Appeal No. UKEATS/0041/19/SS

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal hearing
On 16th June 2021

Before

THE HONOURABLE MR JUSTICE CHOUDHURY

PRESIDENT

(SITTING ALONE)

THE EDINBURGH MELA LTD — APPELLANT

MR C PURNELL — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	Mr Silence Chihuri Solicitor FJSS Group Justice House 24-26 Main Street West Calder EH55 8 DR
For the Respondent	Mr Duncan McFadzean Solicitor ELP Arbuthnott McLanachan 99 Ferry Road Edinburgh EH6 4 PG

Topic no.s 11 Unfair Dismissal

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

Introduction

1. This is an appeal brought by the Edinburgh Mela Limited against the decision of the Edinburgh Employment Tribunal, Employment Judge Meiklejohn presiding, upholding the claimant's claim of automatic unfair dismissal and detriment by reason of having made protected disclosures.

2. I shall refer to the parties as the claimant and the respondent as they were below. The respondent contends that the tribunal erred in law in that the police investigation, which resulted from the respondent's referral, was not a detriment and not something for which the respondent could be held liable.

3. I should mention at the outset that, although that was the sole ground of appeal on which this appeal was permitted to proceed, Mr Chihuri, who appears for the respondent today, has sought to broaden the scope of the appeal to include allegations of bias and injustice in the hearing before the tribunal. For reasons which I shall explain in due course, it is not appropriate for the respondent to attempt to expand the appeal in this way.

Background

4. The respondent, a company limited by guarantee, is a registered charity which has as its main purpose the organisation and delivery of a cultural and arts festival called the Edinburgh Mela.

5. The respondent's articles of association include provision for the number and appointment of members and directors. It was possible under these provisions for directors to remain in post, it would appear, for up to six years, after which there was to be a change.

6. The claimant was appointed to the position of Director of the respondent with effect from 7th of November 2011. He was accountable to the board for the performance of all aspects of the organisation. Expenses incurred by him were required to be approved and authorised by the Chair of the respondent and/or the board.

7. From 2012, the claimant had the authority to make payments of up to £5,000 pounds without having to seek the board's express approval. The claimant lived in London at the time of these events and paid for his own travel to and from Edinburgh, except where travel arrangements had to be changed to suit the respondent's needs.

8. At the respondent's AGM on the 18th of November 2013, Mr Shami Khan was elected Chair of the board. The Vice Chair at that time was Mr Foysul Choudhury and the company secretary was Mr Singh. Mr Choudhury had been a board member since the foundation of the respondent in 1995. Mr Khan had been a director since around 1998.

9. At the respondent's AGM in November 2014, the full board was re-elected, and the officers, including those mentioned already, were re-elected to their current positions.

10. Concerns about the respondent's governance, and in particular the unchanging nature of the board membership over many years, began to be raised from about 2010 following the commissioning of a report by two of the respondent's main funders, City of Edinburgh Council and the Scottish Arts Council (now Creative Scotland). In that report (referred to as "the Pirnie report"), there were criticisms that the respondent was being run *"like a community body"* rather than a board of directors / trustees and that directors were not standing down after serving two terms of three years. The report concluded that the board would be unwise to let these matters lie unaddressed as they are.

11. When the claimant took up his post in 2011, he became aware of the report on governance and began to raise the issue of governance with the respondent's board.

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The claimant did this on several occasions in 2014, including at the AGM in 2014, when he suggested that any member stepping down should have to take a year out before being eligible for re-election in order to allow for the effective rotation and refreshment of the board. A fair summary of the board's response, and in particular, Mr Choudhury's and Mr Khan's response, to that suggestion was resistance, and at times outright hostility, to any suggestion that they needed to stand down.

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12. Proposed new articles of association were put forward for discussion at board meetings in February and March 2015, and at a board meeting on the 22nd of September 2015 the claimant proposed that an EGM should take place on the 20th of October to adopt new articles of association which addressed the board membership issue. However, instead of agreeing what had been proposed, the board instead moved to reduce the number of board members to 12 even though the existing articles made no provision for doing so.

