice***

95. The Claimant sought advice from Balfour & Manson LLP, Solicitors relating to (a) the processes for appointment and removal of directors as set out in the Respondent’s Articles of Association and (b) the suitability of draft replacement Articles. In doing so the Claimant was utilising part of the transitional funding provided by Creative Scotland. Pages 63-66 were “Transitional plan and timescale for the Edinburgh Mela 2015-16” which identified the areas for which transitional funding of £51042 was allocated. These included “Drafting new mem & arts”.
96. The advice from Balfour & Manson was contained in an Advice Note dated 10 February 2016 (pages A82-86). This included the following paragraphs in relation to the Respondent’s then current Articles of Association –

**“6. What are the rules for rotation?”**

6.1 Each director....shall retire at the general meeting following the third anniversary of his appointment. A retiring director may be reappointed for a further 3 year period, but following the expiry of his second term he must sit out for at least one year before being reappointed again.

**7. When does the clock start ticking?**

7.1 Having considered the 2010 Articles (and in particular the definitions set out in Article 15 thereof, which expressly include and apply to directors as at the date of adoption of the 2010 Articles), we consider the clock



starts ticking on the date of appointment of the individual director, whether before or after the date of adoption of the 2010 Articles.”

97. The Claimant made Mr Khan and Mr Choudhury aware of the Balfour & Manson advice when he received it. The evidence before us did not allow us to determine the exact date upon when the Claimant did so was but it was after 10 February 2016 being the date of the Advice Note and before 1 March 2016 being the date of the meeting with funders referred to below.
98. Mr Khan and Mr Choudhury were not interested in the Balfour & Manson Advice Note because it had not been instructed by the Board. Neither read it beyond perhaps a cursory glance. Both said in evidence that the Claimant had told them that the advice had come from a friend and would therefore be free. The Claimant denied this. We preferred the Claimant’s explanation that he was utilising part of the Creative Scotland transitional funding. This was in our view confirmed when Balfour & Manson submitted their invoice (page 294).

***Meeting with funders on 1 March 2016***

99. Mr Khan and the Claimant were invited to meet with the Respondent’s funders, City of Edinburgh Council and Creative Scotland, on 1 March 2016 (“funders meeting”). The Council was represented by Ms Robertson who chaired the meeting. Creative Scotland was represented by Mr P Deverell, Director of Strategy, and Ms Maxwell. The minutes comprised pages 277-285 and included (at page 282) the agenda which was as follows –

1 Public Funding: due diligence and accountability

2 Edinburgh Mela: governance, including implementation of Articles of Association 2010

3 Edinburgh Mela: future plans

4 AOB

100. During this meeting, according to the minutes, the Claimant made a number of statements about the Respondent's governance. He identified a "culture of resistance" in terms of recognising the need for Board rotation. He said that he thought there were key skills gaps – communications, marketing and arts policy experience were missing as highlighted in the Pirnie report. As far as the Claimant was aware, there were no legal skills on the Board.
101. The minutes record the Claimant as saying that staff morale was at an all-time low. There was no strategy, no contingency planning, no risk analysis/matrix. There was a vacuum in leadership. A whole year had been taken up with the issue of governance. There was a breakdown of trust. The executive/staff had no Board strategy to take the organisation forward.
102. The Claimant expressed the view that the Mela had grown but the Board had not developed with it. He said that the Board was not governing itself and therefore, as Director and CEO, he needed to develop the strategy to lead the organisation. The Board did not understand his role or that of the other staff and was not supporting the staff. The Board members' perception was that the Mela was a community organisation but it was a much bigger and significant organisation. It needed skills and good, sound governance to take the organisation forward effectively.
103. The minutes record the Claimant then referring to the "issue relating to representation" by which he meant what we have referred to above as the GSC issue. He said that Board members had accused the staff of interfering with Board matters and that some of the Board had accused the staff of disrespect. The Claimant also referred to the Balfour & Manson advice.
104. According to the minutes, Mr Khan asked what the funders were telling the Respondent to do. Ms Robertson replied stating that the funders could not

release funds without an agreed action plan for the organisation to comply with the terms of its constitution; changing the constitution would not be an adequate response at this stage. Mr Khan then stated that he would take the request for an action plan to the Board and requested a meeting between the funders and the Board without executive/staff. He asserted that the Board was doing everything according to the law and the existing constitution.

105. Ms Robertson reiterated the urgent need for an action plan and timeline for delivery to indicate how the Board would adhere to the constitution and rotate Board members. Mr Deverell referred to the “secondary issue concerning best practice and the spread of skills on the Board” and asked “What skills does the Mela Board need going forward?”

106. The outcome of the funders meeting was expressed in these terms –

“In summary, for the organisation to move forward, an action plan and timeline for implementation, to satisfactorily address board membership and rotation should be provided in the next two weeks. A board skills audit should also be provided. An option suggested was that the AGM in July be brought forward; the longest standing members should stand down; and a further four members stand down by 2017.”

107. Mr Khan was shocked by what the Claimant had said at the funders meeting. He said that he could “barely believe” what he was hearing. He felt that the Claimant was explaining to the funders that they should cut their ties with the Respondent and was “trying to destroy the organisation from inside” and “sabotage” the Respondent.

108. The Claimant’s position was that it was in the best interests of the Respondent that he should be honest when asked by the funders to comment. He did so in a “measured and professional manner”. He asserted that everything he said at the funders meeting he had already said to Mr Khan personally and raised at Board meetings, and that his advice had been ignored repeatedly.

***Feedback to Board***

109. The Claimant sent an email to the Board members on 1 March 2016 (pages 288-289, also A87), after the funders meeting, headed “Major funding crisis for the Mela”. He advised the Board that the Respondent’s funding for 2016/17 totalling £355,114 had been effectively put on hold as a result of the funders’ concerns about governance and that an action plan required to be submitted within two weeks. He said that this had serious implications for the very existence of the organisation as there were only funds to cover basic operating costs until June 2016.
  
110. The Claimant’s email also referred to a funding application to Creative Scotland’s “Youth Musical Initiative” (“YMI”) being turned down as a result of the governance issues. Given that the reasons for the YMI application being unsuccessful included “high financial risk” this was not an unreasonable “at a glance” assessment. However, a more detailed reading of the YMI Application Assessment (pages A113-122) disclosed that the high financial risk related to potential double funding from Creative Scotland rather than governance. This and “a lack of evidence of commitment by partners” were said to let down an otherwise “strong application”.
  
