**Case Number: 2500256/2017**

# EMPLOYMENT TRIBUNALS

*Claimant* **Mr K Kelly**

*Respondent* **Gentoo Group Limited**

**RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

Held at: North Shields On: 11th-14th July (deliberations 26th July) 2017

Before: Employment Judge Garnon
Members: Mr L Brown and Mr J North

*Appearances*
For the Claimant: Mr S Sweeney of Counsel
For the Respondent: Ms J Stone of Counsel

**JUDGMENT**

**The unanimous judgment of the Tribunal is the claim of subjection to detriment contrary to 47B of the Employment Rights Act 1996 ( the Act) is not well founded and is dismissed.**

**REASONS**

(Bold print is our emphasis and italics are quotations from statements or documents)

## 1. Introduction and Issues

1.1. The claim was issued on 22 February 2017. The claimant was born on 14 September 1958 and employed from March 2001 to December 2004 by Sunderland Housing Group (SHG) which later became the respondent ("Gentoo").

1.2. The disclosures, which Gentoo accepts took place, are in summary:-
(a) In April 2004 a letter to the SHG senior board raising concerns about the rescoring of tenders.
(b) In late summer of 2004 raising the same concerns with the Housing Regulator.
(c) In September 2004 verbal disclosure to the Regulator about the tendering exercise.
(d) On 24 December 2004 a letter to the Regulator alleging the respondent had dismissed him because he had made protected disclosures.
(e) In January 2005 a meeting with the Deputy Field Officer of the Regulator during which he repeated his concerns.

(f) In September 2005 a letter to Austin Mitchell MP and to the Regulator concerning the tendering exercise and his dismissal.

1.3. The respondent concedes these were "protected disclosures" as defined in section 43A of the Act. Each showed, in the claimant's reasonable belief ,a person had failed, was failing or was likely to fail to comply with a legal obligation to which he was subject, or that information tending to show that had been or was likely to be deliberately concealed. The liability issues as per the agreed list are:-

1.3.1. does the Tribunal have jurisdiction to hear this claim in the absence of a statutory right for a job applicant to bring a claim of detriment by reason of a protected disclosure?

1.3.2. were the following detriments done on the ground that the claimant had made the protected disclosure –
(i) rejection of an application for the position of Finance Director of Gentoo in the summer of 2016;
(ii) rejection of an application for a position as a Board member of Gentoo on or about 18th November 2016.

1.4. The second issue involves deciding whether the making of the disclosures in 2004 had a more than trivial influence on Gentoo's decisions to reject the applications . At a preliminary hearing Mr Sweeney indicated that in respect of each position, the respondent issued an information pack, which included an application form and the relevant criteria in respect of each position, particularly with regard to qualifications and experience. The claimant will say he met the criteria. The respondent will say he lacked both the necessary qualifications and experience and in any event, in respect of each position, there were better candidates, who were shortlisted for interview. We must decide why the claimant was not even shortlisted.

## 2 Findings of Fact

2.1. We heard the claimant and, on his behalf Mr Martin Kelly, (no relation of the claimant) Chief Executive of Accent, a housing association. On behalf of Gentoo, we heard Mr William Barkworth and Ms Kelly Shaw, both Recruitment Consultants employed by Campbell Tickell, Mr James Tickell, its Lead Partner, Mr Ian Self, Gentoo Board member, Mr John Craggs presently Chief Executive of Gentoo, and Ms Louise Bassett , latterly responsible for HR at Gentoo. We had three lever arch files of documents which were far more than needed to understand and decide the issues.

2.2. Gentoo is a North East based Housing Association with around 28,000 properties and a turnover of £215 million. The claimant was previously employed as Director of Corporate Services and Company Secretary by SHG. He was dismissed for bullying one of his colleagues on 15th December 2004. **After he had been accused** of bullying and both before and after his dismissal, he made the protected disclosures concerning alleged irregularities in a tendering process. In his then position he was responsible for what can broadly be called "governance".

2.3. The background, which is largely uncontested, is well summarised in Mr Craggs' statement at paragraphs 1 to 5. SHG was created upon a transfer from Sunderland City

Council (the council) on 26th March 2001 of its Social Housing Service. Mr Craggs had been employed by the council since December 1990 managing its housing stock. The claimant had been employed by the council for a similar length of time to oversee the housing accounts function in conjunction with the City Treasury Department. He also had responsibility for services including IT, HR and general office administration.

2.4. The housing stock itself was transferred in March 2001. The management team of SHG included Mr Peter Walls as Chief Executive, the claimant and Mr Craggs as Group Strategic Executive. There was also a person whose title was Group Director of Finance, responsible for management/financial accounting and treasury matters.

2.5. The claimant is a member of the Association of Accounting Technicians (AAT). This is an accounting qualification but not one recognised by the Consultative Committee of Accounting Bodies (CCAB). It is an over-denigration of a person who has achieved the highest AAT qualification, as the claimant has, to describe them as a "book-keeper". An AAT qualification, added to experience and practice, may make a person at least as "capable" as a less experienced holder of one of the CCAB qualifications, the commonest being Chartered Accountant, Certified Accountant and Member of the Chartered Institute of Public Finance and Administration (CIPFA). Not dissimilar is the situation which prevails in the legal profession where an experienced Fellow of the Institute of Legal Executives may be at least as capable as a qualified solicitor within the area in which he has specialised for many years. The claimant has for most of his career been engaged in some form or other of social housing.

2.6. However, there are roles which, to the outside world and to Regulators "should be" filled by people with what are undoubtedly the higher qualifications. We accept as years have gone by, events involving Gentoo and other housing corporations (one of which had a financial crisis and was criticised for having a Finance Director without CCAB qualifications) have made it more important that senior positions be filled with people with such qualifications, if only to enable the Board of a company, if something does go wrong, to say "Well, we employed a qualified person and trusted him to do his job".

2.7. The claimant argues passionately this is not how things should be. He cites Mr Craig Moule Finance Director of Sanctuary Group, which is three times the size of Gentoo, who has no better accounting qualifications than the claimant. We accept the evidence of Mr Barkworth that 'if Mr Moule were to apply for that job at Sanctuary today, he probably would not get it no matter how competent he is. Mr Tickell said the same. Criteria and "fashions" in recruitment change over the years, not always for the better, especially at the shortlisting stage.

2.8 The size of a housing association which employs a Finance Director is relevant. Gentoo is, by national standards, fairly large. Although we accept the claimant's point that the basic principles of the job remain the same, the bigger the company, the greater the demand on its finance director and other officers

2.9. Such companies are at least in part funded by public money and this hybrid of public and private means they are scrutinised by the Housing Regulator to ensure public money is not squandered. Mr Sweeney cross examined, well but without success, on the basis the claimant believes public money is being used on undeserved severance payments to officers

of Gentoo and if the claimant were Finance Director then, in view of the position he had taken in 2004, Mr Craggs and others would have feared he would have exposed further irregularities.. We do not find there are any to expose. However, it is **possible** Gentoo may have treated the claimant as they did in 2016, if they feared he would be over- enthusiastic in the roles then on offer ..

