CASE NUMBER 2500256/17

EMPLOYMENT TRIBUNALS

Claimant **Mr K Kelly**

Respondent **Gentoo Group Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL ON RECONSIDERATION

Held at North Shields On 9th July 2018

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

Upon reconsideration we unanimously revoke the judgment we reached on **26th July 2017**. The same Tribunal will take the decision again. There will be a telephone case management hearing to give directions as to the extent of any new evidence in chief, further cross examination and additional disclosure of documents .

REASONS (bold print is our emphasis)

1 Introduction

1.1. Following a hearing on 11th-14th July and deliberations on 26th July 2017, we reached a unanimous judgment the claim of subjection to detriment contrary to 47B of the Employment Rights Act 1996 (the Act) was not well founded, so was dismissed.

1.2. The claimant was employed **from March 2001 to December 2004 by Sunderland Housing Group (SHG) which later became the respondent ("Gentoo").**The disclosures were between April 2004 and September 2005 to the SHG senior board, the Housing Regulator and a letter to Austin Mitchell MP concerning a tendering exercise.

1.3. The detriments claimed were
(i) rejection of an application for the position of Finance Director of Gentoo in September 2016;
(ii) rejection of an application for a position as a Board member of Gentoo on or about 18th November 2016.

We are not being asked to reconsider our decision on the second detriment. The case involved also a " jurisdiction " issue which we resolved in favour of the claimant and are not being asked by the respondent to reconsider.

1.4. We had to decide whether the making of the disclosures in 2004 had a material influence on the decision not to shortlist him for interview. The respondent said he lacked both the necessary qualifications and experience and there were better candidates. The final paragraph of our reasons read:
*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.*

Today the claimant submits our decision would or may have been different had he, and we, known of evidence discovered since the hearing. Royal Mail Group -v- Jhuti has been decided by the Court of Appeal with the result we predicted.

1.5. Whether the new evidence may have changed the result and whether that renders it necessary in the interests of justice to reconsider the decision is for the whole Tribunal to decide today . If it is, the decision will have to be taken again. The parties had been told we do not expect them to be prepared to deal with that at this hearing. Another would be fixed as and when its scope has been decided and directions given.

2. The Relevant Law on Reconsideration

2.1 We start with text of the Employment Tribunal Rules of Procedure 2013 (the Rules) on the point as far as relevant
Principles
70. A Tribunal may, .. . on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.
Application
71. Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.
Process
72.—(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being

varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.
(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

2.2. For reasons earlier given in writing our Employment Judge did not refuse the application under rule 72 and extended the time limit of 14 days under rule 71.

2.3. The only ground for reconsideration is whether it is **necessary in the interests of justice.** Previous versions of the Rules referred to a "review" of a decision rather than "reconsideration" and were more explicit. For example rule 34 of the 2004 Rules contained as a ground for a review
(d) new evidence has become available since the conclusion of the hearing to which the decision relates, provided that its existence could not have been reasonably known of or foreseen at the time or
(e) the interests of justice require such a review.

2.4. Ms Stone rightly cites Flint v Eastern Electricity Board [1975] ICR 395 and Ministry of Justice v Burton [2016] ICR 1128), where it was held the interests of justice include: justice to the successful party ("*once a hearing which has been fairly conducted is complete, that should be the end of the matter*"); and the public interest in the finality of litigation ("*it should only be in unusual cases that the employee.. is able to have a second bite at the cherry*"). This militates against the discretion being exercised too readily but in both those cases the new points the party applying for reconsideration sought to make could have been made at the original hearing. Mr Sweeney cites Outasight VB Ltd-v-Brown EAT/0253/14. We find no inconsistency in the authorities. In our view if new evidence which could not reasonably have been known of at the time does come to light which, as Ms Stone put it , has something approaching a 50/50 chance of changing our decision , we would be entitled to find it was necessary in the interests of justice to reconsider it though it was nearly a year ago and even a limited fresh hearing will cause work for the parties and the Tribunal.

3 The New Evidence

3.1. It was part of the claimant's original case Mr Craggs and Mr Lanaghan had a reason for not wanting him back because the protected disclosures he made in 2004 and 2005 demonstrated he was determined to uncover wrongdoing. As held in Allsop-

v- North Tyneside Council, no public sector employer is permitted to afford to employees benefits they are not entitled to receive such as "enhanced" redundancy payments . Governance within public authorities rests in many hands but largely in the hands of the Finance Director to ensure such expenditure does not occur.