111. Mr Khan then sent an email to the Board members on 1 March 2016 (page A88) in which he said that the Claimant had “commented selectively” on the funders meeting. He also said that the Claimant had not consulted with him before sending his “major funding crisis” email and that the Claimant’s email did not “reflect the true content or tone of the meeting”.
  
112. The emails from the Claimant and Mr Khan prompted a flurry of emails from other Board members (pages A89-91) expressing concern and recognising the urgent need for a Board meeting.

113. In response to Mr Khan's statement that he had "commented selectively" on the outcome of the funders meeting, the Claimant sent a further email to the Board members on 2 March 2016 (pages A91-92) in which he included the text of an email he had just received from Ms Robertson (also sent on behalf of Mr Deverell and Ms Maxwell) outlining the agreed actions from the funders meeting. This led to further emails including a lengthy exchange between the Claimant and Mr Singh on 2/3 March 2016 (pages A93-96).

***Board meeting on 10 March 2016***

114. A meeting of the Board was arranged for 10 March 2016. The Claimant expected to attend and on 9 March 2016 he sent an email to the Board (page 292) urging them "to consider the consequences of not meeting the funders requirements" and attaching an option paper (pages A142-143).

115. Mr Khan replied to the Claimant's email on 9 March 2016 (page 291) advising him that the meeting was for Board members only. The Claimant replied to Mr Khan (pages 290-291) protesting about this and referring to the absence of an agenda, the provision in his contract of employment that he should attend all board meetings and the need for transparency.

116. Mr Khan responded to the Claimant (page 290) stating "Your attendance at the Board meeting of the 10th March 2016 is not necessary as you are not needed."

117. The Board meeting duly took place on 10 March 2016. The minutes were at pages 295-299. Mr Khan "walked through" the minutes of the funders meeting. He said that he was not happy with the way the meeting had been conducted and asked whether it was an investigation. He said that the minutes missed some of the things discussed and he had emailed the funders about this.

118. The outcomes of the Board meeting as recorded in the minutes were the following action points –

- RS to prepare draft Response/Action plan as discussed and agreed and circulate to all.
  - SK to look at option of employing a legal firm at the earliest.
  - SK to write to Chris Purnell asking for explanation with evidence about the comments/allegations that he made in front of funders.
  - RS to write to Chris and General Manager to set up AGM 2015 on 24 March 2016.
119. The Claimant was told, after this meeting, by Councillor McVey that he had been criticised during the meeting by Mr Khan, Mr Choudhury and Mr Singh and it had been suggested that the Respondent's problems had been caused by his interference. It had also been suggested that the Claimant had been conspiring with others to undermine the Respondent. The Claimant was upset to discover that the Board had decided to engage a firm of employment lawyers and HR consultants since he was the person responsible for managing the Respondent's budgets and finances and staff.

***Email to Claimant on 11 March 2016***

120. Mr Khan wrote to the Claimant on 11 March 2016 (pages 300-301). While the evidence was not entirely clear as to who had drafted this, it was apparent that Mr Choudhury and Mr Singh were involved, and perhaps also other Board members.
121. As the terms of this email are significant in relation to what happened next we record them in full –

“Regarding the Notes of the meeting of the 1<sup>st</sup> March 2016. As an outcome of the Board meeting that was held on the 10<sup>th</sup> March 2016, there

are various points the Mela Board would like you to justify in writing. Relevant supporting evidence must also be submitted.

To begin: The Chair Shami Khan was asked to attend the meeting “alone”, did you have any part in this intimidating demand?

You said at the meeting that “When you took up post in 2010, two predecessor Artistic Directors had indicated that governance issues were the biggest risk going forward, and that this had been their reason for leaving”. Please provide the evidence for this statement.

Please provide evidence of the “culture of resistance” to which you referred.

Please explain how the “skills gaps” referred to, affected the performance (success) of the Mela since its formation? What improvements in performance could have been gained with other skills?

Please provide the result of the survey used to arrive at the conclusion that, “staff morale was at an all-time low”. Was this reported in writing to the Board?

Please provide the evidence for the following statement, “There is no strategy, no contingency planning, no risk analysis/matrix. There is vacuum in leadership. There is a breakdown of trust. The Executive staff have no Board strategy to take the organisation forward”.

Please provide evidence that “the principle of” (Board member) election was “rejected by members, because it meant there was no rotation”.

You “suggested” that “the Board has not developed” with the growth of Mela. Please provide evidence of this lack of development.

Your “opinion” is that “the Board is not governing itself and therefore, as Director and CEO (you) need to develop the strategy to lead the organisation. The Board does not understand (your) role or that of the other staff, and is not supporting the staff going forward. The Board members’ perception is that the Mela is a community organisation. But it is a much bigger and significant organisation. It needs skills and good, sound governance to take the organisation forward effectively”. Please justify your “opinion” with evidence. Where in the constitution it is said that the Mela is “much bigger and significant” than a community organisation whose “charitable purpose will be furthered to reflect the South Asian origins of the Mela”?

Please provide the evidence which lead you conclude that “we have a serious problem”. Is this an allegation or conclusion from an independent investigation?

The advice you received from “charity lawyers”, did the Board know about this approach to lawyers and did they sanction the decision? Who made the decision to approach the lawyers? Where the lawyers document given to the funders?

Please give the names of those “Board members who were no longer representing eligible organisations for membership”. When did you discover this?

Were members of the Board informed that Appendix 3, that information about them was being passed to the funders? Was any other information passed to the funders without permission? If yes, please provide the information passed.

Now, matters also related to the Notes of the meeting which were not included in the original notes but were sent to the funders pointing out that you had said at the meeting of the 1<sup>st</sup> March 2016 that the Mela Board did



not have the “capacity or the competence” and that the new “rotation policy was flawed”. Please explain and provide the evidence for these statements?

Separate points: Clarification is required regarding the following: Is it correct that “£20,000 and £12,000 are being held by Creative Scotland because of pending governance reform”? Please provide evidence that this was stated by Creative Scotland.

You also said in an email that, two people have complained to OSCR, what have they complained about and who are these people. Evidence regarding the complaint is requested.

I thank you for your co-operation in advance. The notes (minutes) of the Board meeting (10/3/2016) will be available to you as soon as possible. However, it is important that I receive answers to these questions within seven days so that I can pass your answers, with your supporting evidence, to the Board. After I receive your response, you will be invited to a meeting to discuss the matter.”