2.10. The difference which occurred between the time the council ran its own social housing and when SHG was set up should not be underestimated. When the claimant worked for the council, while he had responsibility for overseeing the accounts, the City Treasury Department, which did have CCAB qualified accountants, was in overall charge. That is why, despite his undoubted experience and competence in the field, when SHG was set up and needed a Finance Director the claimant was not given the job. It went to a Chartered Accountant called Andrew Taylor recruited externally from Price Waterhouse Cooper on 30th April 2001. When, years later, Mr Taylor left, his successor, Mr Jason Ridley was also a Chartered Accountant. The staff employed in the council's Housing Department including the claimant were by and large transferred to SHG under the Transfer of Undertakings (Protection of Employment) Regulations 1991. The claimant's position was "slotted" into the wider governance and compliance function called Corporate Services Director without direct responsibility for finance.

**The events of 2004/05**

2.11. From 2001-2004 the claimant was Line Manager of a Mr Eddie Hutchinson the Head of Internal Audit. In his oral evidence Mr Craggs, was particularly critical of the claimant's people management skills. The relationship between the claimant and Mr Hutchinson was strained and from Mr Craggs' recollection the primary cause of the major fall out between them in 2004 was a dispute about who should sign reports that were going to the Board or some committees. Mr Walls, the Chief Executive, with whom the claimant generally had a very good relationship, took the side of Mr Hutchinson and this led to a row between the claimant and Mr Hutchinson the circumstances of which gave rise to a formal complaint by Mr Hutchinson against the claimant of bullying.

2.12. Mr Craggs' involvement at that time was peripheral. One day the claimant told Mr Craggs he was going to "*have it out with*" Mr Hutchinson. Mr Craggs counselled against it. The claimant proceeded anyway. His behaviour towards Mr Hutchinson included what the claimant said was a *spontaneous outburst.* Mr Craggs was not a witness in the initial disciplinary hearing of the claimant, but he was in the internal appeal. From what the claimant had told him before the conflict with Mr Hutchinson ,to quote his statement, "*Before the appeal meeting I couldn't understand how Kevin was going to continue to maintain that the outburst had been spontaneous*" At the appeal meeting the claimant's union representative accused Mr Craggs of fabricating his version of that conversation. In his oral evidence Mr Craggs said this was the first time his integrity and honesty had been called into question. He deeply resented that and has never forgotten it. Both the claimant and Mr Hutchinson went sick shortly after the incident in March 2004 and were absent from work for many months. It is this which prompts Mr Craggs' comments in paragraph 12 of his statement that the whole process was very disruptive to the operation of the business.

2.13. It is important to note it was **shortly after** the claimant became aware he was to face a bullying charge that he made his first protected disclosure. The subject matter of the disclosure was that in a tendering exercise to appoint **up to** five contractors, scored not only on price but on content, one tender submitted by a highly reputable building company, Bellway, came sixth The Chartered Surveyor in charge of that exercise was Mr Alan Thompson. Bellway's price was lower than the contractor who came fifth but its tender lacked some content. It then transpired the Bellway tender had omitted by accident a significant part which would have been likely to alter the scoring. Mr Thompson took advice from the Head of Legal Services. We were not told of anything corrupt or improper about what happened only a simple difference of opinion as to whether a tender which is manifestly deficient can or should be revisited when the defect has been corrected. Steps were then taken by Mr Thompson, with Mr Walls' blessing, and with the claimant in charge of governance, to rescore the tenders whereupon Bellway came fifth. Mr Walls took the view it was absurd for a more costly bid to "win", thereby costing Gentoo tens of thousands of pounds, when the Bellway bid had erroneously missed out a part which if present would have beaten the other contractor. The claimant took a view more in line with traditional public sector values that procurement rules should be strictly applied whatever the outcome. Both views are arguable and a difference of opinion permissible.

2.14. Ironically, one person who agreed with the claimant's view Gentoo should be bound by strict procurement rules common in the public sector was Mr Hutchinson. When the claimant made his early disclosures, the decision made by SHG was that neither Bellway nor the other contractor should be awarded a contract, only the top four tenderers. However, the claimant persisted with his allegation of irregularities. These were later investigated by Trowers & Hamlins law firm and their conclusions, set out in a report, were that, done properly, it is permissible to re-score deficient tenders. The claimant does not accept this view. Darnton-v-University of Surrey and Babula-v-Waltham Forest College held a worker does not have to be correct in the assertion he makes. His belief must be reasonable. Wall L.J. said in Babula

*".. a belief may be reasonably held and yet be wrong…. Provided his belief (which is inevitably subjective) is held by the Tribunal to be objectively reasonable, neither (1) the fact that the belief turns out to be wrong – nor, (2) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to a criminal offence - is, in my judgment, sufficient, of itself, to render the belief unreasonable and deprive the whistle blower of the protection afforded by the statute".*

2.15 The claimant made further disclosures, after telling SHG, to the Regulator and eventually to Austin Mitchell MP. Mr Craggs is sceptical of the claimant's motivation. Austin Mitchell, MP for Grimsby not the claimant's constituency, was a campaigner against the very process of "privatisation" of council housing provision. Mr Craggs believes the claimant wanted to detract from and " armour plate" himself against the disciplinary charge he was facing and later to win the tribunal calim he brought . If that had been found at the time, the disclosure would not have been protected because the law then was the disclosure had to be made in good faith as defined in Street v The Derbyshire Unemployed Workers Centre. per Wall L.J. :

*… In my judgment it is manifest that a person may reasonably believe that the information disclosed and any allegation contained in it are substantially true, and still not make the disclosure in good faith.*

*The primary purpose for the disclosure of such information by an employee must, I think, be to remedy the wrong which is occurring or has occurred; or, at the very least, to bring the … information to the attention of a third party in an attempt to ensure that steps are taken to remedy the wrong. The employee making the disclosure for this purpose needs to be protected against being victimised for doing so; and that is the protection the Statute provides.*

*Motivation, however, is a complex concept, and self-evidently a person making a protected disclosure may have mixed motives. .. It will, of course, be for the Tribunal to identify those different motives, and nothing in this judgment should derogate from the proposition that the question for the Tribunal at the end of the day as to whether a person was acting in good faith will not be: did the applicant have mixed motives..*

*In answering this question, however, it seems to me that Tribunals must be free, when examining an applicant's motivation, to conclude on a given set of facts that he or she had mixed motives, and was not acting in good faith. If that is correct, how is it to be done? I can see no more satisfactory way of reaching such a conclusion than by finding that the applicant was not acting in good faith because his or her predominant motivation for disclosing information was not directed to remedying the wrongs identified in section 43B, but was an ulterior motive unrelated to the statutory objectives.*

2.16. The claimant commenced Employment Tribunal proceedings after being dismissed on 15 December 2004 for the bullying allegation. The proceedings were for wrongful and unfair dismissal and the latter included an allegation the principal reason for dismissal was the making of the protected disclosure. The claim was settled under a compromise agreement on 4th November 2005. The money paid to the claimant, £130,000, was well in excess of the statutory maximum he could have obtained on claims of ordinary unfair dismissal and wrongful dismissal. This large sum may have indicated a recognition by SHG the reason for his dismissal was the making of the protected disclosure which would remove the cap on compensation. However on the evidence we heard, the claimant's contract was what Ms Bassett describes as a "legacy contract" from the council where, if a dismissal is not by reason of conduct or capability, employees are entitled to a contractual payment equal to a redundancy payment without any cap on the amount of a week's pay and with a multiplicand of one and a half times the statutory one. His continuous employment dated back to 1990. The claimant accepts that was the reason for the high amount in the compromise agreement which settled claims which could be brought in the courts too .