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13. Attempts were then made towards the end of 2015 for the member information forms to be updated. These required declarations of the organisations which members represented.

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14. There was an issue with Mr Choudhury's declaration, which appeared to the claimant to be false and/or incorrect. Mr Khan sought to arrange an emergency board meeting for the 29th of October 2015 whilst the claimant was on leave. When the claimant indicated that he should be present, Mr Khan considered the claimant was being obstructive.

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15. The meeting went ahead. Various comments were made by the board members, to the effect that they and the chair were being "*disrespected*" and that it was "an insult" to be asked to complete member information forms.

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16. The relationship between the board and the claimant continued to deteriorate in subsequent months. The claimant tried to communicate the concerns about governance which had been raised as far back as 2010 and were still not being addressed. Mr Choudhury's response, echoed by Mr Chihuri today, was to say that the Mela had been successful for many years before the claimant had come on board.

17. In view of the incorrect information provided by Mr Choudhury as to the organisations he represented, the claimant considered that his membership of the board was invalid. Mr Choudhury took this as a personal attack and stated that he would take the matter to lawyers and to the police.

18. The claimant considered it his duty to raise his concerns about governance with the main funding bodies and also sought legal advice about the rotation of directors. Mr Khan and Mr Choudhury were not interested in that advice.

19. At a meeting in March 2016, the claimant identified a "*culture of resistance*" against the need for board rotation. The claimant also referred to staff morale being at an all-time low, and to the lack of any strategy, contingency planning and leadership. He said there was a breakdown of trust.

20. Mr Khan said that he was shocked by what the claimant had said and considered that the claimant was trying to destroy and sabotage the respondent, although for what purpose the claimant would do so is not made clear.

21. The concerns raised about governance led to the funders suspending the respondent's funding pending an urgent action plan to address the concerns.

22. A board meeting took place on the 10th of March 2016, from which the claimant was excluded. The minutes of that meeting indicated that it had been suggested that the claimant had been conspiring with others to undermine the respondent.

23. Mr Khan sent an email to the claimant on the 11th of March 2016. This email is fundamental to the claimant's claim of constructive dismissal. The email asked a series of questions of the claimant requiring him to justify his concerns, all of which were matters of which the board were well aware.

24. The claimant regarded the email as **"***disingenuous*" and indicative of the board's determination not to deal with concerns facing the respondent in an open manner in line with the interests of the organisation. He also considered that there was a determination to criticise him without foundation.

25. As a result, the claimant considered that there was a breakdown in trust and confidence and resigned. The board's response to this was to instigate an investigation into the claimant's claims for expenses.The tribunal found that investigation to be unjustified and concluded that there had been no improper conduct on the claimant's part.

26. The tribunal considered that the respondent's accusations, including Mr Choudhury's outlandish claim that the claimant was using the respondent as a "*personal cash fund to jet around the world and live a life of luxury on the respondents account*", made no sense whatsoever, and were quite simply untrue.

27. Following the claimant's resignation, the respondent discovered that he had held the position of Visiting Professor at Napier University. The respondent regarded this as a breach of the claimant's contract of employment, the terms of which provided that any other appointment required written approval from the chair and/or the board. The tribunal accepted the claimant's explanation that this was a position which had been held by his predecessor and for which there is no remuneration. The tribunal considered this a trivial matter, and that the claimant's position in Napier University was consistent with promoting the respondent's best interests.

28. In a further development, the respondent reported the claimant's alleged wrongdoing to the police. The police carried out an investigation which took from around June 2016 until November 2017. Although the outcome was that no further action would be taken, the claimant was understandably very distressed by the ongoing investigation. He described it in these terms.

> **"The protracted police investigation I've been subjected to has been the most unpleasant experience of my life and is taking a heavy toll on myself and my family both financially and in terms of stress suffered by myself."**

29. 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.

30. There was also adverse press coverage in which the respondent was reported as referring to there being "*financial irregularities*". Unsurprisingly, this proved damaging to the claimant when he tried to obtain alternative employment.

The Tribunal's Conclusions.