### ***Claimant's resignation***

122. The Claimant regarded the email from Mr Khan as “disingenuous”. He saw it as the Board challenging him to justify in writing points of which the Board were already aware and in some cases, in the Claimant’s view, responsible for. He felt that it “illustrated a determination not to simply deal with the concerns facing the Mela in an open manner in line with the interests of the organisation, along with a determination to criticise me [him] without foundation”.

123. The Claimant described his reaction to Mr Khan’s email in these terms –

“The email I received from the Chair on Friday 11<sup>th</sup> March was in effect the final straw as it showed a complete refusal to accept responsibility, an

effective denial of knowledge of things which had been under discussion for a very long time, a lack of grasp of the issues, and sought to be putting blame on me.

Because of the foregoing I felt that Mela had acted in such a way as to destroy trust and confidence between us, entirely in breach of their obligations towards me under my employment contract....”

While we detected the hint of a lawyer’s hand behind this language, we believed that it was a fair description of how the Claimant felt. His relationship with the Board had broken down.

124. The Claimant wrote to Mr Khan and the Board on 14 March 2016 (pages 304-305) intimating his resignation. The following are excerpts from the Claimant’s letter –

- “I find myself in an impossible situation, unable to stand by while the Mela is destroyed from within.”
- “The [Pirnie] report ...indicated the grave risks to the Mela if they were not addressed. These stark warnings have been systematically ignored....Resistance to change was evident then and has worsened since.”
- “I have warned yourself and the board....that if rotation and best practice in relation to governance were not addressed, it could threaten the existence of the organisation.”
- “The attempts to blame myself and the staff for the current funding crisis are quite preposterous.”
- “As director and CEO, it is my duty and legal obligation to conduct due diligence and advise the board of non-compliance or

malpractice....Even when a clear cut case of misrepresentation was presented....the decision taken by the board was to ignore the rules laid out in the constitution and protect the individual concerned.”

- “I have made significant sacrifices both financial and personally....to take the organisation forward and I feel that the way I am being currently treated is wholly unacceptable and deeply unfair.”
- “I have no confidence in the chair to conduct the business of the board in the best interests of the organisation and so it is with deep sadness that I am left with no choice but to resign.”

125. Mr Khan replied to the Claimant on 15 March 2016 (page 317) but, as this was sent to the Claimant’s Mela email address, he did not receive it. Mr Khan’s reply invited the Claimant to raise a grievance as an alternative to resignation. In the absence of a response from the Claimant, Mr Khan wrote to him on 30 March 2016 (page 323) accepting his resignation, effective from 15 March 2016.

126. Following the Claimant’s resignation five members of the Respondent’s Board also resigned.

### ***Alleged financial irregularities***

127. The Respondent appointed Mr Williams as Interim Festival Director. He discovered that the Claimant had deleted 1,149 items from a Dropbox account. This was confirmed by an email from Dropbox to the Claimant’s “edinburgh-mela” email address (pages 318-319). This email stated “You deleted Volunteer Requests.docx and 1,148 other files”. According to Mr Williams’ witness statement the deleted items were “largely suspected to be the Respondent’s business documents”. The Claimant’s position was that the deletion of files was akin to clearing out his desk. He deleted things like personal photos. He downloaded Festival related items to Mela files. He was not “covering his tracks”. We accepted the Claimant’s explanation and did not believe that his

deletion of the Dropbox files was intended to damage the Respondent. However, we could understand why the reference in the email from Dropbox to “Volunteer Requests.docx” gave the impression that the Claimant had deleted business documents relating to the Respondent.

128. Mr Williams reported this to Mr Khan. This prompted an investigation by Mr Williams into the Respondent’s finances. Mr Williams generated a report on 17 June 2016 (pages 333-337) and then met with Ms Swift on 29 June 2016. Pages 338-339 contained a list of charge card items/questions and pages 340-341 contained a list of petty cash queries. On pages 338-339 there is recorded against each charge card item the explanation provided by Ms Swift and in some cases a comment by Mr Williams, usually to the effect that “no authorisation” was given. On pages 340-341 there is recorded against each petty cash item the explanation provided by Ms Swift.
129. Ms Swift’s evidence was that in her role she saw and scrutinised all payments made on the company credit card (which we understood to be the same as the company charge card) and also expense claims. She would request further information if anything did not look normal. She had to input all expenditure into the SAGE accounts system with a detailed explanation of every transaction. She said that she had to reconcile the accounts “to the penny”. She was therefore, in our view, well placed to answer Mr Williams’ queries.
130. Both the Claimant and Ms Swift were asked about items on the lists of charge card and petty cash items and gave consistent and credible explanations.
131. There were two occasions when the Claimant used the charge card in error. These both appeared on the charge card statement dated 6 August 2015 (erroneously shown as 2016 on page 339). On 22 July 2015 the Claimant had withdrawn £40 from an ATM using the charge card in error. This amount was repaid to petty cash on the same date.

132. On 31 July 2015 the Claimant had paid for a hire car to attend a wedding using the charge card in error. The amount involved was £91.70. The Claimant told Ms Swift about this. On 17 September 2015 Ms Swift emailed the Claimant about various items including the car hire, asking how she should code this. The Claimant replied the same day instructing Ms Swift to put it through as normal travel expenses. He asked Ms Swift to remind him of the amount and said that he would speak to Ms Dean about “how best to reconcile it” (page 165). Ms Dean’s oral evidence to us confirmed that the Claimant did speak to her about this. The Claimant overlooked this until he was reminded after his resignation, whereupon he sent a cheque to the Respondent (page 330).
133. The Respondent’s witnesses (and Mr Choudhury in particular) regarded the hire car matter as a misuse of public funds. They asserted that the Claimant had only repaid the car hire cost when he was caught out. We did not believe that this was correct. In reporting the matter to Ms Swift and discussing it with Ms Dean, the Claimant had acted in a manner which was consistent with having made an honest mistake. It was unfortunate that he had overlooked repayment until reminded but there was no question of the matter being concealed from the Respondent, nor any intention on the part of the Claimant not to reimburse the Respondent.
134. The Respondent was surprised that some expenses incurred by the Claimant in connection with his British Council trip to India (see paragraph 62 above) had been charged to them as they were under the impression that the British Council were covering all the costs. Mr Khan emailed the British Council on 26 May 2016 (page 332) about this and received a reply on 27 May 2016 (page 331) confirming that the British Council “booked and paid for the airfare, accommodation and local transport (in India)” and that “some related subsistence was provided”. This was consistent with the Claimant’s evidence. The assertion in Mr Khan’s evidence that the British Council email confirmed that the trip was fully paid for was incorrect.

