Appeal No. UKEAT/0319/19/AT (V)

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 21 May 2020
Judgment handed down on 6 August 2020

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

MR P GREENBERG — APPELLANT

DPP LAW LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	Mr J Stuart (of Counsel) Instructed by: Thirsk Winton Swan House 9-12 Johnston Road Woodford Green IG8 0XA
For the Respondent	Ms A Beale (of Counsel) Instructed by: Morecrofts LLP Cotton Exchange Old Hall Street Liverpool L3 9LQ

SUMMARY

UNFAIR DISMISSAL

The Claimant in the Employment Tribunal was a partner conducting legally-aided criminal defence cases. Unsolicited, at the end of a conference, the father of a client left him, and the barrister involved in the case, envelopes containing thank-you cards and cash, in his case, £300. The Claimant sought advice from the firm's Compliance and Legal Practice partner, who replied "I'll leave it to your conscience". He also sought advice from the Law Society's ethics helpline. It referred him to guidance on significant gifts, but, he recorded, did not have a problem with this payment, so long as it was appreciated that it would not affect his work or his impartiality.

Some months later, the Claimant went to a pub with a view to interviewing witnesses, but was unable to do so. As he was leaving, the client's father, after a discussion in the car park, dropped £150 through his car window. Subsequently, the father told the barrister that he had paid the Claimant something to cover his expenses of getting the statements, to hurry him up. The barrister was concerned that the Claimant may have accepted a "top-up payment" contrary to the Legal Aid Authority's contract specification, which led to a statement from her being sent to the LAA. They in turn sent her statement to the firm, seeking their comments.

The firm instituted disciplinary process. The disciplinary charges accepted that the first payment was viewed by all concerned as a gift, but charged that the Claimant had not returned the second payment, nor reported it to the COLP, spoken to the ethics helpline about it, or told any other partner about it. The charges asserted that the payment was a top-up, in breach of the LAA contract, putting that contract at risk, as well as being a breach of professional rules; or that, if the Claimant believed it to be a gift, he was negligent as to the risk of how it would be viewed. The Claimant's case was that the payment was not a top-up, that he genuinely believed

it to be another gift, that he did not speak to the COLP or the SRA again, as he had spoken to them before, and in view of their responses on that occasion, and that he had in fact told another partner about it. The Claimant was dismissed and his appeal against dismissal was unsuccessful. The Employment Tribunal found the dismissal to be fair. The Claimant appealed.

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.

HIS HONOUR JUDGE AUERBACH

Introduction

1. I shall refer to the parties as they were in the Employment Tribunal ("the Tribunal") as Claimant and Respondent. This is the Claimant's appeal against the reserved Decision of the Tribunal (Employment Judge Ferguson), arising from a Hearing held at East London Hearing Centre in November 2018, dismissing his claim of unfair dismissal. The Tribunal found that he was fairly dismissed by reason of conduct. Before the Tribunal, and at this appeal Hearing, the Claimant was represented by Mr Stuart, and the Respondent by Ms Beale, both of counsel.

The Facts

2. I take the facts from the decision of the Tribunal, and primary documents which were before it. The Respondent is an incorporated solicitors' practice. I will refer to the practice as the firm. A substantial part of the firm's work is legally-aided criminal defence work. The Claimant is a solicitor of some 20 years' experience. He was a director, shareholder and employee of the Respondent, conducting criminal defence cases. Though this is not an old-style partnership, he was effectively an equity partner.

3. The Legal Aid Agency's ("LAA") Standard Crime Contract requires the Respondent to ensure that neither it nor its "affiliates" brings the legal aid scheme into disrepute "by engaging in any unprofessional or unlawful conduct which is likely to substantially diminish the trust the public places in the legal aid scheme." It requires compliance with any relevant professional body rules. It also incorporates a specification which includes provisions (at paragraphs 8.41 – 8.44) headed: "Payment other than through this Specification". In particular, paragraph 8.41 states that, subject to irrelevant exceptions "you must not charge a fee to the Client or any person for the services provided under this Specification or seek reimbursement from the Client

or any other person for any Disbursements incurred as part of the provision of such services." Paragraph 8.44 begins: "You must not charge the Client for the provision of Contract Work or seek payment of Disbursements incurred from the Client unless an exception under this Contract applies. All payments for Contract Work must come through us." Among practitioners, the term "top-up payment" is used to refer to an additional private payment which contravenes these provisions.

4. The Claimant took over the defence of a legally-aided 18-year old charged with grievous bodily harm with intent. Bail was secured for the client, who had been in custody. The Public Defender Service advocate instructed in the case was Charlotte Surley. On 18 January 2017 there was a case meeting involving the client, the client's father, John Walsh, the Claimant and Ms Surley. At the end of the meeting Mr Walsh left the Claimant and Ms Surley two envelopes. When they opened them after he left, each was found to contain cash and a thank-you card. The one picked up by the Claimant contained £300. The one picked up by Ms Surley contained £480.

5. Ms Surley later emailed the Claimant that she had been advised to return the money, and would be doing so. That night the Claimant emailed Stuart Nolan, the Respondent's Managing Director, Compliance Officer for Legal Practice ("COLP") and Compliance Officer for Finance and Administration, telling him about the envelope he had received, including that Mr Walsh had said "thank you Paul this is for your expenses", and that he had only opened it after he had left. He concluded: "Just wanted to know what to do with it, let me know." In a further email he added that there was £300 cash inside. Mr Nolan replied: "I'll leave it to your conscience!"

6. The Claimant also discussed the matter with another Director of the Respondent, Rebecca Blain. He also telephoned the Law Society ethics helpline, and made a note of their advice. They "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." They referred him to paragraph IB 1.9 of the Solicitors' Code of Conduct, concerning refusing to act where a client proposes making a gift of significant value "unless the client takes independent legal advice."

7. There was, at a later date, a second incident. The Claimant went to a pub to interview witnesses, but was, in the event, unable to do so. Before the Claimant left, Mr Walsh gave him £150 in cash. The Claimant's account of this episode in his evidence to the Tribunal was that, after leaving the pub, he was in his car, with the window rolled down, speaking to Mr Walsh who was by the side of the car. Mr Walsh had then dropped the cash through the window before walking off. The Claimant told the Tribunal that he had never requested any payment, or suggested that it would affect his handling of the case. He believed it was simply another show of gratitude. He told Mr Walsh that he did not need any gift, but he just walked off.

8. On 19 October 2017 the Respondent's Chief Executive, Sue Christopher, received an email from the LAA. The email enclosed a statement from Ms Surley. She gave an account of the incident in January 2017, including that Mr Walsh had at one point referred to her and the Claimant "not getting much on Legal Aid." After they had opened their envelopes, and found the cash, she told the Claimant she would have to report it. She said that he commented that his COLP colleague "would probably tell him to keep his gift so long as it wasn't 'silly money'." She said he asked her if there was anything which she needed, "so maybe he could get that for me instead of me taking the cash" but she refused and said she had to report any gift at all.

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9. Ms Surley continued that the Claimant had been due to meet witnesses on a date she gave as 5 June 2017. She had needed witness details from him to complete the draft Defence Statement ("DS"). After chasing the Claimant she had received these details on 2 October 2017. She then had a conference with the client, and Mr Walsh (but not the Claimant) on 3 October 2017. The Tribunal cited the following extract from her account of that.