3.2. In November 2017 press releases revealed Gentoo reported itself to the Regulator and the police in that month. On 12 March 2018 Mr Keith Lorraine ,Chair of Gentoo's board, in a BBC television programme, said excessive severance payments had been made that were not approved by the Board and were in breach of guidelines issued by the Regulator. He confirmed Mr Craggs had resigned over this.

3.3. Mr Sweeney did cross examine during the hearing on the basis of Mr Craggs and Ms Bassett knowing of and being at least acquiescent in the making of such payments to Mr Lanaghan. The claimant says Ms Bassett confirmed no such payments were made. Ms Stone says she only said she was not aware of such payments. Our Employment Judge's note does not resolve the conflict. Even if the claimant is right, a person may in the witness box deny something on the basis they do not know it has happened, rather than from positive knowledge it has not.

3.4. Mr Kelly's submissions at paragraph 17 read:

Had truthful evidence been given about the payments of excessive amounts of public money I submit that the outcome of the hearing would have been different, in particular in respect of the finance director role in respect of which there was a private discussion about between Mr Craggs and Ms Bassett in the absence of Mr Barkworth. The tribunal sets out its findings in respect of the 26 September 2016 in paragraphs 2.35 - 2.38 which includes the discussion between Mr Craggs and Ms Bassett. That there was a private discussion with Mr Craggs in the absence of Mr Barkworth was a critical feature in my case. ***I believe that Mr Craggs and Ms Bassett were both aware of the issue of excessive severance payments.***

3.5. He adds that in a letter dated 28 December 2017 the respondent averred the issue came to light as a result of KPMG preparing the 2016/17 accounts. He gives a very technical explanation in paragraphs 21ff why there was unlawful accounting practice in the 2015 /16 financial statements concealing the payments to Mr Lanaghan which KPMG had to rectify in the following year's financial statements.

3.6. Ms Bassett was appointed Executive Director of Corporate Services on 13 June 2016 and was the director of HR before that. The claimant says it is "*beyond comprehension*" she was unaware of the arrangements made to allow the early release of pension for Mr Lanaghan in 2015/16 and his appointment as Assistant Chief Executive in 2016/17. He says
I believed (rightly as it has turned out) there had been a wrongdoing. I was looking from the outside in, with very limited information. Ms Bassett and Mr Craggs were in prime position with access to all relevant information

38 it is for these reasons that I do not accept the points made in the Respondent's letter of 28th December that Mr Craggs and Ms Bassett did not know about the severance payments to Mr Lanaghan before giving evidence at last year's E.T. Surely it cannot be the case that nobody other than Mr Lanaghan knew ?
39 These are the very things I believed that Mr Craggs and Mr Lanaghan feared could result from my appointment as FD as I maintained at the hearing. Mr Craggs as CEO and the decision-maker regarding my application for FD knew it was imperative that my application was declined. I submit that Ms Bassett's and Mr Craggs evidence needs to be reconsidered in the light of the revelation that, as I maintained, excessive and unapproved -and I would say unlawful - payments were made .

3.7. He says had he been aware of this at the hearing in July 2017 Mr Sweeney's cross examination of Ms Bassett and Mr Craggs in relation to the private conversation on 26 September 2016 would have been different. In our reasons we said:

2.9. … 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 .*

3.8. Although strict rules of evidence do not apply in an Employment Tribunal, barristers and solicitors adhere to a professional code of conduct. If a client has a suspicion amounting to a belief one of his opponent's witnesses has been guilty of some misconduct, it is permissible for the advocate to raise the matter in cross examination. If the witness denies the wrongdoing, and the advocate does not have evidence to disprove the denial, it is wrong to continue with an attack on his or her honesty or integrity. Mr Sweeney stopped exactly where he should have stopped. In our judgment at the time, he had not done enough to implicate Ms Bassett in any knowledge of unlawful payments or show there were irregularities to be exposed.

3.9. We did not accept Mr Craggs would have welcomed the appointment of Mr Kelly, whatever qualifications Mr Kelly may have obtained. However we did not think Mr Craggs at the meeting on 26 September told Ms Bassett Mr Kelly should not be appointed for any other reason than lack of qualifications. At the end of the hearing, Ms Bassett's credibility was undented. The main argument being put today by the claimant is that had he known then what he knows now her credibility and that of Mr Craggs would have been severely dented in cross examination by Mr Sweeney.