135. There were other matters in respect of which the Respondent believed that the Claimant had acted improperly, including payment of per diems paid to himself (in respect of the India trip), to Ms Swift (in respect of a trip to Poland), to artists involved in the Bollywood Love Story production at the 2015 Mela, having the artists' per diems signed for by someone called Rajani, taking upgrades such as high speed wi-fi, wine purchases, travel between his home in London and Edinburgh, hotels and airport transfers. We found the evidence of the Claimant about all of these matters to be entirely credible and that there had been no improper conduct on his part.

136. We refer to the following statements by the Respondent's witnesses –

- Mr Khan – “Mr Williams found that the Claimant had been using the company's finances as somewhat of a personal cash pot. Mr Williams further uncovered that the Claimant appeared to have been jet-setting around the world on the companies [sic] account....”
- Mr Singh – “We estimate that the Claimant may have taken around £30,000.00 from the business in the form of the paying out of per diems, paying himself per diems and his charge card expenditure without any proper authorisation. Unfortunately, the Claimant's actions in deleting documents means we will never know the full extent of what was taken but this is a reasonable guesstimate.”
- Mr Choudhury – “In retrospect it is clear that the Respondent has been treated appallingly by the Claimant and he has used the Respondent, a charitable organisation for the benefit of cultural involvement, as a personal cash fund to jet set around the world and live a life of luxury on the Respondents account.”
- Mr Williams – “It appeared to me that the Claimant was incurring thousands of pounds worth of expenses for everything from Easyjet flights, cash withdrawals, personnel [sic] car hire, artists travel,

accommodation, per diems, wine, airport transfers for the Claimant, taxi fares for the Claimant, legal work, high speed wi-fi and day to day expenses. The common theme showed that the Claimant had authorised these expenses or accrued them himself and the Board was not advised nor was any approval sought from the Board. The Claimant had literally accrued thousands of pounds of unreasonable expenses without the board's permission or authority including expenses that could only possibly be personal travel expenses such as Easyjet flights and airport transfers around Gatwick."

137. We preferred the evidence of the Claimant in relation to all of these matters. The Respondent's assertions that the Claimant had acted improperly were misconceived. Mr Khan's reference to the Claimant "jet-setting around the world" and Mr Choudhury's reference to the Claimant using the Respondent as a "personal cash fund to jet set around the world and live a life of luxury on the Respondents account" made no sense whatever and were quite simply untrue.
138. The evidence of Ms Jackson demonstrated how far removed from the truth was the suggestion that the Claimant had used the Respondent's finances as a "personal cash pot". She described the process by which the Fringe Box Office, operating in partnership with Red Sixty One Ltd, provided ticketing and box office services to the Respondent. This included cash handling on site during the festival. Mela staff were not involved. After reconciliation and deduction of charges for these services, funds were remitted directly to the Respondent's bank account. In the case of the 2015 Mela £48,971.20 was remitted on 3 September 2015 and £5191.49 was remitted on 5 September 2015.

### ***Appointment at Napier University***

139. Following the Claimant's resignation, the Respondent discovered that he had held the position of Visiting Professor at Napier University. They regarded this as a breach of clause 14 of the Claimant's contract of employment (page 164) in terms of which any "other appointment" required written approval from the Chair

and/or the Board. The Claimant told us that his predecessor had held the same appointment. There was no remuneration. We considered that this was a trivial matter and that the Claimant's position at Napier University was consistent with promoting the Respondent's best interests.

***Police investigation***

140. The Respondent reported the Claimant's alleged wrongdoing to the Police. The Police carried out an investigation which appears to have taken from around June 2016 until 15 November 2017. The outcome was a decision that no further action would be taken.

141. The Police investigation was described in the Respondent's witnesses' statements in these terms –

- Mr Khan – “...we have been advised that the Claimant will be formally questioned for his crimes once the Police have been able to put a final sum on the amount that he has indeed stolen.”
- Mr Singh – “The matter has been reported to the police who have advised that their concern is how much the Claimant has taken from the business and when they have final sums they will be charging him accordingly.”
- Mr Choudhury – “Having spoken with the police they have explained that the Claimant will be formally questioned for his crimes once a figure has been able to be put together as to how much the Claimant has stolen. As to criminal proceedings against the Claimant it appears that this is more a question of “when” as opposed to “if”.”
- Mr Williams – “The matter has been reported to the police and I understand that the police have advised that once they are able to pin-



point a final figure as to how much the Claimant has stolen they will be charging him for his crimes.”

142. In fairness to the Respondent’s witnesses, these statements were prepared in preparation for the start of this Hearing in November 2016, at which time the Police investigation was ongoing. It seemed to us improbable that the Police would have spoken in the terms described above. The statement attributed to Police Scotland in the Times report of 23 June 2016 (at page 473) was in these terms –

“We have been made aware of claims relating to financial irregularities involving an individual. As this is forming part of an ongoing enquiry, which includes whether a crime has been committed, it would be inappropriate to comment further at this time.”

However, we are prepared to accept that what the Respondent’s witnesses said in their statements was the impression, albeit mistaken, which they had at that time about what the Police had said.

143. On the basis of the evidence before us, we have no hesitation in finding that the Claimant did not steal anything from the Respondent.
144. The Police investigation placed very considerable strain on the Claimant due both to the nature of the allegations and the time taken to complete the investigation. He described it in these terms –

“The protracted police investigation I have been subjected to has been the most unpleasant experience of my life and has taken a heavy toll on myself and my family both financially and in terms of stress suffered by myself.”

The Claimant did not seek medical help but he disclosed that he and his wife had attended marriage guidance counselling, the need for which he attributed to the stressful situation in which he found himself.

***Press coverage***

145. The Claimant's departure from his position with the Respondent in March 2016 was reported in the press. The Claimant denied speaking to the press but it was apparent that his resignation letter had come to their attention.