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> **"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.'"**

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10. Ms Surley wrote: "Based upon the previous gift of money that had occurred in the case, I was concerned by the suggestion that Paul appeared to be 'topping up' his fees in a Legally Aided case." She discussed the matter with a colleague and it was agreed that she should report the matter to her Head of Advocacy, which she did.

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11. The covering email from the LAA asked Ms Christopher to confirm within seven days whether two or more cash payments were received by the Claimant and "[h]ow this demonstrates compliance with sections 8.41 to 8.43 of the crime contract specification."

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12. Ms Christopher forwarded the LAA email to Mr Nolan, who opened an investigation, sent the email to the Claimant, and suspended him. The Claimant emailed Mr Nolan on 23 October 2017 with his response. He said he was acutely conscious of his professional obligations and referred to his unblemished career to date. He broadly agreed with Ms Surley's account of the first incident, but said he never discussed legal aid rates with the client and did not recall Mr Walsh saying they would get little on legal aid. He had never requested or accepted a top up in any legally aided matter. He denied offering to take Ms Surley's cash, but

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agreed he had discussed whether it would be acceptable for the client to buy her a gift rather than offering cash.

13. In relation to the second incident the Claimant's account included the following:

> **"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. At that time, there was no urgency in any event to serve the addendum defence statement. Of the three potential witnesses I did email Charlotte details of one of them by text on Friday 25 August at 7.24am. It was not until Monday 16 October that I was able to travel down to Broadstairs again and speak to two witnesses and obtain signed statements. The third witness statement was taken over the telephone on 17 October and has been sent to the witness for her signature. The clients trial is listed on 13th November**
>
> **All statements, with one unsigned, were sent to Charlotte by email by myself on Tuesday 17 October.**
>
> **In relation to paragraph 23 [of Ms Surley's statement], 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 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."**

14. The Claimant also wrote this:

> **"My understanding is supported by Charlotte given that which is said in paragraph 24 of her statement to the effect that 'based upon the previous gift of money…'.**
>
> **Counsel may have speculated that I may have been 'topping up' my fees in a legally aided ease, but I was not. I do not know what was said between Counsel and the client's father at the subsequent conference, because I was not present, but I can only assume that Counsel has misunderstood that which may have been said to her. I have never topped up Legal Aid fees in this case, or any other."**

15. The Claimant stated that he did not consider that he had acted contrary to the LAA contract. He referred to recollecting that a gift of significant value should be refused. He did not consider this to be of significant value. He stated that after the meeting in January he had telephoned Mr Nolan, who had indicated that he did not have a problem with it. He had also

spoken to Ms Blain, telephoned the Law Society ethics line and made a note of their advice. If his understanding was not correct, he apologised and offered to repay the money.

16. Mr Nolan wrote a statement in response, stating, in relation to the January payment, that he recalled not a phone call, but an email (which he attached). He commented:

> **"As the director responsible for compliance and as the senior and managing director I have on occasion been asked my opinion on professional practice issues; indeed I have spoken to Paul in the past about the same.**
>
> **When asked what would be the right thing to do I have said, not just to Paul but also others, that if in doubt follow your conscience; hence my response. In other words 'do the right thing.'**
>
> **I have rarely encountered a colleague who doesn't understand what would be the right thing to do even when the circumstances may not be straightforward.**
>
> **I didn't hear anything further to the email and assumed that Paul had returned the payment — following his conscience.**
>
> **As regards the second payment I was not consulted by any means before or at any time after the payment he admits was made."**

17. Ms Blain emailed Mr Nolan that she recalled speaking to the Claimant about the first incident, and that he mentioned having told Mr Nolan about it, though she could not recall whether by phone or email. She said she had no knowledge of the second incident.

18. By a letter of 25 October 2017 Mr Nolan invited the Claimant to a disciplinary hearing on 30 October before another director and shareholder. It appears that the Claimant was sent Mr Nolan's and Ms Blain's statements. The allegations identified, at 1, the two payments, observing that all parties understood that the first payment had been offered as a gift. The letter continued:

> **"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.'"**

19. The letter continued:

> **"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 payment;**
> **b. Report the payment to me as the company's COLP;**
> **c. Disclose the payment to any other Directors within the company; or**
> **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 of 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 a 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."**

20. The letter warned the Claimant that the allegations, if proven, could amount to gross misconduct, which could lead to his summary dismissal.

21. Ms Christopher informed the LAA that the Claimant had been suspended and invited to a disciplinary meeting, and said that she would let them know the outcome.

22. On 30 October 2017 solicitors for the Claimant emailed indicating that he was not fit, on account of stress-related anxiety and low mood, attaching a doctor's note signing him off for four weeks. They requested that the investigation proceed on paper. They said they would need to take further instructions. They requested various documents and asked if the firm had an anti-bribery and/or gift policy, and, if so, to be given a copy. They objected to the appointment of Mr Kilty, as he would not be impartial, and they set out matters they relied upon in that regard.

23. The Tribunal said, at [31]:

> **"Later on 30 October Mr Kilty sent a letter to the Claimant by email informing him that the disciplinary matter had been considered in his absence. Mr Kilty said he did not consider the documents requested had any bearing on the issues to be determined. He found the allegations proven on the balance of probabilities. He concluded that the appropriate course of action was dismissal without notice."**

24. The dismissal letter identified that the evidence considered by Mr Kilty was the statements of Ms Surley, the Claimant, Mr Nolan and Ms Blain. Mr Kilty considered it not appropriate to delay, taking into account that the Claimant had made a statement in response to the allegations. He did not consider the documents requested by the Claimant's solicitors to be relevant. Although the Tribunal did not, I will set out the text of his substantive conclusions:

> **"I find the allegations as set out in the letter of 25th October 2017 to be proven on the balance of probabilities. I am satisfied that as a Director, you were (or ought reasonably to have been) aware of your obligations in terms of acceptance of gifts and in terms of a law firm's anti-bribery obligations.**
>
> **I find that the allegations, which I have found proven, are serious enough to amount to gross misconduct and I hereby make that finding.**
>
> **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.**
>
> **I have considered the letter of your solicitors Kingsley Napley, of today's date. I have also considered if there are any reasons why, despite my finding of gross misconduct, you should not be dismissed without notice but do not find there to be any.**
>
> **I therefore conclude that the appropriate course of action is to dismiss you without notice. Your employment will therefore terminate with immediate effect from today's date."**

25. Ms Christopher emailed the LAA that the Claimant had been summarily dismissed for gross misconduct. She set out that it had been found that he had breached paragraphs 8.41 to 8.43 of the LAA contract, brought the firm into serious disrepute with the LAA and the profession, behaved contrary to SRA rules, breached trust and confidence, and allowed his judgment to be adversely affected by the opportunity for personal gain. On 31 October 2017

Mr Nolan emailed staff enclosing "gift guidance", which advised that offers of money or particularly expensive gifts should always be refused. He also reported the matter to the SRA.

26. By an email of 6 November 2017 the Claimant appealed. He gave a further account of events. He described Mr Nolan's January response as ambiguous, and referred to the lack of formal guidelines. If Mr Nolan's guidance had been to return the gift, he would have done so. The Claimant stated that he now realised that the conference, followed by the visit to the pub, was not on 5 June but on 1 September. He wrote that: "as I was leaving, John Walsh gave me a second gift of £150." He went on to give a detailed account of having, on the journey home, spoken to Ms Blain, including telling her about the second payment. He asserted that dismissal was a disproportionate response to an alleged lack of judgment, particularly when he had reported both gifts to co-Directors. He alleged that there was another agenda at play. He attached supporting statements from Mr Walsh. Mr Walsh stated in them that the two payments were simply gifts to show his appreciation of good work, not to top up expenses, hurry the Claimant up, or secure favour. He confirmed the date of the second payment as 1 September, not 5 June.