2.17. In the "Compromise Agreement" the claimant agreed he would never again claim he had been dismissed for making the protected disclosure while the respondent accepted unfair and wrongful dismissal. The claimant stated unequivocally on the first day of this hearing when questioned, not only by Ms Stone but by the Tribunal, he did not seek to resile from the written concession that the reason for his dismissal in 2004 was **not** the making of the protected disclosures. On the second day our Employment Judge asked why he thought something which was not the reason for dismissing him in 2004 was likely to be the reason for not wanting him as an employee in 2016 .He retreated from his earlier answer and said he always had his suspicions it was the real reason. He said his view was due to the contents of the draft witness statements from 2004 disclosed in these proceedings but there is nothing in those statements which could reasonably have altered his view. We find he always thought it played some part, but did not think he was allowed to say so.

2.18. Our overview of the relationship between the claimant and Mr Craggs is that it is **not** as Mr Craggs says in paragraph 10 of his statement "*reasonable*". We believe Mr Craggs would not **want** the claimant employed at Gentoo for several reasons. First, the claimant had called him a liar in 2004, second his people management caused problems, third, he had bullied Mr Hutchinson, fourth, he was off sick, allegedly due to stress for many months from April 2004 until his dismissal in December, as was Mr Hutchinson, during which extra work fell on colleagues and lastly, in Mr Craggs view, he obtained a generous settlement he did not deserve. How, if at all, the protected disclosures figured in Mr Craggs thinking, is a more difficult question.

2.19. Mr Craggs was himself not implicated in any of the claimant's allegations People tend mind a protected disclosure if it (a) places pressure upon **them** to take steps to correct the matters which the disclosure highlights, which steps they are reluctant to take for any number of reasons including for example cost. or a wish to continue practices they know to be wrong or (b) may cause them to be the subject of internal or external criticism or scrutiny which they do not welcome.

2.20. We find Mr Craggs did not mind at all the original disclosure to the senior board or to the Housing Regulator. The issue at the time was whether a tenderer should be held to a defective tender or allowed to correct an omission. It was in everyone's interests to have that question answered both internally and by the Regulator. However, while on the sick the claimant appeared to be relentlessly asserting his view was the only correct view. We found indications in Mr Craggs evidence he lost patience with the claimant repeating allegations when SHG were already addressing them and especially going to Austin Mitchell MP. Ms Stone did not dilute Gentoo's pleaded argument or seek to go behind the concession made, probably before she was instructed, that all six disclosures were protected , by making a point she could have raised. We will address it briefly, because it came out loud and clear from Mr Craggs oral evidence.

2.21. Difficult questions of causation arise when a disclosure is accompanied or followed by behaviour of the employee which is itself unacceptable. In Martin v Devonshires Solicitors, a case of victimisation due to a "protected act" the EAT upheld a Tribunal's finding that a firm of solicitors did not victimise an employee by dismissing her because she had made allegations of sex discrimination against various partners. A number of **related and separable** features of the allegations, not the allegations themselves, were the reason for the dismissal. The EAT held there could in principle be cases where an employee was subjected to some detriment in **response** to the doing of a protected act but where the employer could say the **reason** was not the act as such but some feature of it which could properly be treated as separable such as the manner in which the complaint was made. In Bolton School v Evans a similar conclusion was reached. Both cases were cited in Panaylotou v Kerneghan 2014 EAT 0436/13 where Lewis J said

*In the present case, reading the decision of the tribunal as a whole, the tribunal was seeking to draw a distinction between the fact of making protected disclosures and the manner or way in which Mr Panayiotou subsequently pursued the issues raised. The tribunal found that the employer was motivated by the fact that Mr Panayiotou would campaign relentlessly if he were*

*not satisfied with the action taken following his protected disclosures. That theme emerges repeatedly as indicated from the passages set out above. It was the fact that Mr Panayiotou would never accept any answer save that which he sought, and the sheer effort required to deal with the correspondence which he generated and the further complaints he made if he were not satisfied with the action taken, together with his long absence from sickness from which he would not be returning, which explained why the employer acted as it did. The tribunal was not purporting to say that, simply because Mr Panayiotou had made a number of repeated disclosures, qualifying disclosures after a particular time were not to be treated as protected disclosures. It was contrasting protected disclosures with the campaign that followed. It was not saying that disclosures of information, made as part of a campaign, could not be protected disclosures.*

The part played by Mr Craggs in the decisions not to shortlist the claimant we shall address in detail shortly. Mr Craggs took the view Gentoo should not assist the claimant by shortlisting him as a "exceptional " candidate despite his lack of CCAB qualification That will not provide a basis in itself for concluding the claimant suffered detriment on the ground of having made a protected disclosure if all Mr Craggs **felt and communicated** to the people who actually took the decision, was a generally negative view of the claimant which he would have felt even if the claimant had never made the protected disclosures.

2.22. Not part of the claim itself is an application the claimant made in **September 2015** for a position on the Board of Gentoo on its Risk and Audit Committee. Campbell Tickell were used in the recruitment process. Mr Barkworth led the recruitment but assisted by Ms Shaw. Both Ms Shaw and Mr Tickell had kept in touch with the claimant over the years because as recruiters, or as Ms Shaw frankly describes herself a "head hunter", it is her business to know people , their abilities and whether they are "in the market" for a move. Although there were a substantial number of applications for the Board position, Ms Shaw e-mailed the claimant at 4:36pm on 10th September saying she was wondering if he had any suggestions of suitable people worth approaching. The claimant was at the time Finance Director of a small housing association called Tyne Housing but had not himself made application for any position which was publicised in Campbell Tickell's bulletin and by public advertisement. Ms Shaw's e-mail informed the claimant they were recruiting for non-executive positions with skills across finance,, governance etc. The closing date was Monday, 14 September at 12 noon.