31. The tribunal found that the terms of the 11th of March 2016 email from Mr Khan breached the respondent's duty of trust and confidence towards the claimant, that breach being fundamental and going to the root of the contract; the claimant resigned in response to the breach and did not delay doing so; and the claimant was constructively dismissed by the respondent.

32. The tribunal also found that the claimant had made protected disclosures to the board at the meeting on the 1st of December 2015. These were that the respondent's register of members was not up to date and that the board had failed to address the governance issues raised in the Pirnie report.

33. Further disclosures were found to have been made in respect of Mr Choudhury's membership information and the legal advice that the articles were not being complied with in relation to board rotation. These disclosures tended to show that the respondent had failed and was failing to comply with legal obligations to which it was subject. The tribunal also found that these disclosures were made in the public interest.

34. The tribunal was also clear that the reason for the repudiatory conduct on the respondent's part was the fact that the claimant had made these disclosures.

35. Accordingly, the claim of automatic unfair dismissal under section 103A of the **Employment Rights Act 1996** was made out.

36. The tribunal also found that the claimant had suffered detriment in a number of ways. At paragraph 192, the tribunal said this:

> **"<u>If there had been a protected disclosure, did the claimant suffer detriment?</u>**
> **192 The Tribunal found 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 with 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 as 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.**
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> **193 It followed the claim under section 47B ERA succeeded. The detriment claim was therefore also upheld."**

37. The tribunal assessed the compensatory award based on loss of earnings and other matters to be just under £50,000. The remedy for detriment is dealt with at paragraphs 205 onwards as follows**.**

"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."

The grounds of appeal.

41. The original notice of appeal contained five grounds of appeal and included an allegation of bias on the part of the tribunal. On the sift, Lord Summers dismissed all the grounds of appeal, save for ground 5, which was that the tribunal had erred in concluding that the police investigation was a detriment. It appears that Lord Summers' view was that the bias ground needed to be considered in context before it could proceed.

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42. It appears that the tribunal was asked to comment on the bias ground, and it did so by way of a document sent to the EAT on the 11th of February 2020. There was then a Rule 3(10) application, which I am told was heard remotely and then determined on the papers.

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43. At the conclusion of that process, Lord Summers confirmed that the appeal would proceed only in relation to ground 5. I mention all of this because the respondent has, both in its skeleton argument and its oral submissions before me today, sought to rely on allegations of bias. Indeed, I was even referred to the case of **Porter v McGill**, one of the leading authorities on bias. This approach is unacceptable. There is no basis for raising grounds expressly rejected by the Judge at the Rule 3(10) stage.

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44. The respondent could have appealed against the rejection of the bias ground to the Court of Session but did not do so. In these circumstances, it is not open to me to consider the bias ground, and it is not open to the respondent to have another bite at the cherry by trying to resurrect the bias ground before me.

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45. Mr Chihuri was at pains to suggest that the tribunal's judgment was seriously flawed and that the assessments made by the tribunal as to the credibility of the claimant's evidence and as to the lack of credibility of the respondent's witnesses were flawed. However, all of this seeks to reopen clear findings of fact made by the Tribunal, and indeed to rely upon evidential matters that ought to have been raised before the first instance tribunal.

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46. It is not appropriate to seek to raise these matters now, no matter how aggrieved the respondent might be as to the judgment. There is a proper process for doing these things and Mr Ridgeway, who appeared for the respondent below, drafted grounds of appeal (presumably based on instructions), only one of which was permitted to

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proceed. It is not open to the respondent to sidestep that process by pleading to the perceived injustice of the situation.

Ground Five – Submissions

47. The respondent's skeleton argument on this issue was unhelpful. That appears to be because it considered that it could raise other issues going beyond the scope of ground five.

48. As to ground five itself, the main arguments raised by Mr Chihuri are that the board considered that there were financial irregularities, that there was a proper basis for believing that to be case, and, given that the respondent is a charity with duties to report matters of misconduct such as this, it had no option but to refer the matter to the police. As such, there is no basis for saying that the investigation is a detriment.