27. The Claimant was invited to an appeal hearing before another director and shareholder, Paul Lewis. He remained signed off sick, but his solicitors agreed to it taking place in his absence.

28. On 23 November 2017 Mr Lewis wrote to the Claimant. He considered Mr Kilty's decision to have been correct. He had considered the notice of appeal and documents. He had considered "the entirety of the allegations" in the letter of 25 October 2017. In particular, he had considered the timing of the second payment, Ms Surley's account that Mr Walsh had said

A he had paid the Claimant's expenses to go and see the witnesses, that Mr Walsh's statements did not deny saying this, the failure to report the second payment to the firm's COLP and COFA (that is, Mr Nolan) and the failure to consider "how accepting repeated cash payments from a third party might compromise your integrity as a solicitor." He was satisfied that the allegations in the letter of 25 October 2017 were made out. Given that the proven allegations "raise questions as to your integrity as a solicitor" and breached trust and confidence, he considered that no lesser sanction than gross misconduct would be appropriate. He upheld the decision to dismiss without notice.

29. The Claimant was subsequently removed as a director of the Respondent, and the dismissal also triggered a transfer of his shares at 20% of value.

30. There followed an SRA investigation, in the course of which the Claimant provided a further statement from Mr Walsh giving an account of the 1 September 2017 payment, including putting the cash through the car window. As to saying anything to Ms Surley about "hurrying up", this "could only have been me making a throw away 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."

31. The SRA wrote to the Claimant's solicitors on 25 September 2018. They noted the terms of IB 1.9, Law Society guidance that gifts exceeding £500 were of "significant value" and that the two payments received by the Claimant totalled less than that. They continued:

> **"That said, there is a clear risk associated with the acceptance of a gift, because of the perception that it could be an inducement to act in a certain way. This risk is enhanced when the gift constitutes cash and is further enhanced when the relevant client matter is funded by Legal Aid. As you are aware, solicitors acting on a publicly funded basis are not entitled to receive private payment. This is clearly set out under the terms of the Legal Aid Standard Crime Contract. Added to this, clear concerns about a possible inducement were raised due to the circumstances in which Mr Greenberg received the monies (the second time by bank notes put through his car window) as well as the lack of**

> **clarity over the basis upon which the monies were given to him. In light of this, we had serious concerns that Mr Greenberg may have accepted a financial advantage in circumstances which bore the hallmarks of bribery."**

32. However, the SRA noted Mr Walsh's statements that both payments were intended as gifts, that there was no evidence that the Claimant acted any differently following receipt of them, and that, following receipt of the first payment, he had raised the matter with the COLP and the ethics helpline. They accepted that he "took some limited steps to do the right thing." They concluded that there was insufficient basis to take further action and they were closing the matter. They indicated that, were the Claimant to be offered a cash gift again, he should seek "clear, categoric" advice from the COLP, and if it was not clear, seek immediate clarification from the COLP. He should also consult the firm's policies and procedures.

33. The Tribunal noted that the Claimant had been suspended by the LAA from doing legal aid work pending the SRA investigation, but, following the SRA's decision, that was lifted. A statement that his conduct was nevertheless not what would be expected of someone working under the LAA contract, was, following an objection from him, subsequently withdrawn.

The Employment Tribunal's Decision

34. The Tribunal set out the relevant provisions of section 98 **Employment Rights Act 1996**, and directed itself by reference to **British Home Stores Limited v Burchell** [1980] ICR 303 and **Iceland Frozen Foods Limited v Jones** [1982] IRLR 439. The appeal, rightly, does not criticise its self-direction on the law, as such.

35. The Claimant's primary case was that the true reason for dismissal was because of other partners' personal animosity and business differences with him, and that they had used the

incident as a pretext to expel him and acquire his shareholding at a discount. The Tribunal did not find this proven, and accepted that the reason for dismissal was genuinely because of his conduct in relation to the second payment from Mr Walsh.

36. The Tribunal continued:

> ***"Did the Respondent hold a genuine belief that the Claimant had committed the act/acts of gross misconduct alleged against him?***
>
> **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.**
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> **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.**
>
> **55. The Claimant relied heavily on the absence of any notes of Mr Kilty's and Mr Lewis's decision-making process. In neither case, however, was there a hearing, or even a meeting with others at which one might expect minutes to be taken. Mr Kilty said that he would have made notes for his own purposes, but could not recall whether they were handwritten or typed. Mr Lewis said he would have annotated the documents provided to him, and that he shredded the documents after making his decision. I do not consider that the failure to retain or disclose such notes to be of any real significance. No application for disclosure was made and, while it would have been preferable for Mr Lewis to keep his copies of the documents with any annotations he had made, they were copies only, and in the absence of any formal notes their disposal does not justify drawing an adverse inference."**

37. The Tribunal then considered whether the Respondent had reasonable grounds for its belief. The Judge expressed surprise that the only potentially relevant provision in the Solicitors' Code of Conduct was IB 1.9, which appeared to be directed principally towards gifts in wills. There was no general provision about gifts from clients or cash gifts. It was also not in dispute that the firm had no gift policy before introducing one the day after the Claimant's dismissal. The Judge therefore proceeded on the basis that there was nothing inherently

improper in receiving a cash gift from a client or their family member. However, she observed that the value of a payment could be relevant to whether that payment was genuinely a gift.

38. The Tribunal was referred to no provisions of the Solicitors' Code relevant to a cash payment that was not a gift. The Respondent relied on the LAA contract specification. It had also been accepted in submissions that *receiving* money for doing work on a case, such as visiting witnesses, would breach this, even if such payment had not been specifically requested.

39. I should set out the next few paragraphs of the Reasons 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.**
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> **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.**
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> **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."

40. The Tribunal then considered whether the Respondent had carried out as much investigation as was reasonable. It did not consider it unfair for the Respondent not to have spoken to Mr Walsh, as his intention was of limited relevance, the Claimant was in as good a position as him to give an account of the circumstances of the second payment, and the Claimant's account had not been disputed. It was also reasonable to rely on Ms Surley's account of what Mr Walsh had said to her; and in his statements that the Claimant had obtained from him, Mr Walsh had not denied using the words she attributed to him. The Tribunal observed that even his later statement to the SRA accepted that he may have said something about hurrying up the Claimant.

41. The Tribunal went on to reject the contention that Mr Kilty should not have handled the disciplinary process. It did consider that he was wrong not to put off the disciplinary hearing, in particular, given the evidence of the Claimant's ill health, his solicitors' request for more time to take instructions, and the fact that, while the Claimant had given a statement in response to that of Ms Surley, he had not yet specifically responded to the disciplinary charges. However, taking account of the response to the allegations that the Claimant gave in his appeal email, and that this had been considered by Mr Lewis, the Tribunal concluded, applying **Taylor v OCS Group Limited** [2006] ICR 1602, that the overall process was not, on this account, unfair.

42. The Tribunal also concluded that, though Mr Kilty should have postponed the disciplinary hearing, his failure to do so was not reflective of a deliberate attempt to prevent the Claimant participating, or a pre-determined decision to remove him. Reviewing, at the end of its decision, its view as to the reason for dismissal, in light of its conclusions about process, the Tribunal also reaffirmed its conclusion that the dismissal *was* by reason of conduct, as claimed.

