Neutral Citation Number: [2021] EWCA Civ 672

Case No: A2/2020/1672

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
HHJ Auerbach

Royal Courts of Justice,
Strand, London, WC2A 2LL

Date: 07/05/2021

Before :

LORD JUSTICE LEWISON
LORD JUSTICE POPPLEWELL
and
LORD JUSTICE LEWIS

- -

Between :

DPP LAW LTD

Appellant

- and -

PAUL GREENBERG

Respondent

- -
- -

Anna Beale and Catherine Meenan (instructed by **Morecrofts LLP**) for the **Appellant**
James Stuart (instructed by **Thirsk Winton LLP**) for the **Respondent**

Hearing date : 27 April 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.30 a.m. on Friday, 7 May 2021.

Lord Justice Popplewell :

Introduction

1. The Respondent, Mr Greenberg, is a criminal defence solicitor with around 20 years post-qualification experience who was employed by the Appellant ("DPP Law"). He was a partner of its predecessor firm, and a director from its incorporation. DPP Law dismissed Mr Greenberg for what it alleged to be gross misconduct arising from his acceptance of a payment of £150 from the father of one of his legally aided clients, on the ground that this constituted a "topping up" of the sums due to the company from the Legal Aid Authority ("LAA") which was forbidden by the terms of the company's legal aid contract. The Employment Tribunal ("ET") rejected his claim for unfair dismissal. The Employment Appeal Tribunal ("EAT") allowed his appeal on the basis that the ET Judge's finding that DPP Law had reasonable grounds for its belief in Mr Greenberg's misconduct was not sufficiently "rooted in findings of fact" about the process of reasoning for the dismissal in the minds of those who took the decision; and that the ET Judge had made a substitution error of law, substituting her own view of the evidence as sufficient to justify dismissal, rather than addressing whether the relevant persons at DPP Law had reasonable grounds for their belief in his misconduct when dismissing Mr Greenberg. DPP Law now appeals to this court.

2. At the conclusion of the hearing the parties were told that we would allow the appeal. These are my reasons for joining in that decision.

Narrative

3. I take the following facts from the findings of the ET, and from the documents referred to in its decision.

4. In September 2004 Mr Greenberg joined David Phillips and Partners, as a partner; the firm was then practising in criminal law mainly in Liverpool, and Mr Greenberg opened an office for the firm in Romford, Essex. In 2014 DPP Law was incorporated with each of the partners of the firm becoming employee directors. By the time of Mr Greenberg's dismissal in 2017, his shareholding was approximately 14%, and his drawings were approximately £11,200 a month.

5. DPP Law had a contract with the LAA, which provided at paragraphs 8.41-8.44 that the company must not charge a fee to anyone for the services provided under the contract or seek reimbursement from anyone for any disbursements incurred as part of the provision of such services, other than in specified exceptional circumstances.

6. In late 2016 Mr Greenberg was instructed to represent Jake Walsh, an 18 year-old charged with grievous bodily harm with intent. It was a legal aid case which had been transferred from another firm. Jake Walsh was then in custody on remand.

7. On 18 January 2017 Mr Greenberg attended a meeting with Jake and his father, John Walsh, at Canterbury Crown Court. Mr Greenberg had instructed an advocate from the public defender service, Ms Charlotte Surley, who was also in attendance. This was not long after the case had been transferred and Mr Greenberg and Ms Surley secured Jake Walsh's release on bail. At the end of the meeting, as he was leaving, John Walsh handed two envelopes containing cash to Mr Greenberg and Ms Surley. After the

meeting Mr Greenberg and Ms Surley had a discussion about whether or not they could or should keep the money. That evening, Ms Surley emailed Mr Greenberg saying that she had spoken "to the relevant people" about "the surprise gift" and had been told that "we must return it to John Walsh securely".

8. Later that evening Mr Greenberg sent an email to Stuart Nolan. Mr Nolan was DPP's Managing Director and Compliance Officer for Legal Practice ("COLP") and Compliance Officer for Finance and Administration ("COFA"). The email stated that John Walsh had thrust an envelope into his hand at a con that day and had said "thank you Paul, this is for your expenses"; and that Mr Greenberg had only opened the envelope once the con was over and Mr Walsh had left. The email concluded: "just wanted to know what to do with it. Let me know." A couple of minutes later Mr Greenberg sent Mr Nolan a further email saying that the envelope contained £300 in cash.

9. Mr Nolan replied the following morning saying: "I'll leave it to your conscience!"

10. After receiving Mr Nolan's email, Mr Greenberg discussed the matter with Ms Rebecca Blain, another director of DPP Law who was based in Essex. He then telephoned the Law Society ethics helpline and made a note of the advice, which was that it did not "have a massive problem with this as long as … the client's father is aware that it wasn't an inducement or an incentive and that I remain impartial throughout."

11. On 1 September 2017 Mr Greenberg went to Canterbury Crown Court for a meeting in relation to Jake Walsh's case. By this time a trial date had been set for mid-November 2017. After the meeting Mr Greenberg drove to a pub near where the Walsh family lived in order to speak to some potential witnesses. He was unable to take statements because there was a funeral wake taking place and the pub was very busy. On that occasion John Walsh gave Mr Greenberg £150 in cash.

12. On 19 October 2017 DPP Law received an email from the LAA. It was sent to its Chief Executive, Ms Sue Christopher, and enclosed a statement by Ms Surley expressing concern that Mr Greenberg appeared to be "topping up" his fees in Jake Walsh's case. Ms Surley's statement extended to five closely typed pages and described the incident on 18 January 2017 in some detail, referring to the cash as a "gift". She said that John Walsh had referred to her and Mr Greenberg "not getting much on legal aid" at some point during the conversation when he handed over the envelopes. She said they each picked up an envelope at random after John Walsh had left, and that the one she picked up contained a card with "thank you" written inside and £480 in cash. The one Mr Greenberg picked up contained an identical card and around £300 in cash. She said she discussed the matter with Mr Greenberg, and explained that she would have to report the gift; and that Mr Greenberg had said to her that his COLP colleague "would probably tell him to keep his gift so long as it wasn't silly money". She said that at one point Mr Greenberg asked her if there was anything she needed "so maybe he could get that for me instead of me taking the cash." She said she refused, and explained she had to report any gift at all.

13. Ms Surley's statement went on to describe a meeting with John Walsh at Canterbury Crown Court on 3 October 2017. Jake's case had been listed for a pre-trial review on that day. Mr Greenberg was not there. Ms Surley referred to the earlier client conference, following which Mr Greenberg had been due to meet with the defence

witnesses to take their statements, wrongly giving the date as 5 June 2017 instead of 1 September 2017. Ms Surley said she had chased Mr Greenberg on several occasions since then for the details of the witnesses in order to be able to insert them into an addendum defence statement, and that these had only been provided late at night on 2 October 2017. She said that these matters were discussed during the conference on 3 October 2017 with Jake and John Walsh. She described part of that conversation as follows:

> "This discussion about the addendum DS and the late arrival of the witness details caused Jake's father to make an off the cuff expression of frustration about Paul, using words to the effect of 'I wouldn't mind but I even paid his expenses to go and see them [the witnesses]' I told John Walsh that he didn't need to do that as the case was legally aided and the LAA would pay Paul's expenses. John then responded with words to the effect of 'I know but I thought it might get him to hurry up a bit'."