49. Mr Chihuri also sought to argue that the reporting of the matter to the police was not because of the protected disclosures, but simply because of the financial irregularities. This appeared to stray into the area of causation and whether or not the detriment was on the ground of the claimant having made protected disclosures. Unfortunately for the respondent, the ground of appeal for which permission was granted does not expressly challenge causation, its focus being solely on the issue of whether or not there was a detriment at all.

50. Mr Chihuri, in what were very courteous and clear submissions, did persist in coming back to the issue of the judgment and the alleged flaws in that judgment. It was made clear to him that those are not matters which can be addressed on this appeal. Whilst Mr Chihuri accepted that detriment is to be construed broadly, the fact is, in his submission, that there were no disclosures here and that the referral to the police was not for that reason. He also suggests that account ought to have been taken of

contributory fault on the part of the claimant given the way that he had abused his privileges by incurring excessive and unauthorised expenditure.

51. The second main point made by Mr Chihuri is that insofar as the tribunal took into account the length of the police investigation, that was not a matter over which the respondent had any control.

52. I was referred to the case of **BHS v Burchell**, although the relevance of that was not understood. Finally, Mr Chihuri urged on me that this is all very unjust because the Mela is now not running as a direct consequence of this action. Once again, that seems to be straying into irrelevant territory.

53. Mr McFadzean appears for the claimant as he did below. He submits that the respondent's ground of appeal is stated in a misleading manner. The tribunal did not find that the police investigation itself was a detriment, but the fact of being reported to the police and subjected to a lengthy investigation. He noted that the accusation was based, as the tribunal found, on alleged financial irregularities which were without justification. He said that that is clearly a detriment on anybody's terms.

54. As to the length of investigation, it was clearly foreseeable that it might take some time and that does not affect the tribunal's analysis. They were perfectly entitled to take into account the length of time taken to investigate the matter. He notes that, insofar as it has been suggested by Mr Chihuri that it was not the intention of the respondent to subject the claimant to a detriment, it not open to the Employment Appeal Tribunal to hear evidence on that.

55. In reply, Mr Chihuri came back to the issues which he had raised in his opening submissions. Reliance was also placed upon alleged alteration of witness evidence in the course of police proceedings. Once again, this strays into issues of fact which are not before the EAT.

Discussion

56. The relevant principles relating to whistleblowing detriment for present purposes can be summarised as follows.

57. Firstly, detriment is to be construed broadly. As stated by the Court of Appeal recently, in the case of **Jesudason v Alder Hey Children's NHS Foundation Trust** [2020] ICR 1226:

> **"27. In order to bring a claim under section 47B , the worker must have suffered a detriment. It is now well established that the concept of detriment is very broad and must be judged from the view point of the worker. There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment. The concept is well established in discrimination law and it has the same meaning in whistleblowing cases. In *Derbyshire v St Helens Metropolitan Borough Council (Equal Opportunities Commission intervening) [2007] ICR 841* , para 67, Lord Neuberger of Abbotsbury described the position thus:**
> **"In that connection, Brightman LJ said in *Ministry of Defence v Jeremiah [1980] ICR 13* , 31A that 'a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment'. That observation was cited with apparent approval by Lord Hoffmann in *Chief Constable of the West Yorkshire Police v Khan [2001] ICR 1065* , para 53. More recently it has been cited with approval in your Lordships' House in *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337* . At para 35, my noble and learned friend, Lord Hope of Craighead, after referring to the observation and describing the test as being one of 'materiality', also said that an 'unjustified sense of grievance cannot amount to "detriment"'. In the same case, at para 105, Lord Scott of Foscote, after quoting Brightman LJ's observation, added: 'If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice'."**
> **28. Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the claimant genuinely does so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective."**

58. Secondly, detriment can occur even after the relevant employment has ceased: see **Woodward v Abbey National PLC** [2006] ICR 1436.

59. Thirdly, in determining whether the detriment is done on the ground that the worker had made a protected disclosure, it is for the employer to show that the impugned

conduct was not materially influenced by the protected act: **See Harvey's on Industrial Relations at D36.**

60. Fourthly, causing a detriment is a statutory tort or delict. Accordingly, the usual principles of foreseeability will apply in determining the extent to which an employer is liable for injury to feelings resulting from the detriment.