43. In the preceding paragraph, as to the sanction of dismissal, the Tribunal said this:

> **75. It is of course an extremely serious matter to dismiss a solicitor, particularly one of considerable seniority and experience, who was a director and shareholder of the company. The finding of gross misconduct, however, was itself extremely serious. In particular the Respondent reasonably concluded that it amounted to a breach of the Legal Aid Contract Specification. It compromised the Claimant's integrity and risked jeopardising the Respondent's relationship with the LAA. At the very least it was an extremely serious error of judgement and it was reasonable for the Respondent to conclude that it could no longer have confidence in the Claimant. I accept that dismissal fell within the range of reasonable responses.**

The Appeal

44. The Notice of Appeal sets out four numbered Grounds of Appeal, each described in a heading, but then developed in a number of paragraphs.

45. Ground 1 contends that the Tribunal erred in its approach to identifying the conduct alleged as the basis for the dismissal. It failed to analyse the distinct allegations of misconduct, and to analyse the Respondent's findings by reference to those specific allegations. Instead, at [53] and [60], it formulated its own version of the fundamental allegation, as being "whether the Claimant knew, or should have known, that the second payment was, or might be, perceived to be, a top-up payment." But this charge was never put to the Claimant. The Tribunal thereby failed to consider whether the dismissal was fair with respect to the specific matter charged. Reliance was placed on **Strouthos v London Underground Limited** [2004] IRLR 636 and **Royal Mail Group Limited v Lall**, UKEAT/0228/12.

46. Ground 2 contends that the Tribunal erred in concluding that the Respondent had reasonable grounds for its belief, when it had failed to follow a fair process. The substantive paragraphs indicate that the criticism here is indeed of the *process*, and in two particular respects. First, the dismissal is said to have been unfair on the basis that the Claimant did not have an opportunity to comment on, and provide evidence in response to, the allegations of misconduct, including the evidence of Mr Walsh, which only became available later. Secondly, the Tribunal was wrong to conclude that there were reasonable grounds to find the Claimant guilty of *all* the charges, when the Respondent had not adjourned its process to await the outcome of those of the SRA and LAA, both of which resulted in no action being taken against the Claimant.

47. Ground 3 contends that the Tribunal was wrong to find that the Respondent conducted as much investigation as was reasonable, bearing in mind the potential implications for the Claimant's career, and as a professional person, of a finding of misconduct. **Salford Royal**

NHS Foundation Trust v Roldan [2010] ICR 1457, **Turner v East Midland Trains Limited** [2013] ICR 525 and **Kulkarni v Milton Keynes Hospital NHS Trust** [2010] ICR 101 are cited.

48. This ground refers specifically to the paragraphs of the Tribunal's decision relating to the failure to postpone the disciplinary hearing, and to note-keeping. It contends that the Tribunal erred in its approach to the lack of any formal notes of the disciplinary process and the destruction of such informal notes as there were. **Vauxhall Motors v Ghafoor** [1993] ICR 376 is cited.

49. Ground 4 contends that the Tribunal erred in its conclusion that dismissal was within the band of reasonable responses, having regard to ACAS guidance on factors relevant to sanction, a number of which are set out. It also relies on **Post Office v Marney** [1990] IRLR 170 for the proposition that, in deciding what sanction to impose, it is important to consider the individual circumstances of the case, and not simply to apply an inflexible policy.

50. On consideration of the Notice of Appeal on paper Choudhury P was of the view that there were no reasonable grounds for bringing the appeal. However, at a Rule 3(10) Hearing, at which Mr Stuart appeared for the Claimant, HHJ Shanks said:

> **"I was persuaded by counsel that there was an arguable appeal on the basis that the EJ may have concentrated solely on whether there were reasonable grounds for a conclusion by the Respondent that the Claimant had been negligent (para 2.2.3.6), rather than considering properly whether there were reasonable grounds for the other conclusions in para 2.2.3 which formed the basis of the decision to dismiss (see para 60 where the EJ describes the "issue for the R" and para 66 where she concentrates on recklessness and gross negligence). It may be arguable that the other conclusions were not adequately investigated and that para 2.2.3.6 on its own could not have justified dismissal (particularly in the case of a solicitor who stood to lose his valuable shareholding in the R)."**

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51. I interpose that this numbering refers to the paragraphs of the Tribunal's decision where it first described the seven points, lettered (a) – (g), in paragraph 2 of the disciplinary charges, when describing the issues it had to decide. I will henceforth number those points 1 – 7. HHJ Shanks directed a full hearing and stated: "The grounds of appeal can stand as they are."

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The Arguments

52. In her written skeleton Ms Beale submitted that HHJ Shanks' reasons for permitting the appeal to proceed did not embrace all of the issues raised in the Grounds of Appeal. She also submitted that the points identified in his reasons developed or added to Ground 1. However, she acknowledged that he had permitted all of the Grounds to proceed; she addressed in her skeleton and oral arguments all of the matters covered by the original Grounds and (if it enhanced them) HHJ Shanks' decision; and she accepted in oral argument that I should consider all of them.

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53. Ms Beale also submitted that there was considerable overlap between the Grounds, and Mr Stuart acknowledged this. I will not set out, in what follows, all of the detailed points which were made in the skeletons and the oral arguments; but will summarise what seemed to me to be the most significant arguments raised on each side.

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Claimant

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54. Mr Stuart developed and added to the arguments in the Grounds of Appeal, in particular raising the following points.

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55. In relation to Ground 1, Mr Stuart submitted that the salient point was not just that deliberate misconduct is a materially different allegation from negligence. In addition, for a

solicitor, actually breaching the LAA contract and/or SRA rules of conduct is wholly different to being negligent in failing to identify a *risk* of some adverse consequence. The Tribunal's formulation of the issue for the Respondent gave rise to four permutations, from the proposition that the Claimant knew that the payment was a top-up payment, at the most serious end of the spectrum, to the proposition that he *ought* to have known that it might be *perceived* as such, at the least serious end. Dismissing an experienced and trusted professional for one lapse of judgment that did not, in the event, cause any loss to the firm, was very unlikely to be fair.

56. The Claimant was also, submitted Mr Stuart, not given a fair opportunity to meet the specific allegation. These matters were particularly material, given that Ms Surley's account of an "off-the-cuff" expression of frustration by Mr Walsh, became transformed into an allegation of actual topping-up, but upon no direct evidence – Ms Surley was not there when the second payment was made. Had the Respondent questioned Ms Surley, or Mr Walsh, or sought a decision from the LAA contract manager, in the first instance, it would have been apparent that there was no case for the Claimant to answer. It was not fair for the Respondent to decide that a breach of the LAA contract had occurred, without checking whether the LAA was of that view.

57. In summary, the Judge had failed to distinguish between allegation 6 – which was of negligence, and also not of *gross* negligence – and all of the other allegations; and this distinction was critical, bearing in mind the Respondent's case, as reflected in Mr Kilty and Mr Lewis' letters, that it had found *all* of the allegations proven. Nor was it open to the Judge to uphold the dismissal on the basis that the Respondent *could* have dismissed in reliance on a finding of negligence, when he was in fact dismissed on the basis that the disciplinary charges as a whole were upheld, and for accepting what was found, in fact, to be a top-up payment.