146. The Respondent felt the need to reply, and to explain why the Mela would not be taking place in 2016. They issued a press statement on 2 July 2016 (page 478) which appears to have been in response to a report published in the Scotsman on 30 June 2016 (pages 474-477). The Respondent's statement included this paragraph –

“We can confirm that there is an ongoing Police investigation into financial irregularities, but we would like to state that none of our Board members is under investigation.”

There was a further report in the Scotsman on 13 July 2016 (pages 479-482) which quoted the Respondent's Board as saying –

“....the council's concerns stem from a complaint raised by an aggrieved member of staff who resigned amid “financial irregularities”.”

147. The Respondent also prepared a document (pages 500-503) explaining why the 2016 Festival would not take place. In this document the Respondent was critical of both the funders and the Claimant. There were also references to elements of what we describe below as the “Conspiracy Theory”.

148. The references in the press to “financial irregularities” proved damaging to the Claimant as we explain below.

***Mitigation***

149. Following his resignation in March 2016 the Claimant sought comparable employment and submitted a series of job applications, none of which was successful. He said that job opportunities within the arts sector were “few and far between”. The Claimant found that the subject of his resignation came up at job interviews and he had to explain the situation to prospective employers. He said that when searching for his name on Google, as he believed prospective employers and recruiters would do, the “Mela crisis” appeared prominently on the first page of results. He believed that the references to “financial irregularities” had a negative impact on his job prospects.
150. The loss of his income meant that it became financially unsustainable for the Claimant and his family to continue to live in London and they took the decision to relocate to Bristol. Following the move to Bristol, the Claimant’s wife secured a job which required her to work three days per week in London. This resulted in a “role reversal” in terms of looking after their two children (then aged 12 and 9).
151. The property which the Claimant and his wife purchased in Bristol required extensive renovation which the Claimant undertook himself between December 2016 and October 2017. During this period the Claimant continued initially to look for arts sector employment. However, after another job application in April 2017 at which the Mela issue was again raised and where, despite what he considered to be a very good interview, he was unsuccessful, the Claimant became demoralised. He decided to establish his own business in the field of interior design and property renovation.
152. As at 15 March 2016 the Claimant was earning £3583.00 per month gross and £2688.86 net from his employment with the Respondent. He was meeting the cost of travelling between London and Edinburgh and accommodation in Edinburgh himself which he assessed at £6500 per year.

153. The Claimant estimated his net income from his own business in the part year to 31 March 2018 to be £8000. He produced details of income and expenditure in the year to 31 March 2019 which showed a net profit (after adding back “personal project” costs) of £7160.59. His business had been quiet during the summer of 2018 and this led the Claimant to submit a job application in September 2018 – he described this as a “wobble”. Since then things had picked up and he anticipated that by October 2019 his income would be comparable with what he had been earning in March 2016 (taking account of the travel and accommodation costs he was incurring at that time).

### ***Conspiracy theory***

154. This assertion was most forcefully articulated in the evidence of Mr Choudhury. Although not foreshadowed in his witness statement, Mr Choudhury believed that this dated back to 2013 when Mr Khan replaced Mr Cardownie as the Respondent’s chair, becoming the first Asian to hold that position. Mr Choudhury found support for this in the language used by Mr Cardownie in a voicemail message he left on the Claimant’s Mela mobile phone on 29 March 2016. The transcript of this (page 499) read as follows –

“Hi Chris, this is Stevie here. I have been phoning up the relevant people. There is no reason that those involved with the Mela should think that this money is forthcoming. They have not been told anything of that nature.

I have encouraged and I am sure that it has happened that an email to go to them from the funders saying to them, basically, that this includes any contracts based on the premise that the grants are forthcoming, they do so at their peril. And at least the benefit of pulling a fast one by saying at a later date that in terms of the Council and Creative Scotland offending the Mela by not honouring the contract, they could point to the fact that they have had an email telling them not to include any contracts and I have spoken to Lynne Halfpenny (Council employee, Chris’ ally) yesterday and

she says she was still out and she will speak to someone in Creative Scotland. Adam McVey (Councillor on Mela's Board, Chris' ally) has resigned and has parted from the Board and I couldn't believe why he has resigned?

It is still bubbling away. Please keep in touch with me. I will keep you informed and if you hear anything on the grapevine it would be great if I could find out what is happening as well. I will let you know what is happening regarding other complaints with Foysoil regarding his ELREC activities, etc – see you then, bye”

The words in brackets were added by the Respondent.

155. Mr Choudhury found further evidence of a conspiracy in an email from Ms Navarro to the Claimant on 19 January 2016 (page 227) in which Ms Navarro provided the Claimant with “Whistleblowing contact details”.
156. Mr Choudhury also found evidence of a conspiracy in Ms Holmes sharing with the Claimant by email on 28 January 2016 her letter making a report to OSCR (pages 270-271).
157. Mr Choudhury believed that the emails between the Claimant and Ms McAllister on 29 January 2016 with Ms McAllister forwarding to the Claimant advice on removing directors from an acquaintance (pages 272-274) constituted yet more evidence of a conspiracy.
158. Our view was that the voicemail from Mr Cardownie did not reveal a conspiracy against the Respondent, involving the Claimant. At the time of the voicemail the Council's funding had already been put on hold. The more logical interpretation was that Mr Cardownie was stating that the Mela Board should not be entering into contracts with third parties when their funding was in doubt and an email should be sent by the Council making this clear lest the Board subsequently try to blame the funders. We noted that the Respondent's document (pages 500-

503) referred to at paragraph 147 above did what Mr Cardownie anticipated, ie blame the funders – “...the Council and Creative Scotland have killed Mela Festival 2016...”(at page 502).

159. At the time when Ms Navarro provided the Claimant with whistleblowing contact details, the relationship between the Claimant and Mr Khan/Mr Choudhury was deteriorating. We did not find it surprising that the Claimant should be exploring his options to address the governance issues affecting the Respondent’s Board when he perceived reluctance within the Board to do so themselves. Given the importance to the Respondent of its relationship with the Council as a key funder, it was also not surprising that the Claimant should have a good relationship with Ms Navarro as the Council’s Link Officer. That was not in our view evidence of a conspiracy.
160. Our reading of the minutes of the Board meeting on 25 January 2016 is that Ms Holmes was supportive of the Claimant (see pages M114-116) and stated her intention to seek advice from OSCR during this meeting. Against that background we saw no element of conspiracy in her subsequently sending to the Claimant a copy of her letter to OSCR.
161. We could understand that Mr Choudhury would be unhappy that Ms McAllister had sought advice about removal of directors. It would be natural for him to be offended by her references to “three main characters” and “the board refuses to change or in the case of certain individuals step down” (page 274). However, this took place shortly after the Board meeting on 25 January 2016 and was in our view a reaction to the conduct of Mr Choudhury and Mr Khan at that meeting in relation to the GSC issue. Ms McAllister was present at this meeting and would have heard the Claimant arguing that Mr Khan and Mr Choudhury were behaving unconstitutionally (page M116). Once again we did not regard this as evidence of a conspiracy.