61. The tribunal in this case clearly took a very dim view of the respondent's allegations against the claimant of financial irregularities. These were described as "*misconceived*": see paragraph 137. The tribunal also considered that Mr Choudhury's allegation that the claimant was "*using the respondent as a personal cash fund to jet set around the world and living life of luxury on the respondents account*" made no sense whatsoever, and was quite simply untrue.

62. The tribunal found there was no question whatsoever of the claimant seeking to conceal from the respondent any expenditure that he had incurred and that the allegations made by the respondent were "*far removed from the truth*": see paragraph 138.

63. The tribunal also noted that Mr Khan and Mr Choudhury described the police investigation as if it was inevitable that the claimant would be prosecuted for theft. The tribunal considered it improbable that the police would have spoken to the respondent in those terms: see paragraph 142**,** and contrasted the respondent's description with Police Scotland's own statement, which was, as one would expect, open as to whether a crime had been committed at all.

64. The tribunal had no hesitation in concluding on the evidence before it that the claimant did not steal anything from the respondent**.** As I have said already, there is no challenge to the tribunal's conclusion that detriments were because of the disclosures

made. The only challenge is as to the tribunal's conclusion that referral to the police was a detriment.

65. In my judgment, that referral, which was made, as the tribunal found, without justification cannot be anything but a detriment. As set out above, the threshold for establishing that an act is a detriment is not high. Being reported to the police for alleged wrongdoing is not something that occurs in the normal course of employment. An employee who has been reported in that way, particularly when the basis for doing so is unjustified, would clearly have a legitimate sense of grievance, and would, therefore, have been subjected to a detriment.

66. Even if the employer considered that it had good cause for making their report, the employee would still be subject to a detriment. The employer's reasons for doing so may provide grounds for not concluding that the reason was the prohibited one of making a protected disclosure, but the detriment would still be established.

67. There is no challenge here to the causation aspect of the tribunal's finding. That is to say, it is not expressly suggested that the tribunal erred in finding, as it must have done, that the detriment was related to the making of a disclosure or on the ground of doing so. However, even if such a challenge had been brought, it would have been doomed to failure in my judgment given the tribunal's clear and unequivocal finding that the allegations of financial irregularities were baseless: see paragraph 192.

68. Those passages make it clear that the tribunal was satisfied that the causation requirements to establish a claim under section 47B, ERA were made out. That is to say, the tribunal was satisfied that those acts giving rise to a detriment were "*done*" on the grounds that a disclosure had been made. The onus is on the employer to show that the reasons for acting as it did were not on the ground of the protected act: see section 48(2), ERA.

69. It is clear from the judgment that the tribunal was not satisfied that the respondent had shown that the disclosures did not materially influence its actions. It does not take much to infer from the tribunal's findings that the reason for the report to the police was, at least in part, the fact that the claimant had made protected disclosures which were not to the board's liking and which had led to the disingenuous email from Mr Khan. Even if the respondent had a genuine belief that the claimant was responsible for financial irregularities, it would not diminish the fact of the detriment or indeed that these were materially related to the fact that the claimant had made protected disclosures. In any event, as Mr McFadzean submitted, any argument that there was a genuine belief as to the financial irregularities is undermined by the tribunal's conclusion that these allegations were without justification.

70. As to the length of the investigation, it is said by Mr Chihuri that that is something over which the respondent had no control. However, it is clearly foreseeable that if a matter is reported to the police then it is likely to be investigated and that such an investigation might take some time.

71. It has not been submitted that there was some new or unexpected factor that caused a delay. In these circumstances, the tribunal was fully entitled to take account of the length of the investigation in assessing the extent of the injury to feelings which the claimant had suffered.

72. No challenge is made to the assessment of the award for injury to feelings as being one falling within the middle **Vento** band. I consider that any such challenge would have been unarguable in any event.

73. The devastating effect that the allegation of financial irregularities and the police investigation had on the claimant, his personal relationships and his job prospects is apparent from the tribunal's judgment.

74. For these reasons, the single ground of appeal before me fails and is dismissed.