58. Further, there was no basis for those more serious allegations to have been upheld, bearing in mind that the Claimant had not been found guilty of any unprofessional conduct, nor had the LAA opined or determined that there had been any breach of its contract. Rather, in the event, the SRA had found no case to answer, and the LAA had then lifted the temporary suspension of the Claimant in light of the SRA's conclusion; and taken no further action.

59. The Claimant had *not* in fact broken the LAA contract, brought the Respondent into serious disrepute with the LAA, or put its contract in jeopardy. Nor had he broken any professional conduct rule. Nor was there any evidence that he had allowed his judgment to be adversely affected by the opportunity for gain. The Tribunal's approach to that last issue, at [66], was an attempt to shoe-horn the dismissal into a fair category. The Tribunal's proposition that, as the payment was the second one, he might have assumed that it would not be the last, was never suggested to have been part of the Respondent's thinking, nor ever put to the Claimant.

60. In relation to Ground 2, Mr Stuart submitted that the Tribunal's observation that it was open to the Respondent to come to a different view from that of the SRA, was not to the point. It was unfair to have come to a conclusion that the Claimant was guilty of the particular charges *relating to* the LAA, without awaiting the outcome of the SRA or LAA processes.

61. In relation to Ground 3 and the **Roldan** point, the consequences for the Claimant could not have been more serious. He lost his shareholding and his livelihood as a solicitor. It was also wrong in law and logic for the Judge to state that the absence of formal notes made the destruction of informal notes less important. It was also not fair for the Respondent to conclude that the Claimant was reckless to the extent of gross negligence, without hearing, or attempting

to hear, from the two people present when the payment was made, being the Claimant and Mr Walsh.

62. In relation to Ground 4, Mr Stuart developed the points discussed in HHJ Shanks' reasons. He argued that, if it was right, as he contended, that the Tribunal should have concluded that the more serious allegations were not adequately investigated, then the Tribunal should also have concluded that allegation 6 was not, by itself, sufficiently serious to justify the dismissal.

63. Mr Stuart accepted, in light of **Adesokan v Sainsbury's Supermarkets Limited** [2017] ICR 590 (and albeit, I note that it was a case concerned with summary, not unfair, dismissal), that, potentially, negligent conduct can, if sufficiently serious, amount to conduct which may be properly viewed as warranting dismissal. But, he suggested, the conduct in that case was much more serious than here. In the present case there was no applicable Respondent policy, nor any undisputed breach of the LAA contract, or professional obligations. The Tribunal had not made any specific finding about Mr Kilty or Mr Lewis' thought processes. In any event, it should have concluded that, to dismiss a solicitor for a first disciplinary matter, which did not involve any actual loss to the employer, effectively for a lapse in judgment, and resulting in the loss of his accrued share in the business, was outwith the band of reasonable sanctions.

64. Mr Stuart raised a further matter. The Claimant had successfully pursued a complaint to the Parliamentary and Health Service Ombudsman ("PHSO") against the LAA, to the effect that it should have independently adjudicated whether he had acted in breach of its contract, rather than relying on the Respondent's finding that there had been a breach, in support of its

decision to suspend him pending the SRA's decision, and then simply awaiting and relying on the SRA's decision. The LAA had then written a letter of apology. The EAT's Registrar had refused the Claimant's application for permission to rely upon the PHSO decision and LAA letter for the purposes of this appeal, but directed that the application could be renewed before me.

65. Mr Stuart argued that, applying **Ladd v Marshall** [1954] 1 WLR 1489, the only issue was relevance, as these developments came after the Tribunal's decision, and the documents were plainly credible; and that it was reasonable to apply to rely upon them before the EAT, rather than seek a reconsideration from the Tribunal. He submitted that they were relevant to the question of whether the Tribunal had erred in concluding that the Respondent fairly found the Claimant guilty in relation to the charges that related to the LAA, and, generally, as background.

Respondent

66. Ms Beale submitted that Ground 1 was based on the premise that the Judge erred in considering only whether the Respondent had a genuine belief that the Claimant knew, or should have known, that the second payment was, or might be perceived to be, a top-up payment. This, she suggested, was amplified in HHJ Shanks' reasons, to raise the issue of whether the Tribunal had properly considered the allegations other than allegation 6 (negligence). That, in turn, overlapped with Ground 2, and Ground 4, concerning the reasonableness of the sanction.

67. Ms Beale submitted that it was, however, clear that the Tribunal *had* considered the full range of the disciplinary allegations. They were fully set out by it, in the list of issues at [2] and

again in citing the disciplinary charges letter at [25]. The Tribunal's formulation of the central issue, at [53] and [60], did not refer *only* to the negligence allegation, but also comprehended the most serious scenario, in which the Claimant *knew* the payment *was* a top-up payment.

68. Further, the Claimant did have the opportunity, in the overall process, to respond to all the allegations, including allegations 1 to 4, and he in fact did so. In particular, he addressed his own perception of the nature of the payment, in his response to Ms Surley's statement, and in his internal appeal document, relying also, at that later point, on Mr Walsh's statements.

69. The point emerging from **Strouthos** (albeit, said Ms Beale, it was *obiter*) was that it is not fair to find an employee guilty of conduct more serious than that with which he was charged, in that case, dishonestly taking a vehicle, as opposed to doing so in breach of rules and without permission. In **Lall**, similarly, adverse findings about the employee's integrity were made by the employer, on a basis that had not been put to him. In the present case the charges had not changed during the internal process; and the Tribunal's summary of them, which was no more than just a summary, was also a fair one.

70. The Tribunal also did address the different strands of the allegations. It considered the LAA specification, and identified the essential point that it would be a breach to receive a top-up payment, even if not solicited. The Tribunal also referred to the evidence before Mr Kilty, from Ms Surley, that Mr Walsh had told her that the payment might hurry the Claimant up a bit in getting the witness statements. It found that the circumstances were very different from the first payment, which followed a successful bail application and where there was a gift card. It also properly considered the Claimant's reliance, in relation to the second payment, on Mr

Nolan's comment in relation to the first payment, to be "either not credible or wholly unreasonable".

71. The Tribunal then found, at [66], that a conclusion of *either* knowing impropriety *or* gross negligence would have been reasonable, and *either* would have the consequences set out at allegations 1, 2, 3, and 5. The final two sentences of that paragraph were also a finding that allegation 7 was made out. Paragraph [75] also contained findings that showed that the Tribunal had considered all the allegations.

72. Ground 2 overlapped with Ground 1. The Tribunal had properly concluded that the Claimant had had a fair opportunity to respond to the allegations, correctly considering the overall process, including the appeal, applying **Taylor v OCS Group Limited** [2006] ICR 1602.

73. With regard to the fact that the SRA and LAA had, at the time of the dismissal and appeal, yet to reach conclusions, the Tribunal's consideration was carefully rooted in the evidence before the Respondent, although it also gave cogent reasons why the SRA's later decision did not undermine that of the Respondent. There is no rule of law that an employer must allow external regulatory or criminal proceedings to take their course first; quite the contrary, submitted Ms Beale. She referred to **Gregg v North West Anglia NHS Foundation Trust** [2019] ICR 1279. The Respondent was also entitled to take its own view as to whether the Claimant's conduct breached the LAA contract; and the Tribunal was entitled to regard its view as reasonable. The recent PHSO decision, and the apology from the LAA that followed, were simply irrelevant.