14. Ms Surley's statement went on to say that because of her concerns that Mr Greenberg appeared to be topping up his fees in a legally aided case, she had reported the matter to the head of the Public Defender Service, David Aubrey QC.

15. The email from the LAA to Ms Christopher of 19 October 2017, enclosing this statement, asked Ms Christopher to confirm within seven days whether two or more cash payments were received by Mr Greenberg, and how it demonstrated compliance with the relevant provisions of the LAA Agreement.

16. Ms Christopher passed the email to Mr Nolan, who forwarded it to Mr Greenberg the same day, 19 October 2017, saying that he had opened an immediate formal investigation and that he required a written response by Monday, 23 October 2017.

17. Mr Greenberg responded in an email on 23 October 2017. As to the first payment, he broadly agreed with the account given by Ms Surley, but said he never discussed legal aid rates with the client or his family, and he did not recall John Walsh saying that they get little on legal aid. He said that he did not request, and has never requested, a "top up" in relation to any legally aided matter. He denied offering to take Ms Surley's cash, but accepted that he had discussed with her whether it would be acceptable if the client bought her a gift rather than offering her cash. As to the second payment, Mr Greenberg gave the following account:

> "I did attend Canterbury Crown Court with Charlotte and the client, together with members of his family. After the conference, I travelled directly to Broadstairs with the intention of taking witness statements. When I arrived at The Little Albion Pub, I was unable to take statements as there was a Wake, and all of the witnesses were unable to give me any time due to the pub being very busy, noisy and the witnesses having to serve drinks and food. I spoke briefly to the witnesses but did not take statements from them as it was not practical to do so."

18. In relation to the paragraph of Ms Surley's statement which described the discussion between Ms Surley and John Walsh on 3 October 2017, Mr Greenberg's response, in

which he assumed that the date given by Ms Surley of 5 June 2017 for the earlier conference was correct, said:

> "I cannot, of course, comment on the conversation between John Walsh and Charlotte as I was not present. However, I confirm that on 5 June 2017, and having attended The Little Albion Pub in Broadstairs, the client's father did give me £150.00 indicating same was a gift. The client was not present.
>
> For the avoidance of any doubt, throughout my dealings with the client and/or his father, I have at no point asked for any money whatsoever, and at all times perceived the two amounts provided by the client's father as gifts."

19. Mr Greenberg went on to say that he did not consider that he had acted contrary to paragraphs 8.41 to 8.43 of the LAA contract nor any other legal aid provisions. He said that he had a recollection that a gift of significant value proposed by the client should be refused unless the client took independent legal advice, but that he did not consider that either of the gifts were of "significant value". He went on to say that if he was wrong about that, he apologised and would return the money to Mr Walsh. He also pointed out that he had spoken to Mr Nolan and Ms Blain about the first gift and that Mr Nolan had not had a problem with it. He said that their response had informed his position in relation to the second gift.

20. Mr Nolan wrote a statement in response, saying that he recalled being told in general terms of a payment to Mr Greenberg by a client's father. He said that after he advised Mr Greenberg to follow his conscience, he assumed that Mr Greenberg had returned the payment. Ms Blain sent an email to Mr Nolan responding to what was said about her in Mr Greenberg's email of 23 October. She said she recalled speaking to Mr Greenberg about the first incident and that he had mentioned having spoken to Mr Nolan about it. She had no knowledge of the second incident.

21. By a letter dated 25 October 2017 Mr Nolan invited Mr Greenberg to a disciplinary hearing at 2 pm on 30 October, to be conducted by David Kilty, a fellow Crime Team director and shareholder. The letter set out the following allegations against Mr Greenberg:

> "1. That you accepted two separate cash payments from the father of a publicly funded client in the sum of £300 (on 18th January 2017) and £150 (on 5th June 2017) respectively.
>
> It appears that all parties understood the first payment of £300 had been offered to you as a gift.
>
> In respect of the second payment, which you have accepted you received in the sum of £150, it is suggested in the statement from Charlotte Surley (Counsel) that she had been told by the client's father that he had made the £150 payment to you as 'expenses' to go and see witnesses and to speed up your work. This was in the context of the client's father telling Ms Surley that he was

> frustrated with the delay on your part having previously made this payment to you to get you to 'hurry up a bit'.
>
> 2. That having received the payment of £150 from the client's father, which was the second cash payment he had made to you in the same matter within the space of 6 months, you did not see fit to:
>
> a. Refuse the payments;
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> b. Report the payment to me as the company's COLP;
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> c. Disclose the payment to any other Directors within the company; or
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> d. Consult the Law Society's ethics helpline for guidance.
>
> 3. That by acting in the way described above, you:
>
> a. Breached paragraphs 8.41 to 8.43 of the company's Legal Aid contract;
>
> b. Brought the company into serious disrepute with the Legal Aid Agency and other members of the legal profession;
>
> c. Potentially put in jeopardy the company's Legal Aid contract upon which you are aware the company relies for the majority of its fee income.
>
> d. Behaved in a way that was contrary to the rules governing the conduct of solicitors, as set out by the Solicitors' Regulatory Authority.
>
> e. Fundamentally breached the duties and trust and confidence placed in you by the other directors and shareholders of the company.
>
> f. Even if, as you allege and contrary to what is indicated in the statement of Ms Surley, you perceived the second payment of £150 to be a genuine gift, you failed to exercise reasonable skill and care in your role as a director of the company by not identifying that repeated cash payments by the father of the client in a legally aided matter were likely to severely compromise your integrity as a solicitor.
>
> g. You allowed your judgment to be adversely affected by the opportunity for personal gain."

22. The letter emphasised that the issues were of a serious nature and if upheld might result in disciplinary action up to and including summary dismissal for gross misconduct. I shall refer to this as the Allegations Letter.

23. On 30 October 2017, solicitors acting for Mr Greenberg sent a letter to Mr Nolan by email, saying that Mr Greenberg was suffering from stress-related anxiety and low mood and that the doctor had certified that he was not fit to work. A medical note was attached, signing him off for four weeks. The letter said that Mr Greenberg was not going to be able to cope with the further stress of a hearing, which would endanger his health. It requested that any further investigation/hearing take place in writing only. In the letter Mr Greenberg's solicitors said that they would need to take further instructions from him in due course, and requested copies of a number of documents.

24. Later on 30 October 2017 Mr Kilty sent a letter to Mr Greenberg by email informing him that the disciplinary matter had been considered in his absence. Mr Kilty said that he did not consider the documents requested had any bearing on the issues to be determined. The letter said that he found the allegations set out in the Allegations Letter proven on the balance of probabilities; and that the allegations he found proven were serious enough to amount to gross misconduct. The letter continued:

> "In reaching this finding I have paid particular attention to the fact that your actions were in breach of the Legal Aid contract at paragraphs 8.41-8.43 and that breach has brought the company into serious disrepute with the Legal Aid Agency and other members of the Legal profession. This has put in jeopardy the company's Legal Aid Contract which accounts for the majority of our fee income.".

25. The letter continued that the finding of gross misconduct warranted summary dismissal and stated that his employment was terminated with immediate effect. It advised him of a right of appeal.