2.23. At 8:37 on 11 September the claimant replied saying, "*Thanks for the e-mail. It's a big role and no one comes to mind except myself.* ***Not sure Gentoo would welcome my application*** *but if you checked with them and they were fine I would apply*". Ms Shaw did **not** check with Gentoo. She spoke to Mr Barkworth who said if the claimant wanted to be considered he should make an application. At 1:35pm on 11 September she e-mailed the claimant, "*I've just checked with my colleague and* ***we think it would be worth you considering*** *putting in an application*". The claimant replied at 7:59 on Monday, 14 September saying he was in France on holiday and due back in the UK on Tuesday night. He did not have access to his CV information which was at home and could get a completed application to her by noon on Wednesday 16th. He asked if that would be alright. At 9:24 Ms Shaw replied, "*We have a client meeting on Wednesday so I need to check the timings. I could table*

*your application at the meeting*". He replied thanking her and put in his application on Wednesday 16th.

2.24. Mr Barkworth went to the meeting with Gentoo on 16th September, said he had a late application without naming the applicant, and asked if the panel, which did not contain people who as far as we know had any grudge against the claimant, would be prepared to consider a late application. The reply was they had sufficient strong applications submitted in time so were not prepared even to consider it. This is wholly credible. Having prepared for the meeting by reading many pages of reports and CV's, they would not start reading another unless the candidates they already had were unimpressive. Ironically this is similar to the position the claimant took in respect of the Bellway tender back in 2004, i.e. that a late amended tender should not supplant those submitted accurately in time. We are completely convinced the making of protected disclosures, anything else in the claimant's past or indeed his qualifications had **no influence at all** upon the decision not to progress him.

2.25. However, the claimant understandably assumed Gentoo did not now view what had happened in 2001-2004 as a reason not to employ him. He was present at a National Housing Conference in Birmingham on or about 23 September 2015 when it was announced Mr Walls was leaving and Mr Craggs would be Interim CEO. The claimant learned of problems at Gentoo in conversation with Mr Tickell .Shortly after he learned Mr Ridley was leaving and he let Mr Tickell know he might be interested in returning to Gentoo as interim Finance Director. Mr Tickell spoke to Mr Steve Lanaghan (who also had been a colleague of the claimant back in 2001-2004 and was now appointed as Assistant CEO) who told him of the "Abovo arrangement" ( see next paragraph . At some point the claimant asked Mr Tickell if he could arrange a meeting between the claimant and Mr Craggs , but when asked , Mr Craggs thought it was pointless so refused to meet. We accept Mr Tickell's evidence he told the claimant there was no interim role to be filled at that time, but there may be changes later.

2.26. It would have been easier by far if Mr Craggs had been as straight talking in his witness statement as he was in oral evidence. In 2014 Gentoo was, in his words, "*in turmoil*". Following the 2008 market collapse, the Regulator had been paying close attention to commercial and financial aspects of housing associations and from early 2014 Gentoo was under scrutiny. Part of its problems had arisen from branching out into commercial projects which did not prove successful and were depleting the funds for its core business of social housing. In 2015 the Regulator downgraded it in terms of Governance and Value from Grade 1 to Grade 2 of 4. The terminology used by the witnesses was "*from G1V1 to G2V2*". This happened on the "watch of" Mr Taylor as Finance Director and he is a Chartered Accountant. Mr Ridley, another Chartered Accountant, was appointed in his place. By late 2015 it was known Mr Ridley would be leaving. Mr Craggs became Acting Chief Executive on 23rd September 2015. He asked Mr Lanaghan to get an external finance consultancy to look after Gentoo's finance. They approached a company called Abovo who allocated three CCAB qualified Accountants, working in turn, one of whom, Mr Nigel Tooby, a Chartered Accountant. had been deeply involved with Gentoo at the time of the stock transfer in 2001 and had a considerable pedigree in finance in the housing sector. From the departure of Mr Ridley which took place over a couple of months and was complete by the early part of 2016, Abovo looked after finance. **Only** in the sense Mr Lanaghan was the employed officer responsible for overseeing Abovo, was he "Acting Finance Director".

2.27. This interim position was the start of enabling Gentoo to focus on its core business. The aim was to get the Regulator to restore Gentoo to G1V1 after an in-depth assessment expected sometime later this year. Against this background in the autumn of 2016 Gentoo set about recruiting for a permanent Finance Director. The eventual successful applicant was Mr Tooby which, given his background, is unsurprising. This exercise, and the claimant's failure to progress even to the interview stage, is the core of his case. We focus mostly on it because our reasons for rejecting his case are similar to our reasons for rejecting his case in respect of the five Board member positions for which he later applied, but in the latter the respondent's case is even stronger. Again Campbell Tickell handled the recruitment but Ms Louise Bassett had joined Gentoo on 1 October 2015 as HR Director. She was promoted to Executive Director of Corporate Services on 12th June 2016. She did not have a background in the housing sector, having previously worked in the pharmaceutical industry.

2.28. Another key point is, in recent years, some housing associations view as desirable that important officers, including a Finance Director, should have a broader background than social housing. The claimant sees as his strong "selling point" that he has been steeped in the housing sector for the better part of three decades. That is now considered **not** to be a good selling point. It has been found bringing non housing specialists into such matters as finance and governance produces a "fresh" approach which has improved the performance of housing, and other, companies which have their roots in the public sector but have become "privatised". Not everyone agrees. Mr Martin Kelly, Chief Executive of Accent, told us his Board, against his advice, appointed a certified accountant who had international experience of high quality in other sectors. He was removed after 12-18 months due to incompetence in running the finances of a large housing association .Mr Martin Kelly, from personal knowledge, rated the claimant more highly. We do not doubt that is true, but it shows "fashions", in many ways, influence even recruitment panels in such businesses as these. The claimant was introduced to Accent Group by Mr Tickell who was aware his time there was successful, so Mr Tickell would have sung his praises if an occasion to do so arose.

2.29. The first point of note is the claimant's application was not, as was the earlier Board member application, rushed. It is a well crafted CV and there is a footnote to his previous employment with SHG which says he left having been *unfairly and wrongfully dismissed as was recorded in the Newcastle Employment Tribunal*. This puts a reader on notice **something** happened back in 2004. From 2005 until August 2014, the claimant had worked in a number of interim roles (with some breaks). He had applied unsuccessfully for 6 permanent positions. He had no work from September to December 2014 and was then employed from January 2015 as Director of Finance and IT for Tyne Housing, a small group of housing organisations based in Newcastle.

2.30. The first stage was for Mr Barkworth to go through all the applications and prepare a summary in preparation for a long-listing meeting on 26 September between himself and Ms Bassett. Mr Barkworth's first thought was the claimant should not be put forward as it was important for a Finance Director in a major housing association like Gentoo to be a CCAB qualified accountant. Mr Barkworth categorised the 17 applicants with either yes, no or possible. All the yes's, and all but two of the possibles, had CCAB qualifications. Candidate 7 did not, neither did the claimant – candidate 11. It is notable that qualifications are written

immediately below the name of the candidate in the top left hand box of the long listing report thus indicating how important qualifications were.