### **Submissions**

162. Mr McFadzean and Mr Ridgeway provided us with written submissions, supplemented orally. These contain a helpful summary of the parties' respective positions in fact and law and, as they are available within the case file, we will not rehearse them here.

### **Comments on evidence**

163. It is not our function to record every piece of evidence put before us and we have not attempted to do. We have focussed on those parts of the evidence which we found to be material when dealing with the issues in this case.
164. Mr Ridgeway suggested that the Claimant had been aggressive on occasions during his evidence under cross-examination. Our view was that, while the Claimant had defended himself in quite robust terms in response to what he saw as the more bizarre of the allegations made against him by the Respondent's witnesses, his evidence was given in a straightforward and measured way and was entirely credible.
165. The Claimant's witnesses were also credible and their evidence painted a picture which was consistent with the Claimant's evidence about the difficulties within the Respondent's board. Ms Swift, Ms McAllister, Ms Navarro and Ms Holmes all made reference to aggressive behaviour towards the Claimant at Board meetings. Councillor McVey referred to Mr Choudhury behaving "grossly unprofessionally" and having "mistreated" the Claimant. We noted the criticisms of the Claimant's witnesses made by Mr Ridgeway in his submissions but did not agree with them.
166. The evidence of Ms Robertson and Ms Maxwell who represented the Respondent's key funders demonstrated their recognition of and concern about governance issues within the Respondent's Board. They were concerned about

the lack of meaningful Board rotation and adherence by the Respondent to its own constitution.

167. In contrast, the manner in which Mr Khan and Mr Choudhury gave their evidence was often unsatisfactory. Both showed a reluctance to answer simple questions directly and had to be warned by the Tribunal about this. This contributed to the length of the Hearing. Both spoke of the need to account for every penny of public money but seemed unable to recognise that public funding brings with it the need to adhere to funders' requirements including best practice in matters such as rotation of directors. Where there was conflict between the evidence of the Claimant and his witnesses and that of the Respondent's witnesses, we preferred the evidence of the former.
168. Mr Choudhury provided us with a reasonably clear explanation of the GSC issue – see paragraph 87 above – although there were some areas of difficulty with that explanation. We were not convinced that Mr Choudhury had submitted a copy of the new GSC constitution to the Respondent's office and that this copy had been "disposed of". Mr Choudhury referred to new GSC as having broken away from old GSC and we were not convinced that he understood that membership of the Respondent under its Articles of Association could not be transferred (see Article 9.7 at paragraph 15 above), a point which Mr Purnell had tried to make at the Board meeting on 25 January 2015.
169. However, this did not match the rambling and incoherent explanation Mr Choudhury gave to the Respondent's Board on 25 January 2016 (see paragraph 85 above). At the Board meeting on 24 March 2016 Mr Khan referred to the GSC which complained about Mr Choudhury as having come into existence in 2013 whereas Mr Choudhury's evidence to us was that old GSC had established a Scottish Regional office in 2013. We believed that in telling the Board on 24 March 2016 that Mr Choudhury's Board membership was legitimate and requesting that the matter be "closed from today", Mr Khan was effectively sweeping this issue under the carpet.



170. We were satisfied that the Board minutes taken by Ms Swift were as accurate as they could be, given that the discussions became animated at times.

### **Discussion and disposal**

171. We approached our deliberations on liability by posing a number of questions –
- Was the Claimant dismissed by the Respondent?
  - Did the Claimant make a protected disclosure (or disclosures)?
  - If so, was the protected disclosure the reason or principal reason for the dismissal?
  - If not, what was the reason for dismissal and was the dismissal unfair?
  - If there had been a protected disclosure, did the Claimant suffer detriment?

### ***Was the Claimant dismissed by the Respondent?***

172. We reminded ourselves of what Lord Denning said in **Western Excavating Ltd v Sharp 1978 ICR 221** –

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed.”

173. Accordingly, for section 95(1)(c) ERA to apply, there had to be a fundamental breach of contract of employment by the Respondent in response to which the Claimant resigned without waiting too long to do so.
174. That breach might be of one or more express terms of the contract or of an implied term, such as the duty of trust and confidence. The authorities on the duty of trust and confidence including the decision of the House of Lords in **Malik v Bank of Credit and Commerce International SA 1997 IRLR 462** are summarised in **Morrow v Safeway Stores PLC 2000 IRLR 9** to which Mr Ridgeway referred us. It hardly needs said that the relationship between an employer and their most senior employee necessarily involves trust and confidence. That applied in this case, as between the Board and the Claimant.
175. We looked at the Claimant's letter of resignation of 14 March 2016 (pages 304-305) and in particular the sections we quoted at paragraph 124 above. The Claimant was writing in response to Mr Khan's email of 11 March 2016 (pages 300-301). That email asked the Claimant to explain what he had said at the funders meeting on 1 March 2016. We agreed with the Claimant's description of Mr Khan's email as disingenuous. The Claimant was being asked to explain what the Board already knew. He was being blamed for the Respondent's funding difficulties when the fault lay fairly and squarely with the Board. He had told the truth when asked to comment at the funders meeting.
176. For the reasons set out in the preceding paragraph, we found that the terms of Mr Khan's email of 11 March 2016 breached the Respondent's duty of trust and confidence towards the Claimant. That breach was fundamental, going to the root of the contract. The Claimant resigned in response to the breach and did not delay doing so. The Claimant was constructively dismissed by the Respondent.
177. In his submissions, Mr McFadzean referred to twenty four other matters which he asserted were individually or cumulatively a fundamental breach of the Claimant's contract of employment. They went to the heart of the relationship

and seriously damaged or destroyed trust and confidence. If Mr Khan's email of 11 March 2016 was not itself a fundamental breach of contract, it was "the last straw" for the Claimant. We would have accepted that argument had it been necessary for us to do so.