26. The LAA were informed of the outcome on the same day, and on the following day reported Mr Greenberg to the Solicitor's Regulatory Authority ("SRA"). On that day, 31 October 2017, DPP Law purported to remove Mr Greenberg as a director, although some time later DPP Law was advised that it had not followed the correct procedure for removing him and a subsequent board meeting was therefore convened which passed a resolution removing him. Mr Greenberg's dismissal and removal as a director triggered a transfer of his shares at 20% of their value. The updated valuation was £385,895, with the result that Mr Greenberg received 20% of that sum, namely £77,179.

27. On 6 November 2017 Mr Greenberg appealed against his dismissal. He repeated many of the points made in his email of 23 October 2017. He also corrected the date of the second incident, confirming that it took place on 1 September 2017, not 5 June 2017. He said that he had spoken to Ms Blain about the second payment while driving back to London that day. In his appeal he relied upon two enclosed statements from John Walsh. The first referred to the two gifts and said: "At no time had either gift been requested by either Paul or the barrister, Charlotte. At no time had any money payment been mentioned whatsoever. It was a voluntary act which I did to show my appreciation for what I considered to be the very good work undertaken by both of them. At no time was it to top up any expenses that they may be received from the Legal Aid Board. At no time was it "to hurry Paul up" which I understand has been suggested."

28. Mr Greenberg was invited to an appeal hearing to be chaired by Paul Lewis, another fellow Crime Team director and shareholder, on 22 November 2017. Mr Greenberg's solicitors emailed Ms Christopher the day before the hearing agreeing to the matter to

be heard in Mr Greenberg's absence given that he was unlikely to be fit to attend a hearing in the immediate future.

29. Mr Lewis wrote to Mr Greenberg on 23 November 2017 confirming the outcome of the appeal. He considered and rejected Mr Greenberg's complaint of unfairness in the dismissal decision being made without a hearing, and concluded that both the investigation and the disciplinary process were conducted fairly. The letter said that he was satisfied that on the material available to Mr Kilty on 30 October 2017 his conclusions were correct and should not be reversed. The letter then said that he had considered carefully the matters raised by Mr Greenberg in his appeal email of 6 November and listed the matters raised. He said that he had considered the entirety of the allegations set out in the Allegations Letter and referred to 5 particular matters that he had considered before expressing his conclusion that he too was satisfied on the balance of probabilities that the allegations set out in the Allegations Letter were made out. The five particular matters which he identified were (a) the timing of the second payment; (b) the explanation attributed to Mr Walsh in Ms Surley's statement, including "I wouldn't mind but I even paid his expenses to go and see them."; (c) that in neither of Mr Walsh's statements which had been provided did Mr Walsh deny making this or a similar statement to Ms Surley or in her presence; (d) the failure to report the second payment to the firm's COLP and COFA; and (e) the failure to consider how accepting repeated cash payments from a third-party might compromise Mr Greenberg's integrity as a solicitor. He concluded that given that the proven allegations raised questions as to his integrity as a solicitor and breached the trust and confidence placed in him by the directors and shareholders of the company, they were so serious as to amount to gross misconduct and warrant dismissal without notice.

30. Following Mr Greenberg's referral to the SRA, an investigation took place, and the SRA wrote to Mr Greenberg alleging various breaches of the SRA Principles and the Code of Conduct. Mr Greenberg responded via his solicitors and enclosed a more detailed statement from John Walsh which gave the following account of the second payment, after they had been to the pub:

> "Just as he was about to leave, I put £150 in notes into Paul's car through the open window. Paul told me through the window that I didn't need to give him any money but I walked off quickly. That was a thank you to Paul for what I continued to believe was excellent service that he had provided. He did not ask me for any money. I gave it to him voluntarily. It was nothing other than a gift. It was not intended to be any favouritism or priority in my son's case or to hurry him up."

31. Mr Walsh also denied saying the words attributed to him by Ms Surley about paying Mr Greenberg's expenses. As to saying anything about "hurrying up" Mr Walsh said this "could only have been me making a throwaway comment because I was confused. I never said or suggested that Paul thought I had paid expenses or that I had paid him to hurry up".

32. On 25 September 2018 the SRA concluded its review of the allegations against Mr Greenberg and decided to close the matter with no further action.

33. Mr Greenberg had been suspended by the LAA from conducting legally aided work pending the outcome of the SRA investigation on 15 January 2018. On 11 October 2018 that sanction was lifted in the light of the SRA's conclusion. The original letter from the LAA stated that the LAA was "still of the view that the conduct of Mr Greenberg was not what would be expected of a lawyer working under the Contract", but following an objection by Mr Greenberg, the LAA agreed to remove that sentence and an amended letter was issued.

The Employment Tribunal Decision

34. Mr Greenberg's unfair dismissal claim was heard by Judge Ferguson, sitting without lay members over three days between the 27 and 29 November 2018. She heard oral evidence from Mr Nolan, Mr Kilty, Mr Lewis, Mr Greenberg, and John Walsh. Her reserved judgment, dismissing the unfair dismissal complaint, was dated the 2 January 2019 and sent to the parties on 7 January 2019 ("the ET Decision"). The ET Decision gave detailed reasons which followed a logical and coherent structure. At paragraph 2, it set out what were described as agreed issues, being:

> "2.1 Was the reason (or principal reason) for the Claimant's dismissal a reason relating to the conduct of the Claimant (ERA s.98(2)(b)), as alleged by the Respondent? The Claimant contends that the reason for his dismissal was the Respondent's shareholders/ directors' personal animosity towards the Claimant and their wish to remove the Claimant in order to take his shares and profit share entitlement.
>
> 2.2 Did the Respondent hold a genuine belief that the Claimant had committed the act/ acts of gross misconduct alleged against him, namely (in summary):
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> 2.2.1 Accepting a payment of £150 from John Walsh, the father of a legally-aided client;
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> 2.2.2 Failing to report the payment to the company's COLP, disclose it to other Directors in the company, or consult the Law Society's ethics helpline for guidance;
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> 2.2.3 And that in acting as set out above, he:
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> 2.2.3.1 Breached paragraphs 8.41 – 8.43 of the company's Legal Aid contract;
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> 2.2.3.2 Brought the company into serious disrepute with the Legal Aid Agency and other members of the legal profession;
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> 2.2.3.3 Potentially put in jeopardy the company's Legal Aid contract;
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> 2.2.3.4 Behaved in a way that was contrary to the rules governing the conduct of solicitors as set out by the SRA;

> 2.2.3.5 Fundamentally breached the duties of trust and confidence placed in him by other directors and shareholders of the company;
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> 2.2.3.6 (In the event that he perceived the £150 payment to be a genuine gift) Failed to exercise reasonable skill and care in his role as a solicitor by not identifying that repeated cash payments by the father of a legally aided client were likely severely to compromise his integrity as a solicitor;
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> 2.2.3.7 Allowed his judgment to be adversely affected by the opportunity for personal gain.
>
> 2.3 Did the Respondent have reasonable grounds for its belief?
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> 2.4 Did the Respondent carry out as much investigation as was reasonable in all the circumstances of the case?
>
> 2.5 Did the Respondent follow a fair procedure in dismissing the Claimant, in the sense that the procedure followed fell within the range of reasonable responses?
>
> 2.6 Did summary dismissal fall within the range of reasonable responses?"