2.31. Candidate 7, known to Ms Bassett, had worked for the software company Sage. She was surprised he did not have any accountancy qualification. Mr Barkworth's opens his note by making that point, continues to say the candidate has high grade experience with blue chip companies and ends with " *If the lack of formal qualifications is acceptable, they represent an interesting alternative to a traditional finance director* ". The phrase used before us was this was a "wild card "candidate. Probably due to his lack of CCAB qualification, he was not given an interview either.

2.32. The first thing Mr Barkworth says in his comments about the claimant is he had previously worked for SHG as Corporate Services Director and Company Secretary. He says the key concern is his lack of a CCAB qualification. Against that he points out his 10 years of work as an Interim Financial Officer since he left SHG during which he held some really quite senior interim positions. There is difference between the requirements for an interim position holder and a permanent position holder. Interim position holders are more trouble shooters than long term strategic planners. Mr Barkworth's report says , "*Also his experience over the last 10 years as an interim has been focused on operational issues and crisis management roles and he therefore appears to lack the substantive and broader strategic involvement other applications demonstrate.*"

2.33. The other major concern was that the claimant in his most recent and only permanent role at Tyne Housing was working for a much smaller organisation where his present salary was £46,000 (though later to rise to £53,000). The job for which he was applying had a salary package of £140,000 plus some additional benefits. The closest the claimant had ever come to such a level of earning was as an Interim when he was paid on a day rate which, multiplied by 220, would have been £138,000 per annum, but he would have had no sick pay, holiday pay, pension or additional benefits save for expenses. The lowest earning other candidate, who was marked" no", was on a package of at least £70,000. There are in fact good reasons, from a family and health point of view, why the claimant has taken the role with Tyne Housing but that is not clear from the application and existing salary is a guide regularly used by Recruitment Consultants to evaluate the seniority and experience of candidates. The claimant's closest relevant experience – his work at Accent - had finished by October 2007. He was not made permanent Finance Director even at Accent. The claimant accepts Mr Tickell said in their very first conversation years earlier he would do better if he were to become CCAB qualified. Mr Tickell repeated this about 4 times subsequently.

2.34. Mr Barkworth's initial view was the claimant would have been a "no" , at which point he knew nothing of any protected disclosures but he marked him a "possible" simply because of his previous work for SHG. Mr Barkworth's report notably commented: "*A practical consideration for the panel will be any relationship legacy following his departure from SHG*". We accept Mr Barkworth's and Ms Bassett's evidence that legacy may have been a positive one, but it is more likely Mr Barkworth thought , as did Mr Tickell later, .that anyone who has left having been unfairly and wrongfully dismissed will have some "history" which may make him unwelcome. We find Mr Barkworth's report was wholly uninfluenced by protected disclosures he knew nothing of , and no-one influenced him against the claimant.

2.35. A good deal of Mr Sweeney's incisive cross-examination was directed towards what appeared to the claimant, quite reasonably in our view, to be suspicious circumstances about events of 26 September, in particular whether Mr Barkworth or Mr Tickell met with representatives of Gentoo and which representatives they were.

2.36. A chain of e-mails suggests, if read literally, Mr Tickell, who gives far more than just recruitment advice to Gentoo, was going to attend Gentoo **in place of** Mr Barkworth. However the truth is that Mr Tickell was in attendance at Gentoo **on the same day** to be at a Board meeting at which some very difficult topics were to be discussed. That meeting started at 11:00am but was preceded by a presentation which caused the meeting to run late. Ms Bassett was present for much of the Board meeting which accounted for her being late for the meeting with Mr Barkworth to go through the long-list fixed for 4:00pm. It was at least 4:10pm before she arrived. Mr Tickell had been briefed on the candidates so he could answer any questions that might arise in the Board meeting. That is consistent with Mr Barkworth's email at 307 which relates to his being available on the phone during the board meeting, rather than during the shortlisting meeting, which he attended without Mr Tickell.

2.37. At some time, probably that day during a break in the Board meeting, Mr Tickell had a discussion with Mr Lanaghan. We accept Mr Tickell genuinely cannot recall the timing or content of a brief discussion In the absence of Mr Lanaghan as a witness (he having retired) we will assume he had found out the claimant was an applicant and expressed negative views about the claimant that day. However, those views were not about the protected disclosures but the claimant's departure under a compromise agreement. **Whatever, Mr Lanaghan said to Mr Tickell was not passed on to Ms Bassett or Mr Barkworth in advance of the discussion they held about the content of the long-listing report.**.

2.38. When they came to the claimant in the shortlisting meeting, Ms Bassett, who had not been connected with Gentoo at all until 2015, decided to go and have a word with Mr Craggs to see whether there was any special reason why the claimant and/or two other former employees of SHG/Gentoo, who were CCAB qualified but going to be rejected for lack of experience, should be put through for an interview. Leaving Mr Barkworth in her office, she went to Mr Craggs' office where, having come out of a fraught Board meeting, he looked, in her word, "distracted". She explained one of the applicants they were likely to reject **unless he had a pressing reason not to do so** was "Kevin Kelly". Mr Craggs' **first question** to her was whether the claimant had, since working for SHG, "***qualified***". In his oral evidence, Mr Craggs told us if the answer had been "yes", he believes "*a leopard can change its spots"* and although he had considerable reservations about the claimant's people management skills, he may have suggested putting him forward for an interview. However, once Ms Bassett informed him the claimant still only had the AAT qualification, Mr Craggs' said that there was no special reason to shortlist him as a wild card candidate. .**That is all he said, and all she relayed to Mr Barkworth, who jointly with her decided** to reject the claimant at that stage. Out of curiosity, she asked Mr Craggs before leaving his office what the dismissal in 2004 was about, and he told her to speak to Mr Lanaghan. She spoke to him the following day **after** the decision had been made and he told her the claimant had been accused of bullying and had

fallen out with Mr Walls. Ms Bassett recalls no mention of protected disclosures. The claimant was advised he would not be interviewed on 30th September 2016.

2.39. Before the result was known to the claimant, five Board member positions had became available and again he applied with a CV disclosing the ending of his previous employment at SHG. Mr Barkworth prepared a similar report, at page 1012 - 1046, covering a massive 87 applicants. Ms Stone says the idea was to place a generic advert and then focus on the specialist skills and experience in the light of the applications. The advertisement and information pack was insufficiently informative for the Finance Director role, but was even more so for these positions.