4 The Key Parts of Our Original Decision

4.1. The main witnesses were the claimant and, on behalf of Gentoo, Mr William Barkworth, a Recruitment Consultant employed by Campbell Tickell, Mr James Tickell,

its Lead Partner , Mr John Craggs then Chief Executive of Gentoo, and Ms Louise Bassett , latterly responsible for HR at Gentoo.

4.2. In 2004/5 at an appeal meeting the claimant's union representative accused Mr Craggs of fabricating his version of a 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. Mr Craggs was sceptical of the claimant's motivation in writing to Austin Mitchell, MP for Grimsby not the claimant's constituency, who was a campaigner against "privatisation" of council housing provision. The claimant reached a compromise agreement on 4th November 2005 and was paid £130,000. We did not accept the relationship between the claimant and Mr Craggs was, as Mr Craggs said in paragraph 10 of his statement, "*reasonable*". We believed 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 from April 2004 until his dismissal in December, during which extra work fell on colleagues and lastly he obtained a generous settlement he did not deserve.

4.3. How, if at all, the protected disclosures figured in Mr Craggs thinking, was the more difficult question. We need not repeat all that we found about the events of 2004/05 at paragraphs 2.11-2.21 but paragraph 2.13 contained
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.

4.4. We found Mr Craggs did not mind the original disclosure to the senior board or to the Housing Regulator but lost patience with the claimant repeating allegations when SHG were already addressing them and especially going to Austin Mitchell MP. At paragraph 2.21. we dealt briefly with an argument which was not part of Mr Craggs case by reference to Bolton School -v-Evans and Panaylotou-v- Kerneghan. We did so because, having heard his oral evidence, it would have been unsurprising and understandable if, in 2016, Mr Craggs **had said** he would not want Mr Kelly on the

Gentoo team because his past behaviour indicated he would seize on anything which looked to him like a breach of rules and interpret it as an indication of wrongdoing.

4.5. Ms Louise Bassett had joined Gentoo on 1st October 2015 as HR Director. She did not have a background in the housing sector, having previously worked in the pharmaceutical industry. The first stage in recruitment to the Finance Director post was for Mr Barkworth to go through all the applications and prepare a summary in preparation for a long-listing meeting on 26th September 2016 between himself and Ms Bassett. The claimant's application contained a footnote to his previous employment with SHG that he left having been *unfairly and wrongfully dismissed "*. This put a reader on notice **something** happened back in 2004.

4.6. 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 as 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. The qualifications were 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.

4.7. Of Candidate 7, Mr Barkworth noted he had high grade experience with blue chip companies and ended 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.

4.8. Of the claimant Mr Barkworth noted he had previously worked for SHG as Corporate Services Director and Company Secretary. He said the key concern was his lack of a CCAB qualification. Against that he pointed out his 10 years of work as an Interim Financial Officer since he left SHG during which he held some senior interim positions. Mr Barkworth, who knew nothing of any protected disclosures, marked him a "possible" because of his previous work for SHG. His report commented: "*A practical consideration for the panel will be any relationship legacy following his departure from SHG*". We accepted that legacy may have been a positive one, but found it more likely Mr Barkworth thought anyone who said he had been unfairly and wrongfully dismissed would have some "history" which may make him unwelcome. We found Mr Barkworth's report was wholly uninfluenced by protected disclosures and no-one influenced him against the claimant. Nothing in the claimant's application for reconsideration makes us think there is a possibility of us changing our view.

4.9. We made no criticism of Campbell Tickell. We believed Mr Tickell had more than one conversation with Mr Craggs and/or Mr Lanaghan about the claimant, the cumulative effect of which 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 found he did not share it with Mr Barkworth or anyone else before then . Nothing in

the claimant's application for reconsideration makes us think there is a possibility of us changing our view on this point either.

4.10. We set out findings that a Board Meeting on 26th September 2016

2.36. .. 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. ..

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. ... ***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..*

4.11. We believed the versions given by Mr Craggs and Ms Bassett of the private discussion they had on 26th September . Why did we believe Ms Bassett? Many years ago , Tribunals commonly gave uninformative subjective reasons like " *the demeanour of the witness during her evidence*". We did not. Rather we said:
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.