74. Turning to Ground 3, save in relation to the matter of notes, the challenge based on the **Roldan** line of authority was vague and generalised. Nor did it feature in HHJ Shanks' reasons. In any event, from the Reasons at [75] it was clear that the Tribunal had in mind the seriousness of the matter for the Claimant, both professionally and in terms of the impact on his shareholding in the Respondent. This was also a case where the allegations had already been independently raised by a barrister from outside the Respondent, with the LAA, so that the charges then properly embraced the wider impact on the relationship with the LAA. Nor was this case like **Roldan**, where the employee lost the right to live and work in the UK and was subject to a criminal investigation. Nor was it like **Kulkarni**, which concerned whether Article 6 applied to internal proceedings against a doctor, who was at risk of being barred from working in the NHS.

75. The procedural issues specifically raised before the Tribunal, about the decisions not to speak to Mr Walsh, and not to postpone the disciplinary hearing, were properly addressed by it, and were not specifically pursued on appeal. The only specific ground of procedural challenge pursued on appeal regarded not making, or keeping, notes. As to that, the Tribunal properly concluded that, given that there were no oral hearings, at either the disciplinary or appeal stages, it was of no real significance in this case. This case was quite different from **Ghafoor**, where an oral hearing took place, but inaccurate notes of that hearing were produced.

76. In relation to Ground 4, and the fairness of the sanction, the Tribunal took into account, at [75], the Claimant's seniority, experience, and status as a shareholder and director. It understood the particular ramifications of dismissal for him. Its conclusion that it was reasonable for the Respondent to decide that it could no longer have any confidence in the Claimant was not perverse. With reference to **Marney**, the evidence in this case was *not* that

A the Respondent had applied an inflexible policy. Both Mr Kilty and Mr Lewis stated in their decisions that they had specifically considered whether a sanction short of dismissal should be applied in this case.

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77. The Tribunal did not err in relation to considering whether allegation 6, of negligence, alone justified dismissal. In fact it did not focus on just that allegation; but, in any event, it properly concluded, at [75], that the Claimant's actions were "at the very least a serious error of

C judgment", which made it reasonable for the Respondent to conclude that it could no longer have any confidence in the Claimant.

D 78. There was no dispute that the Claimant had accepted a cash payment on a second occasion when there was no thank you card, and no other context (unlike the first occasion, which followed a successful bail application) which might suggest it was a mark of gratitude.

E Even if the Claimant's conduct was only negligent, it was more, not less, serious negligence than that in **Adesokan**. Though the SRA's later decision was not strictly relevant, it was striking, said Ms Beale, that the SRA had, in its own decision, referred to what it regarded as the clear risk concerning how this payment could be perceived, which had given it serious

F concerns.

79. Similarly, the Tribunal was entitled to take the view that the Claimant was properly

G found by the Respondent, at least to have unacceptably taken the risk of this payment being viewed as improper, and hence to have put at risk the LAA contract, with enormous potential repercussions for this particular firm's business. He was an experienced partner running a

H separate office. It was plainly open to the Tribunal to find that the Respondent was entitled to conclude that it had lost confidence in him. Both Mr Kilty and Mr Lewis had said in evidence,

A that they would still have dismissed, whatever view the LAA and SRA ultimately took. Ms Beale submitted that the Tribunal was fully entitled to consider that dismissal was a permissible sanction, having regard to allegation 6 having been found proven, alone. Its decision in this regard could not be described as perverse.

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80. In reply Mr Stuart particularly stressed two points. First, the dismissal letter did not break down the allegations; and, he said, the thrust of the Respondent's case before the Tribunal was that the Claimant was dismissed for knowingly accepting a top up, which was also the main thrust of the charges. Secondly, while he accepted Ms Beale's general point, that there is no rule that it is necessarily always unfair for an employer not to await the outcome of a regulatory process, in this case, the charges *themselves* related to LAA and professional standards.

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Discussion and Conclusions

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81. There is, as I have already noted, considerable overlap and interaction among the Grounds of Appeal and the various strands of argument challenging this Tribunal's decision as erroneous in law. In my consideration I shall therefore somewhat re-order and re-group the key points of challenge raised by this appeal as a whole, to address them in what is, I hope, a logical order.

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G 82. The place to start is with the disciplinary charges. The particular context was, plainly, that the Claimant is a solicitor, and the firm, a firm of solicitors, both subject to the general professional obligations and regulatory regime that go with that. But more specifically, in this case, the Claimant, and the firm, were required to comply with the terms of the LAA contract,

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specifically in relation to top-up payments; and it was plainly a further significant feature of the charges in this case that the firm was heavily reliant on legally-aided criminal work.

83. Ms Beale pointed out in submissions that, although the charges had a number of sub-strands, they did not relate to a number of discrete incidents. They all concerned the Claimant's conduct in relation to the second payment. This was relevant, she submitted, when considering, in particular, the overall sense and import of the seven sub-points of paragraph 3 of the charges, as they all related to the very same conduct. I agree that it is well to keep this general point in mind, when considering both the Respondent's, and the Tribunal's approach, to these charges.

84. That said, however, the following features of the charges are also, in my view, pertinent to the issues raised by this appeal. First, the clear structure was that the factual basis of the charges was set out in paragraphs 1 and 2, with paragraph 3 setting out why the alleged factual conduct was said to have been so serious that it may warrant dismissal. Importantly, paragraph 1 covered not merely the circumstances of the payment itself, but what it was said that the Claimant did or did not do thereafter. As to that, the Claimant's case, in the internal process, was that the history relating to the first payment explained why he did not speak (again) to Mr Nolan or the ethics helpline about the second payment; and that it was not factually correct that he had not told any other Director about the second payment.

85. Secondly, on a fair reading, the gravamen of paragraph 3 of the charges was that in light of Ms Surley's account, the payment *did* amount to a top-up payment in breach of the LAA contract (point 1), *therefore* bringing the firm into serious disrepute and putting that contract in jeopardy (points 2 and 3), as well as (presumptively) entailing a breach of SRA rules (point 4), and hence amounting to a fundamental breach of trust and confidence (point 5). It was also the

purport of the charges that the Claimant must have appreciated that this was a top-up. The sense of point 6 is that it was *not* accepted that the payment was perceived by the Claimant to be a genuine gift, that being what he *alleged*, "contrary to what is indicated in the statement of Ms Surley". Rather, this was an alternative charge, in the event that the primary charge of knowingly keeping a top-up payment, was not made out. Point 7 reinforced the tenor of the principal basis of the charges.

86. Ground 1 appeared originally to assert (which would be a **Strouthos** point) that the Respondent had purported to dismiss the Claimant for found conduct that was materially different from that with which he was charged. But in oral submissions Mr Stuart indicated that he did not so contend. It does, indeed, seem to me that this was not arguable, as both the dismissal and appeal decisions simply referred to the charges set out in the 25 October 2017 letter. However, Mr Stuart maintained what was a further strand within Ground 1, being that the way that the Tribunal, at paragraphs [53] and [60], described the issue for the Respondent, amounted to a material reformulation of the charges *by it*, to something different from the disciplinary charges that the Claimant actually faced; and so demonstrated that *the Tribunal* had not properly considered the import of the actual charges, in deciding whether the dismissal was unfair.

87. I largely agree with Ms Beale that this criticism is not, as such, well-founded. These passages were plainly meant to be no more than a summary way of capturing the nub of what the Respondent had to decide. The Tribunal did record the full detail of the allegations, both when setting out the issues, and in later citing the charges letter, and it did make, for example, a particular finding that the Respondent believed that the Claimant's conduct amounted to a breach of the LAA contract (which it found, at [75], to be a reasonable belief). These passages

A do indeed, I think, *broadly* capture the nub of the primary and secondary cases set out in the charges, as to why the Claimant's alleged conduct amounted to culpable misconduct.