2.40. The information given to candidates did not categorise those five positions in the way they were mentally categorised by Mr Barkworth , Ms Bassett or the panel. The claimant was considered under two headings, "housing" and "finance", and rejected on both. That good reasons exist for doing something does not mean it was done solely for that reason, but overwhelmingly good reasons make it less likely any other reasons were operative. We need not replicate paragraph 47 of the ET3 which shows the successful candidates' histories, but accept it in its entirety. Those appointed and those shortlisted reveal what the respondent was really looking for. Mr Sweeney submits It is difficult to understand why ,even on the basis of the experience/skill set they were looking for ,Mr Barkworth ,having considered the claimant a 'possible' for Finance Director would not consider him a 'possible' **non-executive** director. We disagree. To us **now**, it is obvious. Mr Self explained they were looking for people to "challenge" executive officers, not do the job themselves, and, importantly, people who could help with the sometimes difficult relationship Gentoo had with the council. In short **non-executive "ambassadors" of high local and national standing.**

2.41. As for housing, Mr Barkworth was looking for someone with real "strategic" insight who had held a senior role within a similarly large housing organization. All but one of the candidates put through to interview had operated at Chief Executive level in a large housing or local government organisation (where housing was a large part of the role). The other candidate had operated at Executive Director Level and had previously been a Deputy Chief Executive and Managing Director in a large housing organization. Mr Keith Lorraine OBE, who was appointed had been Group Chief Executive of a Housing association with 18,000 homes since 2005., was born and raised in Sunderland, and had held prestigious national positions.

2.42. As for Finance and Treasury Mr Barkworth put forward CCAB qualified accountants with more significant level of skills and experience than the claimant. The successful candidate, Mr David Murtagh, was Group Finance Director for the European operations of a large multinational US corporation and had for nine years been on the Board and Chair of the Risk and Audit Committee of a large national housing group of a similar size to Gentoo.

2.43. Betraying his lack of local knowledge, Mr Barkworth had actually put down only as a possible one of the most well respected and well known businessmen in Sunderland. He also has a record of non-executive roles, is Deputy Lieutenant of County Durham and extensive involvement with and knowledge of the council. Mr Self and the panel realised this, despite a scant CV, and the man was appointed.

2.44. There were 87 candidates. There is simply no comparison between the claimant's skills and experience which were not at the strategic level required and those of the candidates who were progressed further .He was one of 37 marked "no" by Mr Barkworth, still acting without knowledge of the protected disclosures, He considered 24 other applications were strong and should proceed and marked 26 as " possibles". The final decision to reject the claimant's application was taken by the panel relatively quickly as a result of Mr Barkworth's "no". Mr Self accepted the detailed applications and CV's of all the "no's" were only skimmed to save time. Although it was put to Mr Self he had been sent a letter about the claimant in 2005 (which Mr Self could not recall having received), that letter was about the bullying allegations and had nothing to do with the protected disclosures. We accept Mr Self's evidence he knew nothing about these matters even though he had been a part of SHG all those years ago. He looked only at the qualifications and experience of the candidates for the roles.

2.45. We accept that although Mr Craggs and Mr Lanaghan were consulted at various points in this process, neither said, nor transmitted via Mr Tickell, anything to influence Mr Barkworth or the panel against the claimant. Indeed his application was so far from what was being sought by way of Board Members, it was barely noticed. He was advised his application was unsuccessful on 21 November 2016.

2.46. A key reason for the claimant bringing this claim is a telephone call he had with Mr Tickell on Friday, 18 November 2016 at 16:15 hours. The claimant made a note very shortly after the call, in manuscript at 1366 to 1369. A typewritten version is at 204-205. Mr Tickell accepts he did tell the claimant he was sorry the claimant had not made the shortlist for the Finance Director position. The manuscript note (with one correction clear from the typewritten version highlighted below) then includes:-

"*He had tried to raise **previously** with John Craggs my strength as a suitable Finance Director and that as my departure was over 12 years ago a lot of water had gone under the bridge then there should not be a problem. John Craggs had let James know that because there was a compromise agreement signed 12 years ago that ended the relationship.*

*I mentioned to James that I had also applied for a board member position and was the same thing going to happen to my application?*

*James replied that I burnt my bridges with Gentoo.*

*He said he didn't know what went on 12 years ago and asked me what that was all about.*

*I told him I couldn't discuss the contents of the compromise agreement but could say that I was accused of bullying, I had had a disagreement with my Head of Audit as he reporting directly the chief executive rather than me and I said things that I apologised for. At the same time there were tendering irregularities which the Auditor had not completely informed me of and I reported to the board. I was subsequently dismissed for bullying and immediately prior employment hearing Gentoo agreed publicly that I was unfairly dismissed.*

*He said in his opinion it did **not** change his opinion about me and that losing my temper with a member of staff should have been forgotten about*".

2.47. The claimant relies heavily on this conversation to suggest Mr Craggs and/or Mr Lanaghan would not welcome applications from him for any positions **and made that view known.** The claimant accepted in cross examination Mr Tickell did not say Mr Craggs or Mr Lanaghan had said he had "burned his bridges" (or words to that effect). That was "*his interpretation*" of what Mr Tickell had said.

2.48. Similarly to Ms Bassett on 29 September, Mr Tickell was curious about the background to the claimant's departure in 2004. We accept Mr Tickell asked the claimant because neither Mr Craggs nor Mr Lanaghan had told him in any detail. However, some discussions about it ,at some time, did occur in our view.

2.49. Mr Sweeney submits the truth probably is that **on 28th September 2016**, Mr Tickell did advocate for the claimant but to no avail; and this is what Mr Tickell meant when he said to the claimant he had **previously** tried to raise his candidacy with Mr Craggs. Mr Tickell may have spoken with Mr Lanaghan, but ultimately Mr Craggs, as the Chief Executive was the one who decided. By the time of the five board positions application, the message has been given to Mr Tickell **and to** Mr Barkworth the claimant was not to return to Gentoo in any capacity and what Mr Tickell said to him about 'burning bridges' is not what Mr Tickell inferred but probably what he was told . At the very least, what Mr Craggs and or Mr Lanaghan said to Mr Tickell, on whatever occasion, caused Mr Tickell, reasonably to infer that what had happened in 2004 meant the claimant should not waste his time applying again to Gentoo, and he shared that view with Mr Barkworth . We reject these submissions, plausible though they are.

2.50. We accept what Mr Tickell said that he was "*talking to the claimant as a friend*". In Mr Tickell's experience, employees do not go back to employers when they have left under a compromise agreement. Mr Tickell reiterated he had on a number of occasions over many years advised the claimant that if he really wanted to make progress to the position of Finance Director he should obtain a CCAB professional qualification.