In other words, even if he had felt like saying what we set out in paragraph 4.4. above, Mr Craggs would not have said it **to her.**

4.12**.** Mr Sweeney submitted at the hearing Mr Craggs and Mr Lanaghan, materially influenced by the protected disclosures, were the actual decision-makers and Ms Bassett was in effect **told** the claimant was not to be interviewed. We accepted such inference **could** be drawn but declined to draw it mainly because we did not accept that even if Mr Craggs did know at the time there were proverbial "*skeletons in the cupboard*" at Gentoo relating to any severance payments to Mr Lanaghan that he would have been so reckless as to alert Ms Bassett to any suspicion of an ulterior motive in not wanting to employ the claimant . Mr Sweeney's cross examination of Mr Craggs and Ms Bassett would have been different if he had known what is revealed by the new evidence. He may have shown Ms Bassett knew about the skeletons already. If he had, our conclusions may have been different as to what was said in the private meeting.

4.13. Why did we believe Mr Craggs about the content of the meeting on 26th September ? With many valid reasons for not wanting Mr Kelly (see paragraph 4.2. above), Mr Craggs belief Mr Kelly was obsessively determined to "root out " unlawful payments " became an insignificant reason **because we did not find Mr Craggs believed there were any to be rooted out**. Mr Sweeney's cross examination did not show he was not aware of any "*skeletons in the cupboard*" at Gentoo relating to any payments to Mr Lanaghan. Had we disbelieved Mr Craggs on that point, again our conclusions may have been different as to what was said in the private meeting.

4.14. Ms Stone submits "*The Tribunal found that it would have given Mr Lanaghan and Mr Craggs "a measure of satisfaction" to rig the process, but that they did not do so, and would not have been so reckless as to do so, particularly as Ms Bassett (among others) would not have hesitated to object (para 2.52) (as indeed she did when she discovered the overpayment). <u>At its highest</u>, Mr Lanaghan's overpayment <u>might</u> have given Mr Lanaghan (and perhaps Mr Craggs but there is no evidence for this) a further reason for that satisfaction. However, **it could not have interfered with the decision making**.* We disagree . If Mr Craggs did know of "skeletons" **and** that Ms Bassett knew too, he may have **told her** not to put the claimant through for interview, **and why**, but she kept the " why" from Mr Barkworth. We agree with Ms Stone there is no reason to reopen the finding that all Ms Bassett relayed to Mr Barkworth was there was "*no special reason*" to interview the claimant. We have no concerns about Mr Barkworth's evidence.

4.15. Ms Stone concludes the recently discovered overpayment of Mr Lanaghan does **nothing** to render our finding unsafe and provides no reason why it would be in the interests of justice to reopen a final decision. She submits Ms Bassett instructed the respondent to self-report to the Regulator that Mr Lanaghan was wrongly paid 6 months

in lieu of notice rather than 3 months .She says "*pension strain and contributions began to be included in Gentoo's accounts for the first time in the 2017 accounts, showing higher figures*". She asserts there is **nothing to suggest** Ms Bassett gave false evidence and as her witness statement for this hearing explains what transpired and when, **her credibility remains unimpeachable as to what was said in her meeting with Mr Craggs on 26 September 2016.** We cannot accept there is nothing "***to suggest*** *that Ms Bassett was aware of any irregularities about Mr Lanaghan's pay at the time they decided in September 2016"* not to interview the claimant, though it is far from proven she did. The issue is whether there is a realistic possibility reopening cross examination of Ms Bassett and Mr Craggs would produce that result. We think there is, but have not formed anything resembling a concluded view because we would need to hear the evidence tested afresh by cross-examination.

4.16. In his written submissions for today the claimant refers to emailing the respondent's representatives in July 2017 asking for disclosure of information about severance payments and early release pension to Mr Lanaghan and the decision-making process of the Board in authorising those payments. He says the respondent's solicitors were incorrect to say such enquiries were not relevant. On 6th July 2018, he made another request to them for documents. Disclosure must not get out of hand. We agreed the main focus of the fresh hearing would be cross examination of Mr Craggs and Ms Bassett and it should take no more than two days including deliberations and announcement of the decision with reasons. We agreed it would be better if these full written reasons were available to the parties before , at a telephone hearing, final arrangements were made..

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T M Garnon EMPLOYMENT JUDGE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 9th JULY 2018