[The ET Judge set out further issues at 2.7 to 2.9 which arose if the dismissal were unfair. Since she found that the dismissal was not unfair, these issues did not arise and she made no findings on them].

35. In setting out the facts, which I have summarised above, she recorded that Mr Greenberg gave the following account to the Tribunal of the receipt of the £150 on 1 September 2017:

> "After I had finished I went to my car which was parked outside the pub and rolled the window down. John Walsh lives very near that pub. He had come along to introduce me to the witnesses. We had a chat and then just before John Walsh turned to walk away he literally dropped £150 through the open window of my car. I had not requested any monies from John. I did not suggest that I needed or wanted any money for expenses. I have never once suggested that if he gave me money it would improve his son's case or cause me to give priority to his son's case over any other case. I believed, and still believe (as he has in fact confirmed) that this was simply another show of his gratitude for what he considered to be my good efforts and service. I told Mr Walsh that he really did not need to give me any gift. However, he just walked off. I was 80 miles from home and it was Friday afternoon and I needed to be home for 6.30 as my wife and I were holding a dinner party for friends. I did not want to cause any offence to John Walsh and I knew that it was not improper

> to receive an unsolicited insignificant gift – as Nolan had implicitly confirmed in relation to the previous, larger gift."

36. At paragraphs 46 and 47 the ET Judge set out the relevant law. No criticism was made of her summary of the law, either before the EAT or in this court. She identified that pursuant to section 98 of the Employment Rights Act 1996 it is for the employer to show the reason for the dismissal and that it is a potentially fair reason; and that a reason relating to the conduct of an employee is a fair reason within section 98(2) of the Act. She referred to section 98(4) providing that the determination of the question whether dismissal is fair or unfair 'depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee' and 'shall be determined in accordance with equity and the substantial merits of the case.' She directed herself that in misconduct cases the Tribunal should apply the three stage test first set out in *British Home Stores Ltd v Burchell* [1980] ICR 303 to the question of reasonableness, setting it out in terms which were not the subject matter of criticism in the EAT or this court.

37. She then proceeded to address in turn each of the issues identified in paragraph 2 using them as section headings. As to the paragraph 2.1 issue, she concluded that the reason for Mr Greenberg's dismissal was not, as he contended, based on animosity towards him or a desire to acquire his shareholding; and in the penultimate paragraph of her judgment she confirmed her finding that DPP Law had established that the reason for Mr Greenberg's dismissal related to his conduct, and was not the result of some ulterior motive.

38. She addressed issue 2.2, namely "did the Respondent hold a genuine belief that the Claimant had committed the act/acts of gross misconduct alleged against him" at paragraphs 53 to 55. Paragraphs 53 and 54 merit quotation in full:

> "53. The Respondent was only ever concerned with the second payment, Mr Nolan having accepted in the letter of 25 October that everyone understood the first payment had been offered as a gift. There was never any dispute that the Claimant had accepted the second payment. The issue for Mr Kilty, and Mr Lewis on appeal, was whether the Claimant knew, or should have known, that the second payment was, or might be perceived to be, a top-up payment.
>
> 54. Mr Kilty accepted in cross-examination that he could have dealt with the disciplinary process differently, for example by postponing his decision until the Claimant had been able to respond to the letter of 25 October containing the disciplinary allegations. He maintained, however, that he genuinely concluded on objective grounds that the Claimant had committed gross misconduct as regards the second payment from Mr Walsh. He said he gave significant weight to Ms Surley's statement because she was "acting completely impartially". There is nothing to suggest that the conclusions set out in his letter of 30 October 2017 were not his genuine view. The same goes for Mr Lewis's letter of 23 November 2017. He set out a number of

> specific factors on which he relied and which are highly relevant to the Claimant's culpability. I accept that in both cases the letters reflected their genuine conclusions."

39. Judge Ferguson addressed the paragraph 2.3 issue, namely "Did the Respondent have reasonable grounds for its belief?" under that heading at paragraphs 56 to 67 of her decision. At paragraph 59 she addressed the terms of the LAA contract and concluded that the essential point was that all payments for contract work must go through the LAA, and that any other payment from a client for work on a case would constitute "top-up" and would breach the firm's obligations to the LAA.

40. The following paragraphs under this heading were the focus of the criticisms made by the EAT and by Mr Stuart on behalf of Mr Greenberg, and I should set them out in full:

> "60. The issue for the Respondent, therefore, was whether the Claimant knew, or should have known, that the second payment from Mr Walsh was, or might be perceived to be, a top-up payment. In other words, did the Claimant reasonably believe that the payment was a gift and did he act reasonably in accepting it? Even if he genuinely believed it was a gift, it could be grossly negligent to accept it if doing so could compromise his integrity and/or jeopardise the legal aid contract.
>
> 61. The evidence before Mr Kilty consisted of Ms Surley's statement, the Claimant's own account provided in his email of 23 October, Ms Blain's email and Mr Nolan's statement.
>
> 62. Ms Surley, an independent professional person, had given a detailed account which suggested that John Walsh had intended the payment to "hurry up" the Claimant in obtaining witness evidence, and that he was frustrated by the lack of progress. That was not implausible, given that the Claimant had, on his own account, been unable to take the witness statements on that day, and by 3 October, some six weeks before the trial date, the statements had still not been produced.
>
> 63. Even on the Claimant's own account, the circumstances of the second payment appeared very different to the first. The first was cash given to both the Claimant and Ms Surley simultaneously, with a card saying, "thank you", shortly after Jake Walsh had been granted bail. The second was cash given only to the Claimant after an unsuccessful attempt to obtain witness statements, and there was no mention of any accompanying card, note, or even any words said that would indicate it was a gift. I note that the Claimant did not say anything about the money having been put through the car window.
>
> 64. The Claimant's contention that he relied on the advice given in relation to the first payment was either not credible or was wholly unreasonable. Mr Nolan's "advice" ("I'll leave it to your

conscience") was not helpful, but it was certainly not express approval to accept the first payment, let alone the second. A further cash payment was bound to give the impression that these were, in fact, top-up payments intended to ensure that the case was given particular attention or priority. That was especially so when there was no apparent indication of it being a gift on the second occasion and there was no obvious reason for John Walsh to thank the Claimant at that stage.

65. The Claimant relies on the SRA's decision not to take the matter further as evidence that the Respondent's decision was unreasonable. There are at least three reasons why the SRA's approach is of limited relevance. First, the SRA's remit was to consider possible breaches of the Code of Conduct only. The disciplinary process was wider than that and focused principally on the requirements of the legal aid contract specification. Insofar as the SRA letter addressed that issue, it acknowledged that there was a particular risk in accepting any gift in a legally aided case. The implication that a solicitor might not be acting improperly by accepting a gift of up to £499 in cash from a legally-aided client, provided advice is sought from the COLP, is somewhat surprising, and might be explained by the fact that the SRA is not concerned with the enforcement of the requirements of the LAA. Secondly and in any event, the SRA applies a higher standard of proof (beyond reasonable doubt) than applies in an internal disciplinary process. Thirdly, the task of the Tribunal is to consider whether the Respondent's approach fell within the band of reasonable responses. It is quite possible for the Respondent to reach a different conclusion to the SRA and for both to be reasonable.