2.51. We make no criticism of Campbell Tickell. Recruitment Consultants are trying to match people to jobs. While their client is the prospective employer, Campbell Tickell need to maintain the goodwill of prospective employees and try to "place them". Rather like estate agents whose client is the vendor, they will only secure a sale, and earn their money, when a house is matched to a purchaser. Recruitment Consultants must have a keen sense of "matches" which are unlikely to come to fruition. Some employers who express firm preferences may be persuaded to consider applicants who on first sight they would reject as not meeting those preferences. Equally, some prospective employees may be persuaded to take a job they would not initially have found tempting. This knowledge of both parties' preferences is often gleaned from short passing conversations. Sometimes making a "match" will involve being benignly duplicitous in not telling parties initially what the other's preferences are. We believe Mr Tickell had more than one conversation with Mr Craggs and/or Mr Lanaghan about the claimant, the earliest of which was probably in or about **September 2015** (see paragraph 2.25 above). The cumulative effect was that Mr Tickell came to believe they would not welcome the claimant back. He shared that view with the claimant on 18th November

2016 but we do not find he shared it with Mr Barkworth or anyone else. We are convinced Mr Craggs did not tell or communicate directly or indirectly via Ms Bassett to Mr Barkworth that the claimant should be marked as "no" for the five board positions

2.52. We can see why as a result of this telephone conversation the claimant believed Mr Craggs or Mr Lanaghan had poisoned the minds of the people who actually took the decisions, but in our view they did not, even if it would have given a measure of satisfaction to have done so. They are steeped in the recruitment policies and ethos of Gentoo and would not be so reckless as to give the least impression they were trying to "rig" a recruitment process to people like Mr Tickell , who may tell someone on the Board, Ms Bassett , a director responsible for HR or Mr Self, a Board member of many years standing , all of whom would not hesitate to object.

2.53. Further, for the reasons given at 2.18-2.20 above, we find neither Mr Craggs nor Mr Lanaghan's antipathy towards the claimant was to any extent influenced by the making of the protected disclosures or **to any material extent** the way in which he pursued them. Mr Craggs telling Ms Bassett there was no special reason for the claimant to be progressed despite his absence of a CCAB qualification was not, consciously or subconsciously, based upon the claimant's protected disclosures. He would have said it even if none had been made

## 3 The Relevant Law and Conclusions

3.1. Section 47B includes

*(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.*
*(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done -*
*(a) by another worker of W's employer in the course of that other worker's employment, …*
*(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is* ***treated as also done by the worker's employer."***

Section 48 adds

*(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B."*

*(2) On* (such a complaint) *it is for the employer to show the ground on which any act, or deliberate failure to act, was done.*

## The " jurisdiction " issue

3.2 Ms Stone accepts a former employee may bring a claim for post-termination detriment (see Woodward v Abbey National plc [2006] ICR 1436). However, she says some sort of connection with the former employment is required and bases her argument on the somewhat differing speeches of their Lordships in Rhys-Harper v Relaxion Group [2003] ICR 867 which concerned post-termination victimisation, but was treated by the Court of Appeal in Woodward as relevant in protected disclosure detriment cases. Unfortunately, it did not clarify which, if

any, of the analyses in Rhys Harper, should be applied. Ms Stone says *A decision not to appoint a former employee to entirely different roles more than 10 years after the relevant employment has terminated does not have the necessary connection with the former employment. The Tribunal has no jurisdiction over these allegations.* We reject that submission.

3.3. In Woodward the complaint was of a detrimental reference related to the employee's former employment given to a prospective new employer .If Mr Craggs had been asked by Ms Bassett who had received a reference request from another housing association to give his opinion of the claimant , he had given a damning appraisal of him motivated by protected disclosures the claimant had made while in employment with SHG, and Ms Bassett had relayed that to the prospective new employer who decided not to interview the claimant , Ms Stone accepts the detriment of not being shortlisted would be actionable in this Tribunal. It makes no sense that if the prospective new employer is Gentoo , Mr Craggs gives to Ms Bassett and/or either relay to decision makers for the shortlisting of the new appointment the same damning information, the Tribunal should not have "jurisdiction "to deal with that detriment .

**Causation**

3.4. Ms Stone says "*The Respondent has shown reasons why the Claimant was rejected. He was not CCAB qualified and the Respondent considered that to be important in an FD and he was outclassed in his application to be a Board Member*." She cites Fecitt v NHS Manchester [2012] ICR 372, where Elias LJ said" *Once the employer has satisfied the tribunal that he has acted for a particular reason,… that necessarily discharges the burden of showing that the proscribed reason played no part in it. It is only if the tribunal considers that the reason given is "false", whether consciously or sub consciously,* ***or the tribunal is being given something less than whole story*** *that it is legitimate to infer discrimination*"

.

3.5. In London Borough of Harrow-v- Knight, Mr Recorder Underhill (as he was) said:

*16It is thus necessary to show that the fact that the protected disclosure had been made* ***caused or influenced*** *the employer to act (or not act) in the way complained of: merely to show that* ***"but for" the disclosure the act or omission would not have occurred is not enough***

3.6. In Kuzel-v-Roche Products Mummery L.J. dealt with causation but in the context of a dismissal claim where the search is for the "principal reason" thus:

*58. Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.*

*59. The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it*

*was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.*

3.7. In s47B, one is not looking for the principal reason, but **an effective cause**. The fact good reasons exist for his rejection does not mean he was rejected solely for those reasons. We do not read Elias LJ as saying otherwise. Elias LJ also stated in Fecitt that s 47B will be infringed "*if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower*". In Villalba –v-Merrill Lynch it was held a finding that a protected act was "*a very small factor, not a significant influence*" justified holding no victimisation had occurred. If the protected disclosure does not materially influence treatment, where "*material*" means "*more than trivial*", there is no causation..

3.8. In law, Mr Sweeney puts the causation test correctly thus

*R must prove the ground on which it rejected C's application(s). If it does, then C's claim will fail. If it does not, then it is legitimate to infer discrimination (in this sense, whistle-blowing discrimination) in accordance with the principles in Igen Ltd v Wong (see para 41 of Fecitt). Note, the Tribunal, if not satisfied that R has proved the ground on which it has rejected C, is not automatically compelled to conclude that R has victimised C.*

*It must ask itself whether, R having failed to discharge the burden of satisfying it of the ground on which it rejected the application(s), it is then legitimate to infer that it was materially influenced by the fact that C made the protected disclosures.*

*C has maintained from the outset that his claim depends on the drawing of appropriate inferences.*

3.9. As in discrimination and victimisation under the Equaltiy Act 2010, and its predecessors even before the burden of proof was reversed, the primary facts must support the drawing of an inference **which may then be rebutted by a non-discriminatory explanation**. In his closing submissions, Mr Sweeney made many valid points including

(a) there is not a single reference anywhere in the candidate pack to the need for a CCAB qualified accountant as an essential requirement

(b) there is **no** need for a Finance Director to sign off the annual report and financial statements as said in the pleadings and most witness statements which is wholly misleading

(c) there is no literature from the Regulator that requires a Finance Director to be a chartered accountant.