B 88. However, while the Tribunal was right not to allow, as it were, a fragmented analysis of the charges to obscure the bigger picture, nevertheless, its task was to consider the fairness of the decision to dismiss, by reference to the charges as framed, and the actual findings that the Respondent did or did not make by reference to them; and it would have been wrong *merely* to C treat this formulation as a substitute for them. I do not think that the use of this formulation in these passages *by itself* shows that the Tribunal did that; but what matters is its actual approach to the Respondent's decision, by reference to the actual charges, in its Decision as a whole.

D 89. I turn to points of challenge which argue that the Tribunal erred, in terms of its approach to the process followed by the Respondent, in particular as to whether the Claimant had a fair opportunity to defend himself, and whether the Respondent conducted a reasonably sufficient E investigation (applying a band of reasonable responses approach).

F 90. First, did the Claimant have a fair opportunity to put forward his case, and his evidence, in response to the charges? The Tribunal – rightly in my view – found that it was not reasonable, as such, for Mr Kilty to have proceeded to a decision directly following receipt of the Claimant's solicitors' letter, that same day. An aspect which particularly troubled the G Tribunal, is that the Claimant had not yet provided a written response to the specific disciplinary charges at the point of dismissal, and should have been given more time to do so. However, it also, rightly, in light of **Taylor v OCS Group Limited** [2006] ICR 1602, did not H treat this as necessarily determinative of the fairness of the dismissal, but considered the end-to-end process, including the appeal stage.

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91. As to that, the Tribunal took into account that the Claimant *had*, prior to dismissal, provided a detailed commentary on Ms Surley's statement, including his factual account of events and his own thought process, and including his arguments as to the significance of his communications with Mr Nolan about the first payment, and as to how his conduct should be viewed. The Tribunal also, as I have noted, acquitted Mr Kilty of any ulterior motive, and accepted that he dismissed, because it was his genuine view that the Claimant was guilty of misconduct in relation to the second payment from Mr Walsh.

92. The Tribunal also took into account its findings that the case and arguments that the Claimant advanced when presenting his appeal were substantially along the same lines as before; that the Claimant presented at that point two statements he had gathered from Mr Walsh; and that Mr Lewis came to his own view. The Tribunal also recorded that the Claimant's solicitors agreed to the appeal decision being taken on paper. I note also that the Claimant commented on the statements of Mr Nolan and Ms Blain in his appeal submission. So, no evidence was relied upon by the Respondent, that the Claimant had not seen or commented upon before the appeal was decided. The Claimant's solicitors had requested some documents that had not been provided. But the Tribunal properly considered that these were not strictly relevant to the disciplinary charges. The request for a copy of any gift of anti-bribery policy was obviously relevant; but the firm, as a matter of fact, did not have one at the time of this incident.

93. A discrete point concerns the Tribunal's approach, at [55], to the lack of notes. As to that, I agree with Ms Beale that **Ghafoor** is not directly in point. Where there has in fact been an oral disciplinary or appeal hearing, there is an obvious potential unfairness if the employer

A has relied on a note of things said at such a hearing, which the Tribunal then finds was not in fact accurate. That did not, as such, arise in this case. Of course, there were, as I have described, issues about the reason or reasons for dismissal, and what the Tribunal was to make of the evidence it had about that; but that is a different point. I will return to it.

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94. Pausing there, I do not think that the Tribunal erred in respect of any of the aspects that I have reviewed so far, by failing to conclude that any of them rendered the dismissal unfair.

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95. However, it is contended that the Tribunal should have found that the investigation was inadequate (relying in particular on the **Roldan** line of authority), in turn affecting the reasonableness of the Respondent's conclusions, in the following particular respects.

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96. First, it is said that it should have been found unfair for the Respondent not to have interviewed (or tried to interview) Mr Walsh, or (possibly) to allow the Claimant to gather more evidence from him. I do not agree. The Claimant had in fact been able to speak Mr Walsh, and was able to table two statements from him, by the time of his appeal, which advanced arguments by reference to them. In light of **Taylor v OCS**, I cannot say that the Tribunal erred by not concluding that he did not overall get a fair opportunity to present evidence from Mr Walsh.

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G 97. Secondly, it was said that the Tribunal should have found that it was unfair for the Respondent not to await the outcome of the SRA and/or LAA processes, or sought the LAA contract manager's view, before coming to the conclusion that the Claimant's conduct amounted to a breach of SRA rules and/or of the LAA contract, and, hence, that its conclusions in this regard did not have a reasonable basis. I consider each of these in turn.

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98. I do not think there was any error in the Tribunal's approach with regard to the SRA. First, as I have described, the Tribunal concluded that the Respondent did *not* have a reasonable basis for finding that the Claimant's conduct amounted to a breach of any particular SRA rule. Secondly, it set out, at [65], what appear to me to have been three sound reasons why the evidence of the eventual outcome of the SRA process did not, of itself, demonstrate that the Respondent had not come to a reasonable view of the other aspects of the charges, in particular in relation to the LAA. For equivalent reasons, I cannot see that it should have been regarded as unfair for the Respondent not to have awaited the outcome of the SRA process.

99. I turn then to the LAA. Specifically, Mr Stuart contended that the Tribunal should have found that the Respondent unfairly concluded that the Claimant's conduct amounted to a breach of the LAA contract (and, hence, that it had the attendant consequence of bringing it into disrepute with the LAA and putting the contract itself in jeopardy), because it had not conducted a reasonably sufficient investigation of that question; and/or did not, on the information it had when it took the dismissal and appeal decisions, reasonably so conclude. He also argued that the eventual outcomes of the LAA process, and indeed the PHSO process, further demonstrated that the dismissal was unfair in this regard.

100. The Claimant plainly feels wholly vindicated by the fact that the LAA has not only not found there to have been any breach of its contract, but has lifted all sanctions against him, retracted a previous criticism of him, itself been criticised by the PHSO for its handling of the matter, and has then apologised to him for that. But it does not necessarily follow from any of that, that the Tribunal should therefore have found the dismissal unfair.

101. So far as the PHSO decision, and subsequent apology from the LAA, are concerned, I agree with Ms Beale that these do not assist the Claimant's case on this appeal. In short that is because this material was not available to the Respondent at either the dismissal or appeal stages, but came much later; and, even had it been available to the Tribunal, or been tabled to it as the basis for a reconsideration application, I think the Tribunal should properly have ruled it not relevant to the issues that it had to decide, in order to determine the unfair dismissal claim. The PHSO was concerned with the LAA's handling of matters, not the Respondent's.

102. Nor does the fact of the LAA's October 2018 decision in and of itself point to the conclusion that the Tribunal should have found the Respondent's view, that the Claimant's conduct breached the LAA contract, was unfairly reached. The fundamental point here is that, though the Tribunal was aware of that decision, the Respondent was not, as it came long after the dismissal and appeal decisions; and the issue for the Tribunal was whether the conclusions of Messrs Kilty and Lewis, that the Claimant's conduct was a breach of the LAA contract, were reasonably reached on the evidence and information available to them, and after a reasonably sufficient investigation, at the time and stage when they so decided.