66. In light of the above I consider that there were reasonable grounds to conclude that all of the disciplinary allegations were made out with the exception of the allegation that the Claimant acted contrary to the solicitors' Code of Conduct. As noted above, the Respondent has not pointed to any provision in the Code which deals with accepting cash not as a gift. The other matters were clearly sufficient to justify a finding of gross misconduct. It was reasonable to conclude that the Claimant's acceptance of the second payment was either knowingly improper, such that it seriously compromised his integrity, or was reckless to the extent of gross negligence. I acknowledge that £150 is not a large sum to someone with an income at the level of the Claimant's, but nor it is insignificant and it is certainly not impossible that he was motivated by personal gain. This is especially so given that it was the second payment and the Claimant might have assumed that it would not be the last.

67. The evidence before Mr Lewis on the appeal differed only in that the Claimant corrected the date of the second payment, he

> alleged that he had spoken to Ms Blain about it afterwards and he provided the two statements from John Walsh. None of those factors made any material difference to the assessment set out above. If anything, the change of date made it more likely that the second payment was given to "hurry up" the Claimant because the trial date was much closer than it appeared from Ms Surley's version of events. Even if the Claimant did mention the payment to Ms Blain, that does not alter the fact that it either was, or risked appearing to be, a top-up payment. She was not a senior director or shareholder and was not the COLP. As for John Walsh's statements, it is notable that he did not deny using the words alleged by Ms Surley or give any details of the circumstances in which the second payment was given. Further, even if he genuinely intended the second payment as a gift, what mattered was the Claimant's perception and how the transaction was likely to be viewed by others, so it was reasonable for the Respondent to consider that his assertion that it was a gift was of limited relevance."

41. As to the paragraph 2.4 issue, namely whether there was as much investigation as was reasonable in all the circumstances of the case, the ET Judge held that the refusal to postpone the disciplinary hearing on 30 October 2017 was difficult to justify, but that looking at the procedure as a whole there had not been any unfairness to Mr Greenberg. There has been no challenge to that aspect of her decision.

42. In relation to the paragraph 2.6 issue, namely whether summary dismissal fell within the range of reasonable responses, the ET Judge concluded that it did. She said that DPP Law reasonably concluded that Mr Greenberg's conduct amounted to a breach of the legal aid contract, compromised his integrity, and risked jeopardising DPP Law's relationship with the LAA. At the very least it was an extremely serious error of judgement, and it was reasonable for DPP Law to conclude that it could no longer have confidence in Mr Greenberg.

43. Mr Greenberg appealed to the EAT. His notice of appeal, dated 14 February 2019, raised four grounds of appeal. It is not necessary to set them out, because all were rejected by the EAT, which allowed the appeal on a ground developed in oral argument

44. On consideration of the notice of appeal on paper, Choudhury J, the President of the EAT, was of the view that the notice disclosed no reasonable grounds for bringing the appeal and directed that no further action should be taken in respect of the appeal under Rule 3(7) of the Employment Appeal Tribunal Rules 1993. Mr Greenberg made an application under Rule 3(10) challenging that decision. It was heard by HHJ Shanks, who allowed it and listed the appeal for a full hearing.

45. The appeal was heard before HHJ Auerbach in the EAT on 21 May 2020, sitting alone without lay members. In a reserved judgment, sealed on 11 September 2020, HHJ Auerbach allowed the appeal and remitted the claim for a full rehearing before a fresh Tribunal.

46. The basis for his allowing the appeal was encapsulated in a summary of his judgment which preceded his detailed reasons:

> "The appeal succeeded on two points. First, the gravamen of the primary disciplinary case was that the evidence before the Respondent showed that the payment was plainly a top-up in breach of the LAA contract. But, however strong it was said to be, that case was, in its nature, circumstantial and inferential. In circumstances where the LAA had not expressed a concluded view, the Tribunal needed to consider what evidence it had about the specific reasoning of the two partners who decided the matter at the dismissal and appeal stages, and whether their conclusions, in particular that the Claimant had acted in breach of the LAA contract, were reasonably reached by them, drawing on the evidence before them. However, the Tribunal had wrongly based its decision on its own analysis of that evidence, and its view that it *could* have reasonably supported a decision to dismiss on that basis. Secondly, the Tribunal did not make sufficient findings to conclude that either of those partners would in fact have dismissed the Claimant (or upheld the dismissal) for negligence alone. Its conclusion that they *could* have relied on that alternative reason was also not a proper basis to uphold the dismissal as fair." (emphasis in the original, as are all italicised words quoted from his Judgment)

47. In his detailed reasons, the EAT Judge identified the argument of counsel for Mr Greenberg, which he ultimately accepted, at paragraph 107:

> "Mr Stuart submitted that what the Tribunal had done was simply engage in its *own* analysis of the evidence that was before the Respondent, and whether it *could* have supported a decision to dismiss, rather than reviewing such evidence as it had, as to how Messrs Kilty and Lewis had actually come to their conclusions that the charges were fully made out. As to their actual thought processes, he submitted, the evidence was scant."

48. At paragraph 110 he said:

> "… the conclusion that the reason for dismissal related to the second payment, did not by itself resolve the more specific questions that the Tribunal had to decide, including what *particular* conclusions Messrs Kilty and Lewis reached, and on what basis, about the nature of the payment, whether it breached the LAA contract, the Claimant's state of mind in relation to it, and, potentially, the significance of what had happened in relation to the first payment (including the responses from Mr Nolan and the SRA), as well as, potentially, the significance of whether the Claimant had told Ms Blain."

49. At paragraph 111 he said that the case against Mr Greenberg arising from Ms Surley's account was essentially circumstantial and inferential, and however strong and serious

that case may have been said to be it could not have reasonably been concluded that it was incontrovertible or unanswerable. In that context the fact that the LAA had not already come to its own considered view about whether there was a breach of the LAA agreement, "at least meant that there was a particular duty on the Respondent to scrutinise closely and critically, all of the evidence before it, and what conclusions it would reasonably support."

50. He then turned to consider what evidence the "Tribunal appears to have had before it, or referred to, and what findings it did or did not make, about Mr Kilty or Mr Lewis' more *specific* reasons for concluding that the disciplinary charges were made out." He went on to say that the dismissal letter from Mr Kilty did not set out any analysis or reasoning in relation to the evidence before him, and that although Mr Lewis' letter referred to features of the evidence before him to which he gave particular consideration, and the Tribunal referred to this at paragraph 54 as part of its reasons for rejecting Mr Greenberg's case as to the true reason for the dismissal and accepting that that letter reflected his genuine conclusions, the letter did not "say anything more about *how* Mr Lewis reasoned from these features, and the Tribunal did not refer to it again in the passage at [56] to [67]. The Tribunal had no contemporaneous notes or, to my understanding, other documents before it, in relation to how Messrs Kilty and Lewis reached their conclusions."