(d) the assertion the Regulator **expects** it, is undermined by Mr Craig Moule holding such a position and Candidate 7 being identified by Mr Barkworth as a possible

That being the case, he submits false or misleading statements and the lack of transparency as to what happened on 28 September and any conclusions we come to in respect of the credibility or reliability of the respondent's key witnesses are sound primary facts from which the proper inference to draw is that, through Mr Craggs and Mr Lanaghan, "the respondent"

was materially influenced by the protected disclosures. Those two men were the actual decision-makers and Ms Bassett was in effect **told** the claimant was not to be interviewed. Thus the respondent has failed to discharge the burden on it, at least in respect of the Finance Director job.

3.10. We accept such inferences **could** be drawn. Ladele-v-London Borough of Islington per Elias LJ gives the best guidance

*The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employee has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. As Lord Browne Wilkinson pointed out in Zafar v Glasgow City Council [1998] ICR 120 :*

*"it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee that he would have acted reasonably if he had been dealing with another in the same circumstances."*

*Of course, in the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation: see the judgment of Peter Gibson LJ in Bahl v Law Society [2004] IRLR 799, paras 100-101 and if the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. As Peter Gibson LJ pointed out, the inference is then drawn not from the unreasonable treatment itself - or at least not simply from that fact - but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, that discharges the burden at the second stage, however unreasonable the treatment.*

3.11. As Elias J in the EAT in Law Society –v- Bahl, His Lordship said

*101. . Persons who have not in fact discriminated on the proscribed grounds may nonetheless sometimes give a false reason for the behaviour. They may rightly consider, for example, that the true reason casts them in a less favourable light, perhaps because it discloses incompetence or insensitivity. If the findings of the tribunal suggest that there is such an explanation, then the fact that the alleged discriminator has been less than frank in the witness box when giving evidence will provide little, if any, evidence to support a finding of unlawful discrimination itself.."*

3.12. In this case the respondent's witnesses were more frank in oral evidence than in their witness statements where they seemed to be saying the events of 2004 had been forgotten .They had not. That Mr Craggs used the phrase about a leopard being able to change its spots, shows he thought the claimant had spots which needed changing. We hope we have said enough in our findings of fact to show why we conclude that was a view he held, and would have held even if no protected disclosures had been made.

3.13. We give a firm indication now that it would be futile for the respondent to make an application for costs, despite Ms Stone's able submissions the claim was hopeless. Many of

the messages received by the claimant caused him to think the whole process had something "fishy" about it. Our findings there was nothing fishy is the product of a far greater degree of scrutiny than the claimant could reasonably have applied from the position he was in at any stage up to and including this hearing. In other words we have accepted innocent explanations for things which definitely did need to be explained. The respondent has also brought this case upon itself especially in the sense the advertisement and information packs were insufficiently informative and what passes for a job description and person specification is so nebulous as a result of a "net being cast " so wide as to attract as many applications as possible .

3.14. There is one more point we feel we need to deal with even though the case law was not mentioned by Counsel. The shortlisting decisions for both positions were made by Mr Barkworth (and/or him and Ms Bassett) who were unaware of the protected disclosures when they made the decisions. Ms Stone says the protected disclosures **could not** have had any influence on them, so the claim must fail. This assumes it is **only the minds of the decision makers into which we must look**. We disagree.

3.15. In Royal Mail Group -v- Jhuti Mitting J held a Tribunal's decision dismissal was not on the ground the claimant had made a protected disclosure because the person who decided to dismiss was misled by the claimant's line manager (to whom she had made the disclosure) and who engineered her dismissal because she had done so was not sustainable. Mitting J set out section 47B, said (1A) reversed Fecitt v NHS Manchester, which it did on that point, and then said:

*32. In the vast majority of cases all that is necessary to discern is the set of facts known to the person who made the decision to dismiss. He will be the sole, or where the decision is a joint one, they will be the joint human agents of the employer who determine the decision. There is, however,* ***no binding statement in the authorities*** *that the mind of that person or those persons must in all circumstances be equated with that of the employer.*

3.16. Not cited to him or to the Court of Appeal in CLFIS (UK) v Reynolds [[2015] ICR 1010], is a case concerning "ordinary " unfair dismissal Orr-v-Milton Keynes Council where Moore-Bick and Aikens LLJ gave one answer and Sedley LJ another. The majority view was one must look only at the mind of the dismissing officer when searching for the "reason" .If in a discrimination case the act complained of is only dismissal , as it was in Reynolds , again one looks at the thought process of the person who took that decision . However, Underhill LJ spelled out how the case could have been pleaded and argued to give the claimant the remedy she sought , if she proved others were motivated by her age, thus

(1) By making an adverse report about the claimant , someone ( Y ) subjects her to a detriment (2) If Y was motivated by her age his act constitutes discrimination (3) If that discriminatory act was done in the course of Y's employment it would be treated as the employer's act; and it would be liable (4) Y would also be liable for his own act (5) The losses caused to the claimant by her dismissal could be claimed for as part of the compensation for Y's discriminatory act, since they would have been caused or contributed to by that act

3.17. Underhill LJ, obiter, referred to his earlier decision in The Co-Operative Group Ltd v Baddeley [2014] EWCA Civ 658. a claim of unfair dismissal where the person who **initiated**

the disciplinary process was motivated the claimant's whistleblowing but those who took the decision to dismiss were not. He had referred to Abernethy v Mott Hay & Anderson [1974] ICR 323 to the effect the "reason" for a dismissal connotes the factors operating on the mind of the decision-taker and continued:

*"There was some discussion before us of whether that approach was applicable in all cases or whether there might not be circumstances where the actual decision-maker acts for an admissible reason but the decision is unfair because (to use Cairns LJ's language) the facts known to him or beliefs held by him have been manipulated by some other person involved in the disciplinary process who has an inadmissible motivation – for short,* ***a Iago situation****. [Counsel for the employer] accepted that in such a case the motivation of the manipulator could in principle be attributed to the employer, at least where he was a manager with some responsibility for the investigation; and for my part I think that must be correct."*

3.18. Mitting J quoted the passages from Reynolds and Baddeley and continued :

*I am satisfied, as a matter of law, a decision of a person made in ignorance of the true facts whose decision is* ***manipulated by someone in a managerial position responsible for an employee,*** *who is in possession of the true facts,* ***can be attributed to the employer of both of them.***

3.19. While Jhuti is going to the Court of Appeal, we respectfully say that , in cases under s 47B . Mitting J is plainly right. Therefore, if we had reached two conclusions (a) that Mr Craggs and/of Mr Lanaghan were , consciously or subconsciously , motivated to a material extent by the claimant's protected disclosures and (b) either of them had , directly of indirectly, influenced or manipulated anyone who played an effective role in preventing the claimant's applications getting further than they otherwise **may** have , we would have found in his favour that he had been deprived of a chance, even if we also concluded he would not at interview have been appointed . . However, we have not reached either conclusion so his claims fail.

Employment Judge Garnon
Date: 1 August 2017

JUDGMENT SENT TO THE PARTIES ON
4 August 2017

P Trewick
FOR THE TRIBUNAL