***Did the Claimant make a protected disclosure?***

178. In his submissions, Mr McFadzean listed a significant number of alleged protected disclosures. We did not consider it was necessary for us to consider all of these individually. Instead, we sought to identify the disclosure or disclosures (if any) which might have been connected with the Claimant's constructive dismissal and/or the alleged detriment.

179. We reminded ourselves that, in terms of section 43C ERA there had to be a "disclosure of information" by the Claimant to the Respondent. We found that the Claimant had made the following disclosures of information to the Respondent at the Board meeting on 1 December 2015 –

- The Respondent's register of members was not up to date
- The Respondent had failed to address the governance issues raised in the Pirnie report

180. We found that the Claimant had made the following disclosures of information at the Board meeting on 25 January 2016 –

- Mr Choudhury was not the nominated representative on the Board of old GSC (being the organisation then in membership of the Respondent and which had raised the complaint against Mr Choudhury)
- Board membership was not transferable

181. We also found that, when the Claimant disclosed the Balfour & Manson report to Mr Khan and Mr Choudhury in February 2016, he was disclosing that the Respondent was not complying with the provisions of its Articles of Association relating to board rotation.

182. We reminded ourselves of the provisions contained in the Companies Act 2006, Part 10, Chapter 2 which deals with general duties of directors. We summarise these by reference to the headings of sections 171-177 –

- Duty to act within powers
- Duty to promote the success of the company
- Duty to exercise independent judgment
- Duty to exercise reasonable care, skill and diligence
- Duty to avoid conflicts of interest
- Duty not to accept benefits from third parties
- Duty to declare interest in proposed transaction or arrangement

183. We found that –

- (a) These disclosures tended to show that the Respondent (and/or the Board) had failed and was failing to comply with legal obligations to which it was subject. Promoting the success of the Respondent and exercising reasonable care, skill and diligence included keeping its house in order where it might come under scrutiny from funders in respect of legal compliance and governance.

(b) They were made in the public interest – as a publicly funded organisation the Respondent was accountable to its funders. The funds allocated to the Respondent by its funders were taxpayers' money and it was clearly in the public interest that the Respondent should behave in a way which was legally compliant.

(c) The Claimant had a reasonable belief that these disclosures were true; this flowed from our finding that the Claimant was a credible witness.

184. Accordingly we were satisfied that the Claimant had made protected disclosures within the meaning of section 43A ERA. In view of this finding we did not consider that it was necessary to determine whether the Claimant had also made protected disclosures under section 43G ERA when he spoke with Ms Maxwell on 11 February 2016 and at the funders meeting on 1 March 2016.

***Was the protected disclosure the reason or principal reason for the dismissal?***

185. As this was a constructive dismissal we had to look at the reason for the conduct on the part of the Respondent which amounted to a fundamental breach of the Claimant's contract of employment. We considered that the answer lay, at least in part, in the language used in Mr Khan's email of 11 March 2016 (pages 300-301) which we have set out in full at paragraph 121 above.

186. Mr Khan had referred to the Claimant's use of the phrase "culture of resistance" in relation to governance issues. He had asked for evidence of "a breakdown in trust" when this had first been alleged by Mr Singh (M109) rather than the Claimant. He had asked the Claimant to provide the evidence which led him to conclude that the Respondent had "a serious problem" when this was abundantly clear from the outcome of the funders meeting.

187. The Claimant had brought to the Board the complaint against Mr Choudhury and the evidence casting doubt on the legitimacy of his position as a director and

whether (a) the Respondent's register of members was accurate and (b) there had been a purported transfer of membership contrary to the Respondent's Articles. It was apparent from his repeated references during his evidence to there being a plot against him involving the Claimant that Mr Choudhury was not well disposed towards the Claimant. Indeed at one point during his evidence Mr Choudhury accused the Claimant of being "racist", an allegation which he then withdrew albeit not very graciously.

188. Against this background we were satisfied that the reason for the Respondent's conduct towards the Claimant which we found to constitute a breach of the obligation of trust and confidence was the fact that the Claimant had made the protected disclosures to which we have referred in paragraphs 180-183 above.

189. It followed that the claim under section 103A ERA succeeded - the Claimant had been automatically unfairly dismissed by the Respondent.

***If not, what was the reason for dismissal and was the dismissal unfair?***

190. Given our finding in the immediately preceding paragraphs, the first part of this question became redundant and the second part academic.

191. Had we not found that the Claimant's constructive dismissal was automatically unfair, we would have found that it was a "normal" unfair dismissal under section 98 ERA because the Respondent had failed to show a potentially fair reason for dismissal.

***If there had been a protected disclosure, did the Claimant suffer detriment?***

192. We found that the Claimant had suffered detriment in a number of ways –

- He had been accused without justification of financial irregularities. While the Claimant was not mentioned by name when the Respondent

participated in the press coverage mentioned above, it would have been apparent to anyone with even a limited amount of knowledge of the Claimant's departure from the Respondent that he was being linked to the alleged financial irregularities.

- His employment prospects were severely damaged. The point which the Claimant made about a Google search disclosing the alleged financial irregularities and his evidence that this arose at job interviews was confirmatory of this. It became impossible for the Claimant to continue his chosen career.
- He had been reported to the Police and subjected to a lengthy investigation which he found very stressful.

193. It followed that the claim under section 47B ERA succeeded.

### ***Remedy***

194. The Claimant was entitled to compensation for his automatically unfair dismissal. This comprised a basic award in terms of section 119 ERA and a compensatory award in terms of section 123 ERA to reflect his loss of earnings.

195. We refer to paragraph 153 above. At the time of his dismissal (a) the Claimant's net pay was more than the then applicable weekly limit of £479, (b) he was 53 years of age and (c) he had completed four years of continuous employment with the Respondent. The multiplier for the purposes of the basic award is 4 (years' service) x 1.5 (the multiplier applicable to service over the age of 41) which equals 6. £479 times 6 equals £2874 which is accordingly the amount of the basic award to which the Claimant is entitled.

196. The period between the date of the Claimant's resignation (in March 2016) and the date upon which he expected his earnings to "catch up" (by October 2019)

was approximately 42 months. The starting point for calculating his loss of earnings was therefore  $42 \times £2688.86$  which equals £112932.12.