51. At paragraph 113 he said:

> "113. As to oral evidence, the Tribunal referred to Mr Kilty saying that he gave significant weight to Ms Surley's statement, because she was impartial. But this reference appears in the context of its reasons for rejecting the Claimant's case as to the ulterior reason for his dismissal, and accepting that the dismissal letter set out what Mr Kilty genuinely believed. There is no other reference in the Tribunal's reasons to any oral evidence it heard, or any other evidence it drew on, as to Mr Kilty or Mr Lewis' more specific reasoning or findings in relation to the evidence before them. Rather, the language used by the Tribunal is, at points, redolent of it having made, and been actuated by, its *own* very particular, and firm, assessment of the evidence that was before the Respondent, in particular: at [62] in relation to Ms Surley's account of what Mr Walsh said he had intended; at [63] and [64], referring to some features of the circumstances not mentioned in Mr Lewis' letter, describing the Claimant's reliance on the earlier advice from Mr Nolan as "not credible or…wholly unreasonable", and commenting that a further cash payment was "bound" to give the impression that these were top-up payments; in the comments at the end of [66] on the question of personal gain; and at [67] commenting on Mr Walsh's statements."

52. His conclusory paragraph on this issue was paragraph 114:

> "114. Standing back, it appears to me that the Tribunal's conclusion, in particular that the Respondent fairly found that the Claimant had knowingly accepted a top-up payment in breach of

> the LAA contract, was not sufficiently rooted in findings about what the Respondent, drawing on the evidence before it, had decided and why, but amounted to a conclusion about what the Tribunal itself made of that evidence, and therefore considered that the Respondent *could*, properly, have made of it. At the stage of deciding whether the dismissal that had actually taken place was based on conclusions that had in fact been reasonably reached, that was not the correct approach; and that conclusion therefore cannot stand."

53. As to his second reason for allowing the appeal, Judge Auerbach said at paragraph 117 that after some anxious consideration he had come to the conclusion that this basis for upholding the dismissal also could not stand. His reasoning was that while the decision letters of both Mr Kilty and Mr Lewis were to the effect that the whole of the allegations in the Allegations Letter were made out, the tenor of those charges was that the primary case was that Mr Greenberg had accepted what was plainly in fact a top-up payment in breach of the LAA contract. The natural tenor of their decisions, as indeed the ET found, was that both Mr Kilty and Mr Lewis had found that primary case to have been made out. There was no finding by the ET that either of them separately considered, and also separately concluded that, even if they were wrong in their primary conclusion, Mr Greenberg still ought to be dismissed on this alternative basis of having been careless as to how others might perceive the payment, and the consequences of that. At paragraph 119 he concluded:

> "It therefore appears to me that the Tribunal was not, in this respect, evaluating whether a reason – or alternative reason – why the Claimant was actually dismissed, was one in respect of which the Respondent itself reasonably took a view that dismissal was in any event warranted. Rather, it was again setting out why it considered that the Respondent *could* have fairly dismissed on that alternative basis. But that was not a sufficient basis on which to uphold the actual dismissal, when the Tribunal did not actually find that this was an alternative basis on which Mr Kilty or Mr Lewis had actually, after consideration of the evidence and arguments presented to them about it, founded their respective decisions. I conclude that the Tribunal's decision cannot therefore be upheld on this alternative basis."

Submissions

54. Ms Beale's submissions on behalf of DPP Law may be summarised as follows:

(1) The ET Judge committed no error of law, and the EAT had not identified any error of law. She made clear findings about the reasons for the dismissal, that Messrs Kilty and Lewis genuinely believed in the truth of those reasons, and that they had reasonable grounds for such belief. There was no "substitution error". The EAT's view that she had merely found that there were reasonable grounds on which a hypothetical employer could have dismissed, and substituted her own decision on the evidence as to whether she would have found the misconduct proved, was not justified by a fair reading of her decision;

it involved an overcritical approach to her reasoning, and impermissible fragmentation of it. This submission was developed primarily in the context of most of the charges in the Allegations Letter, other than those at paragraph 3(f), alleging that the payment was topping up. The ET Judge found that these were Mr Kilty's and Mr Lewis' genuinely believed reasons for finding gross misconduct justifying summary dismissal. Paragraph 3(f) contained the alternative charge that if, contrary to the other allegations, Mr Greenberg perceived the £150 to be a gift, he was nevertheless guilty of the negligence there alleged. Ms Beale also submitted there was a finding that such negligence had been an alternative basis on which the ET Judge found that Mr Kilty and Mr Lewis had dismissed Mr Greenberg, and that the ET Judge properly found that there were reasonable grounds for such a belief.

(2) The EAT Judge was not entitled to hold that findings of the ET Judge were not "rooted" in the evidence, in circumstances where it did not have before it the evidence which had been before the ET, in particular the witness statements or any notes of the oral evidence given. It was tantamount to a finding of perversity, which had not been a ground of challenge to the ET decision at any stage and could not properly be mounted without full access to the entirety of the evidence before the ET.

55. On behalf of Mr Greenberg, Mr Stuart submitted that the EAT Judge was correct in identifying the errors in the ET decision, for the reasons he gave. Mr Stuart focussed his oral submissions on two principal and connected points in support of that conclusion, which mirrored the reasoning of the EAT Judge:

(1) the language used by the ET Judge in paragraphs 56 to 67 revealed that she was expressing her own views on the reasonableness of reasoning which was not reasoning which she found had been adopted by Messrs Kilty and Lewis; and

(2) the ET decision failed to make any findings about the specific reasoning Mr Kilty or Mr Lewis had in their minds for the dismissal decisions they made.

The Law

56. There was no dispute about the applicable principles, correctly identified by the ET Judge. In *British Home Stores v Burchell [1980] ICR* 303, in a well-known passage which has often been cited with approval by this Court, Arnold J, sitting in the EAT, stated at p. 304:

> "What the tribunal have to decide … is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the

> matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the tribunal would itself have shared that view in those circumstances".

57. The following principles, which I take to be well established by the authorities, govern the approach of an appellate tribunal or court to the reasons given by an employment tribunal:

(1) The decision of an employment tribunal must be read fairly and as a whole, without focusing merely on individual phrases or passages in isolation, and without being hypercritical. In *Brent v Fuller* [2011] ICR 806, Mummery LJ said at p. 813:

> "The reading of an employment tribunal decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which a decision is written; focussing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid".

This reflects a similar approach to arbitration awards under challenge: see the cases summarised by Teare J in *Pace Shipping Co Ltd v Churchgate Nigeria Ltd (The "PACE")* [2010] 1 Lloyds' Reports 183 at paragraph 15, including the oft-cited dictum of Bingham J in *Zermalt Holdings SA v Nu-Life Upholstery repairs Ltd* [1985] 2 EGLR 14 that the courts do not approach awards "with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards with the object of upsetting or frustrating the process of arbitration". This approach has been referred to as the benevolent reading of awards, and applies equally to the benevolent reading of employment tribunal decisions.

(2) A tribunal is not required to identify all the evidence relied on in reaching its conclusions of fact. To impose such a requirement would put an intolerable burden on any fact finder. Nor is it required to express every step of its reasoning in any greater degree of detail than that necessary to be *Meek* compliant (*Meek v Birmingham City Council* [1987] IRLR 250). Expression of the findings and reasoning in terms which are as simple, clear and concise as possible is to be encouraged. In *Meek*, Bingham LJ quoted with approval what Donaldson LJ had said in *UCATT v. Brain* [1981] I.C.R. 542 at 551:

> "Industrial tribunals' reasons are not intended to include a comprehensive and detailed analysis of the case, either in terms of fact or in law …their purpose remains what it has always been, which is to tell the parties in broad terms why they lose or, as the case may be, win. I think it would be a thousand pities if these reasons began to be subjected to a detailed analysis and appeals were to be brought based upon any such analysis. This, to my mind, is to misuse the purpose for which the reasons are given."