197. From this figure we required to make a number of deductions –

- The Claimant no longer had to meet his travel and accommodation costs. Based on the annual figure of £6500 provided by the Claimant and calculated over a period of 42 months (3.5 years) this equated to a saving of £22750.
- In the period to 31 March 2019 the Claimant had earned £15160.59 from his own business.
- In the period between 1 April and 30 September 2019 (being the Claimant's earnings "catch up" period) we estimated that his earnings would be £9112.15. We calculated this figure by taking a "broad brush" approach and assuming that the Claimant's earnings would increase by the same amount per month between April and September 2019. The start point was the monthly average of the Claimant's earnings in 2018/19 - £7160.59 divided by 12 which equalled £590.72. The end point was the Claimant's monthly earnings figure in March 2016 which was £2146.19 being £2688.86 less £541.67 (£6500 divided by 12). The average monthly increase was £259.23 which we added for each month to produce a total of £9112.15.
- Finally we made a deduction to reflect the fact that the Claimant was engaged in the renovation of the family home in Bristol between December 2016 and October 2017 and not actively seeking employment during that period. The deduction was calculated by taking what would otherwise have been his loss of earnings (10 months at £2688.86 per month). We then reduced this by £5416.70 (£541.67 multiplied by 10) to produce a net figure of £21461.90. The reduction



of £5416.70 was to avoid counting the travel and accommodation cost saving twice.

198. These deductions totalled £68484.64. This reduced the Claimant's loss of earnings to £44447.48. To this we added compensation for the Claimant's loss of statutory employment protection rights. The Claimant was seeking an award of £300 which we considered to be reasonable. This increased the compensatory award to £44747.48.
199. In terms of section 123(A) ERA, if it appeared to us that the protected disclosure was not made in good faith we could, if we considered it just and equitable to do so, reduce any award to the Claimant by no more than 25%. We did not believe that there was any question of the Claimant's protected disclosures being made other than in good faith and accordingly we decided that no reduction should be made.
200. In terms of section 403(1) of the Income Tax (Earnings & Pensions) Act 2003 the first £30000 of the compensatory award would not suffer deduction of income tax. Deducting the basic award of £2874 from this figure left a balance of £27116. Deducting this from the compensatory award of £44747.48 left an amount of £17631.48 which would be subject to income tax. Accordingly, the said sum of £17631.48 required to be grossed up so that the net amount received by the Claimant reflected our assessment of the appropriate level of the compensatory award.
201. The Claimant would be entitled to receive the compensatory award in the tax year 2019/20. Being resident in England he would be liable to pay income tax at the English rather than the Scottish rates. The first £12500 of his income for 2019/20 would not be subject to income tax as that was the amount of his personal allowance. The next £37500 of his income for 2019/20 would be subject to income tax at the rate of 20%.

202. We had already calculated the Claimant's projected income in the period from April to September 2019 to be £9112.15. As from October 2019 we assumed (in the absence of evidence to the contrary) that the Claimant's income would continue at the same monthly level (being £2688.86 less £541.67 equals £2147.19 per month) so that his projected income for the next six months (ie to the end of the 2019/20 tax year) would be £12883.14. This meant that the Claimant's total projected income for the tax year 2019/20 was £21995.29.
203. Adding this figure to the element of the compensatory award which would be subject to income tax (£17631.48) produced a total projected income figure for 2019/20 of £39626.77. Of this, the first £12500 would be free of income tax and the balance of £27126.77 would be liable to income tax at the rate of 20%. This meant that the taxable element of the compensatory award required to be grossed up to the figure which, after deduction of income tax at 20%, produced a net amount of £17631.48. To calculate that figure we divided £17631.48 by 4 and then multiplied by 5 (reflecting arithmetically the effect of tax at 20%) to give a grossed up amount of £22039.35. When £22039.35 is added to £27116 (the tax free part of the compensatory award remaining after deducting the basic award of £2874 from £30000) the total of the compensatory award becomes £49155.35.
204. Accordingly the total award of compensation to the Claimant for having been automatically constructively unfairly dismissed by the Respondent is the basic award of £2874 plus the compensatory award of £49155.35 which produces a total of £52029.35.
205. Turning to the detriment claim, we reminded ourselves of the decision in **Vento v Chief Constable of West Yorkshire Police (No 2) [2003] ICR 318** which identified three broad bands of compensation for injury to feelings. These bands were updated in **Da'Bell v NSPCC [2010] IRLR 19** so that the lower band (less serious cases) was raised to £600 to £6000, the middle band (serious cases that did not merit an award in the upper band) was raised to £6000 to £18000 and the upper band (the most serious cases) was raised to £18000 to £30000.

206. In terms of the Presidential Guidance: Vento Bands (2017) these bands were further increased to £800 to £8400 (lower band), £8400 to £25200 (middle band) and £25200 to £42000 (upper band). However these increased bands apply only to claims presented on or after 11 September 2017 and so are not applicable to this case.
207. We considered that the Claimant had suffered significant injury to feelings as a consequence of the detriment he had suffered as detailed in paragraph 192 above. We did not believe his description of this as “the most unpleasant experience of my life” to be exaggerated. His reputation had been tarnished by the allegations of financial irregularities and the ensuing Police investigation. He had lived under a cloud of suspected dishonesty and threat of prosecution between the Respondent’s approach to the Police in or around June 2016 until the decision that there would be no further action in November 2017.
208. The Claimant had been compelled for financial reasons to relocate from London to Bristol. There had been a strain on his marriage as evidenced by the need for marriage guidance counselling. He had been conscious of the damage to his reputation by the references at job interviews to the reports of financial irregularity which were disclosed by a Google search against his name. We considered that this had been very distressing and demoralising for the Claimant who found himself unable to continue on his chosen career path.
209. Looking at matters in the round, we believed that (a) these matters did cause significant injury to the Claimant’s feelings and that this was sufficiently serious that it did not fall within the lower band, (b) the injury to feelings fell around the middle of the middle band and (c) the appropriate award for injury to feelings was £15000. In reaching this figure we took into account the period of time which had elapsed since the Claimant had suffered the detriment and our making of this award.

210. In terms of section 49(6A) ERA, if it appeared to us that the protected disclosure was not made in good faith we could, if we considered it just and equitable to do so, reduce any award to the Claimant by no more than 25%. Our determination on the same issue, as recorded at paragraph 199 above, applies equally here.

Employment Judge: Sandy Meiklejohn

Date of Judgement: 14 May 2019

Entered in register: 16 May 2019

And copied to parties