(3) It follows from (2) that it is not legitimate for an appellate court or tribunal to reason that a failure by an employment tribunal to refer to evidence means that it did not exist, or that a failure to refer to it means that it was not taken into account in reaching the conclusions expressed in the decision. What is out of

sight in the language of the decision is not to be presumed to be non-existent or out of mind. As Waite J expressed it in *RSPB v Croucher* [1984] ICR 604 at 609-610:

> "We have to remind ourselves also of the important principle that decisions are not to be scrutinised closely word by word, line by line, and that for clarity's and brevity's sake industrial tribunals are not to be expected to set out every factor and every piece of evidence that has weighed with them before reaching their decision; and it is for us to recall that what is out of sight in the language of a decision is not to be presumed necessarily to have been out of mind. It is our duty to assume in an industrial tribunal's favour that all the relevant evidence and all the relevant factors were in their minds, whether express reference to that appears in their final decision or not; and that has been well-established by the decisions of the Court of Appeal in *Retarded Children's Aid Society Ltd. v. Day* [1978] I.C.R. 437 and in the recent decision in *Varndell v. Kearney & Trecker Marwin Ltd* [1983] I.C.R. 683."

58. Moreover, where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should, in my view, be slow to conclude that it has not applied those principles, and should generally do so only where it is clear from the language used that a different principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision. This presumption ought to be all the stronger where, as in the present case, the decision is by an experienced specialist tribunal applying very familiar principles whose application forms a significant part of its day to day judicial workload.

Analysis and conclusions

59. I start with the structure of the ET Decision. It set out the law correctly. It correctly identified the issues which it had to decide. As to the paragraph 2.1 and 2.2 issues, the ET Judge made a clear finding that the reason for the dismissal was all of the misconduct identified in the Allegations Letter, as reproduced in summary in paragraph 2.2 when identifying the issue; she found those were the reasons given for the dismissal, and that both Mr Kilty and Mr Lewis genuinely believed them to be made out. Indeed it appears from the EAT Judgment at paragraphs 35, 42, 86, 102 and 117 that the EAT Judge accepted that the ET Judge had made findings as to the reasons for Mr Greenberg's dismissal, and that they were that Mr Greenberg had committed all of the misconduct particularised in the Allegations Letter.

60. In the light of those findings she then addressed the question identified at paragraph 2.3, namely "Did it [i.e. DPP Law] have reasonable grounds for its belief", the belief being that of both Mr Kilty and Mr Lewis that Mr Greenberg was guilty of the misconduct alleged against him. The paragraphs criticised by Mr Stuart and the EAT Judge appear under the heading worded in the same way "Did it have reasonable grounds for its belief". The EAT Judge concluded that the ET Judge had not answered

that question; she had not answered any question about DPP's belief; instead she had answered a question whether there were reasonable grounds for her own belief that Mr Greenberg was guilty of the misconduct alleged and whether there were reasonable grounds for a hypothetical belief which DPP Law may or may not have had but merely could have had. Both the structure of the ET Decision, and the language in which the question was posed ("reasonable grounds for *its* belief"), make it improbable that the ET Judge would in this section have been answering a different question from that posed. I would start from the presumption that she did not do so unless driven to a contrary conclusion from the language she used. This element of the *Burchell* test was, after all, very familiar to an experienced employment tribunal judge, and one which she must have applied in many cases.

61. Despite Mr Stuart's valiant submissions I find nothing in the language of paragraphs 60 to 67 to suggest that the ET Judge was answering a hypothetical question, when read fairly and as a whole in the light of earlier passages in her decision; or that she was substituting her own views of whether Mr Greenberg was guilty of the misconduct alleged for what should have been a conclusion on whether the decision makers at DPP Law had reasonable grounds to support their belief that he was guilty of the misconduct alleged. On the contrary the language used by the ET Judge reinforces the impression that having identified the correct question, it was that question which she answered. The constant use of the past tense, employed for example in the last sentence of paragraph 62, the first sentence of paragraph 63, the first sentence of paragraph 64, and the second sentence of paragraph 67, suggests that she was addressing the material which was before the decision makers at the time of their decisions, not identifying material which would support her own current view of whether there was the misconduct alleged. This is also the language used in her central conclusion at paragraph 60 that there "were" (not "are") reasonable grounds to conclude that all of the disciplinary grounds "were" (not "are") made out with one exception; and that it "was" (not "is") reasonable to conclude that Mr Greenberg's acceptance of the second payment was either knowingly improper or reckless to the extent of gross negligence. As a matter of plain language these refer to DPP Law's conclusions, not her own. So too does the last sentence of paragraph 65 referring to whether DPP Law's approach fell within the band of reasonable responses; and the last sentence of paragraph 67 referring to what it was reasonable for DPP Law to consider.

62. Mr Stuart submitted that because she referred to matters which were not part of the Allegations Letter or points made by DPP Law, she must have been addressing material or argument which was pertinent only to her own view of the facts, rather than that which the decision makers had taken into account. He instanced the reference in paragraph 66 to the possibility that Mr Greenberg might be motivated by personal gain or have assumed that the payment might not be the last. This is misplaced, not only because the Allegations Letter at sub-paragraph (g) did allege that he was motivated by personal gain, but also for the reasons pointed out by Lewis LJ in the course of argument. The point being addressed was that £150 was not a large sum to someone of Mr Greenberg's income. That was a matter which was known to Mr Kilty and might potentially have undermined the reasonableness of Mr Kilty's conclusions. I would have expected this to have been a point put to Mr Kilty in cross examination and relied on in argument, but whether or not that occurred, the ET Judge was right to consider it. Her consideration of the possibility that it undermined the reasonableness of the decision, and rejection of it as sufficient to do so, does nothing to suggest she was

deciding what would justify a decision of her own. A number of other similar points made by Mr Stuart suffered from the same flaw: the passages in the ET Decision were directed towards whether the reasonableness of what Mr Kilty and Mr Lewis had taken into account was undermined by other material before them at the time, or factors which they should reasonably have considered at the time of their decisions. They lend no support to an argument that the ET Judge was directing her reasoning to what she herself would have done.

63. Mr Stuart referred also to the ET Judge's point made in paragraph 67 that the correction of the date of the payment from June to September made it, if anything, more likely that it was given to "hurry up" Mr Greenberg, because the trial date was much closer than appeared from Ms Surley's statement. Again this was something he submitted was absent from what was relied on by DPP Law at the time of the decisions, and therefore indicative of the ET Judge addressing what she herself thought justified a finding of misconduct. I am unable to agree. The point was made by the ET Judge in that part of her reasoning which examined how the material before Mr Lewis differed from that before Mr Kilty, in order to address whether it made a difference to the reasonableness of Mr Lewis' conclusion, notwithstanding the reasonableness of Mr Kilty's conclusion. The correction of the date was one of the new matters before Mr Lewis. Her comment was made in the context of finding that this, as with the other new matters, made no difference to her assessment of the reasonableness of Mr Lewis' decision. It was addressed to Mr Lewis' decision, not her own view of whether there was misconduct.

64. Mr Stuart made a number of other points on the language of paragraphs 60 to 67, but none, in my view, carried his argument any further. I am afraid I could see no force in any part his submission that the language of paragraphs 56 to 67 suggested that the ET Judge was answering the wrong question. Nor can I accept the EAT Judge's criticism at paragraph 113 of his decision that the ET Judge's language is redolent of her addressing her own assessment of the evidence for the purposes of addressing whether it would justify a conclusion of her own of misconduct, as opposed to that of the decision makers. To my mind it is to the contrary, as indeed one would expect from the question posed which these paragraphs purported to answer.

65. I turn to the other main thrust of Mr Stuart's submissions, which was that the ET Judge made no findings of fact as to the specific and detailed process of reasoning of Messrs Kilty and Lewis as to why the payment amounted to the misconduct charged. This was at the heart of the EAT Judge's decision at paragraph 114. I understand the latter's process of reasoning to have been: (i) the ET Judge made no such findings; (ii) her conclusion of DPP Law's belief in the grounds for finding misconduct was not therefore "sufficiently rooted" in the necessary findings of fact; and (iii) it followed that it amounted to a conclusion about what the ET Judge herself made of the evidence and whether it justified her own view that there was the misconduct alleged.

66. There are, to my mind, two fundamental flaws in Mr Stuart's submissions, and in this part of the EAT Judge's reasoning.

67. The first is to assume that if the Judge did not set out in her decision additional findings as to Mr Lewis' or Mr Kilty's specific process of reasoning, or make reference to evidence about it, it follows that (i) there was no evidence before the ET Judge of such specific process of reasoning and (ii) the ET Judge was not addressing any such evidence in her findings that Mr Kilty and Mr Lewis' belief in their reasons for

dismissal was in each case a belief for which they had reasonable grounds. Neither conclusion flows from the premise: it is the false reasoning that what is out of sight in the language of a decision must be assumed to be non-existent or out of mind. The EAT Judge did not have before him, and we do not have before us, the entirety of the evidence before the ET. In particular, the ET Judge had witness statements from Mr Kilty and Mr Lewis and each was cross-examined. One might naturally expect them to have been cross-examined about their process of reasoning, or at least those aspects which it would be said on Mr Greenberg's behalf were deficient. But however that may be, it is impermissible to argue, as Mr Stuart does, that simply because the ET Judge did not refer to evidence as to their more specific process of reasoning, there was no evidence about it. It is not incumbent upon an ET Judge to set out in full detail every aspect of the evidence it accepts or every step in its journey to a conclusion, provided the reasons are *Meek* compliant. There has been no suggestion at any stage of the appeal process that the ET Judge's reasons in this case were not *Meek* compliant. Her conclusion that Mr Kilty and Mr Lewis' genuine belief was that the allegations of misconduct set out in the Allegations Letter were made out in full, subsumes any evidence and findings as to their more specific process of reasoning, without it needing to be separately identified in additional findings of fact or expressly referred to in the language of the decision. For the EAT Judge to say that the conclusions were not "sufficiently rooted in findings of fact" is an error in the proper approach of an appellate tribunal to a *Meek* compliant employment tribunal decision.

68. Secondly, and in any event, the ET Judge did in my view identify sufficient aspects of the process of specific reasoning for the decision by Mr Kilty and Mr Lewis, and that was what was being addressed in the section of her decision considering whether there were reasonable grounds for their belief in those reasons.

69. The ET Judge found that Mr Kilty and Mr Lewis reached the conclusions expressed in their dismissal letters that all the misconduct contained in the Allegations Letter was made out. Those letters each set out more than simply a bald conclusion: they referred to particular matters which had been taken into account. The ET Judge found that both Mr Kilty and Mr Lewis genuinely believed what was said in their letters: that is the finding in the last sentence of paragraph 54.

70. In Mr Kilty's dismissal letter, he said he had paid particular attention to the fact that the acceptance of the payment was a breach of the legal aid contract; that such breach brought the company into serious disrepute with the LAA and other members of the profession; and that it jeopardised the LAA contract which accounted for the majority of the fee income. In his evidence, as the ET Judge recorded at paragraph 54, he said he gave significant weight to Ms Surley's statement because she was "acting completely impartially". This was addressed as a reasonable ground by the ET Judge in paragraphs 62 and 67 of her decision.

71. In Mr Lewis' letter he referred to specific matters which he had "in particular but not exclusively" considered. They included matters which were expressly considered by the ET Judge in the paragraphs under criticism when she was addressing the reasonable grounds for his belief. They included:

    (1) "the timing of the second payment", i.e. the fact that it was made after an unsuccessful attempt to take witness statements, with the trial approaching, and not after any particular event which might have prompted a gift by way of

gratitude, in contrast to the first payment; this was addressed as a reasonable ground by the ET Judge in paragraphs 62 and 63 of her decision;

(2) "the explanation attributed to Mr Walsh in Ms Surley's account including 'I wouldn't mind but I even paid his expenses to go and see them'" and that in both statements of Mr Walsh which were before Mr Lewis "Mr Walsh does not deny making this or a similar statement to, or in the presence of, Ms Surley": this was addressed as a reasonable ground by the ET Judge in paragraphs 62 and 67 of her decision;

(3) "the failure to report the second payment to the firm's COLP and COFA": that this was addressed as a reasonable ground by the ET Judge is implicit in her reference to Ms Blain not being the COLP at paragraph 67 of her decision;

(4) "the failure to consider how accepting repeated cash payments from a third-party might compromise your integrity as a solicitor": that this was addressed as a reasonable ground by the ET Judge is apparent from her consideration of the relevance of, and impression made by, repeated cash payments at paragraphs 64 and 66 of her decision.

72. The premise for the EAT Judge's conclusion that the ET Judge must have been addressing whether the evidence supported her own view that there was the misconduct alleged, rather than whether there were reasonable grounds for the views of the decision makers, was therefore a false premise, quite apart from being unsupported by the language of the decision itself. It was that the ET Judge made no sufficient findings about the process of reasoning of the decision makers and cannot therefore have been addressing their views in this section of the ET Decision. However she had made sufficient findings as to the reasoning expressed by the decision makers and was addressing whether there were reasonable grounds for it in these paragraphs; and even if a greater degree of specificity in the reasoning of the decision makers were necessary, which in my view it was not, it did not follow that she had not heard evidence about their process of reasoning to that greater degree of specificity and did not have it in mind in reaching her conclusions in these paragraphs that there were reasonable grounds for the beliefs of the decision makers.

73. In summary, it was the EAT Judge, not the ET Judge who fell into error in this case. He was too ready to find an error of law because he failed to adopt the proper approach of an appellate tribunal to findings by an employment tribunal: his decision was not based on a fair reading of the ET decision as a whole; it failed to recognise the findings the ET Judge had made on such a fair reading; it failed to recognise that the decision did not need to contain more specific reasoning or findings of fact provided it was *Meek* compliant, which was not challenged; and it failed to recognise that the absence of such further findings could not justify a conclusion that there was no evidence of any such reasoning or that it had not been in the ET Judge's mind.

74. These reasons for joining in the decision to allow the appeal make it unnecessary to consider the EAT's reasoning or conclusion on the alternative ground for the ET's decision based on Mr Greenberg having been negligent.

Lord Justice Lewis :

75. I agree.

Lord Justice Lewison :

76. I also agree.