103. As to the adequacy of the investigation, with respect to the charge of breach of the LAA contract, I agree with Mr Stuart that this particular scenario was not straightforwardly analogous to one in which an employee is accused by an employer of factual conduct which is also the subject of a parallel criminal or regulatory process. That is because, in this case, the gravamen of the primary disciplinary case as to why the Claimant's conduct was so serious was that it amounted to *a breach of the LAA contract*, which would have particularly serious consequences for the firm's relationship with the LAA, and its business. Further, the *primary* disciplinary case – which the Tribunal found that both Mr Kilty and Mr Lewis decided had been

made out – was not that the Claimant had *risked* his conduct being *viewed* that way by the LAA, but that what he did plainly *was* a breach; and that he knew or should have known that. The harm to the firm's reputation with the LAA, and the risk to its contract with the LAA, were said, and found by the Respondent, to have flowed from that conduct having *in fact* broken the contract.

104. Ms Beale submitted that, nevertheless, the firm was entitled to form its own view as to whether there was a breach, so long as it came to a reasonable view, on the evidence which it had. It was not obliged to defer to, or await, the LAA's verdict. Given all the features of the circumstances of the second payment (some of which were specifically mentioned in Mr Lewis' appeal decision) the Tribunal properly concluded that it did have a reasonable basis for that view.

105. I agree with that submission up to a point. I do not think it must follow merely from the fact that what was at issue was the question of whether there was a breach of the LAA contract, and the impact, if so, on the firm's relationship with the LAA, that, for that reason *alone*, it could necessarily not have been fair for the firm to come to its own view about that, without any further engagement with the LAA. Further, while the LAA's initial letter was framed in terms of questions, its plain tenor (as any lawyer would certainly appreciate) was that the LAA considered that Ms Surley's statement at least raised a case to answer as to whether there had been a breach of the top-up rules; and that it was looking to the firm to provide an adequate answer.

106. However, the fact that the basis of the primary charge was that there *was in fact* a breach of the contract with the LAA, and the fact that there had, as yet, been no pronouncement by the

LAA, through its contract manager or otherwise, that it considered that it was a breach, coupled with the fact that a cornerstone of the Claimant's defence was that he genuinely (and, by implication, reasonably) believed that it was not a top-up, meant that it was important to consider whether, on the evidence available, there was any room for reasonable dispute about whether this payment, was, in all the circumstances, plainly a top-up. It also, potentially, required some engagement with the Claimant's case as to why he had not (again) consulted Mr Nolan or the ethics helpline, and that he had, in fact, told Ms Blain about this payment.

107. Ms Beale submitted that the Tribunal *had* carefully considered whether the Respondent reasonably concluded, based on the evidence before it, that this payment *was* a top up payment in breach of the LAA contract, and that the Claimant knew, or should have realised this, in particular (leaving aside the SRA aspect, which went in his favour) in its discussion at [61] to [63] and [66] to [67]. 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. Ms Beale's response was, in essence, that this amounted to a perversity challenge, which could not be sustained.

108. This is one of two linked issues, which were effectively highlighted by HHJ Shanks, and which I have not found easy to decide. This Tribunal's Decision is, in principle, well-structured and carefully reasoned. It worked systematically through the **Burchell** questions, prefaced this part of its Reasons, at [61], by reminding itself of what evidence was before the employer, and the elements of its analysis relied upon to support the conclusion that the finding of misconduct

(save in relation to SRA rules) was a reasonable one, all concern aspects of that evidence. The EAT should, in such a case, itself take care to consider whether a purported substitution error challenge, really amounts to no more than a perversity challenge. Further, even when scrupulously applying the band of reasonable responses approach, a Tribunal must, to some extent, inevitably draw on its own appreciation of the evidence before the employer, in order to assess whether it was reasonably capable of supporting the employer's interpretation of it.

109. However, I note the following features of this particular case and this particular Decision. First, as I have noted, the Claimant's case before the Tribunal, at its highest, was that he had not been dismissed because of his conduct in relation to this payment *at all*, but for ulterior reasons (to do with what he said was an ongoing internal business and financial dispute, and personal antipathy in particular on the part of Mr Kilty). The Tribunal did not accept that. It accepted that he was dismissed because of his conduct in relation to the second payment to Mr Walsh. That aspect of its Decision was not, as such, challenged on appeal.

110. But, leaving aside that the charges gave rise to at least some factual issues (including whether the Claimant had told Ms Blain about the second payment) 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.

111. Of course, the premise of the primary disciplinary case, was that the payment was a top-up and therefore in breach of the LAA contract. As to that, if, for example, it had been alleged, and accepted, that Mr Walsh had actually told the Claimant that the payment was to cover his travel expenses, the lack of a view from the LAA could not reasonably have been said to matter. But the case against the Claimant, arising from Ms Surley's account, and those facts which were not in dispute, was, essentially, circumstantial and inferential. However strong and serious that case may have been said to be, I do not think it could have reasonably been concluded that it was incontrovertible or unanswerable. In that context, the fact that the LAA had not, through its contract manager or otherwise, already come to its own considered view about whether there was a breach, 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.

112. I turn then 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. As to documents, the dismissal letter did not set out any analysis or reasoning in relation to the evidence that was before Mr Kilty. It did not, for example, set out whether (and, if so, why) he accepted that Ms Surley's statement alone showed that the payment was a top-up, what he made of the Claimant's or Mr Walsh's statements, whether he formed any view of what, if anything, Mr Walsh actually said to the Claimant when he gave him the money, and so forth. The letter from Ms Christopher to the LAA also simply set out conclusions. Mr Lewis' letter referred to features of the evidence before him to which he "gave particular consideration", and the Tribunal referred to this at [54], as part of its reasons for rejecting the Claimant's case as to the true reason for dismissal, and accepting that that letter reflected his genuine conclusions. But

that 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.

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.

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.

115. However, the Tribunal *also* held that it was reasonable to conclude, in the alternative, that the acceptance of this payment was "reckless to the extent of gross negligence" (at [66]) and at the very least "a serious error of judgment" making it reasonable for the Respondent no longer to have confidence in the Claimant, so that dismissal, as a sanction, was within the band of reasonable responses (at [75]). Whether *that* was a proper basis on which to uphold this dismissal, was the second feature highlighted by HHJ Shanks' reasons for allowing this appeal to proceed to a full hearing. If it was, then the appeal should still be dismissed.

116. Conduct does not necessarily, in law, have to have been (properly) found to be deliberate, for dismissal to be within the range of reasonable sanctions for it. The question is always fact sensitive, and there may be cases where dismissal is within the band of reasonable responses to conduct which has been found to amount to negligence, recklessness, or error of judgment, having regard, for example, to the gravity of its actual, or potential or foreseeable consequences.

117. It is clear that it was this Tribunal's view that this was just such a case. However, again after some anxious consideration, I have come to the conclusion that this basis for upholding this dismissal also cannot stand. That is for the following reasons. First, while the decision letters of both Mr Kilty and Mr Lewis were to the effect that the whole of the allegations in the letter of 25 October 2017 were made out, the tenor of those charges was, as I have noted, that

A the primary case was that the Claimant 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 Tribunal found, was that they both found that primary case to have been made out.

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118. But there was no finding by the Tribunal that either of them separately considered, and *also* separately concluded that, even if they were wrong in their primary conclusion, the Claimant still ought to be dismissed on this alternative basis of having been careless as to how C others might perceive the payment, and the consequences of that. Nor did the Tribunal base its decision on any finding as to what Mr Kilty or Mr Lewis made, or might have made, of the Claimant's arguments in mitigation, and as to sanction, had either of them separately D considered the case in that alternative light. Once again, it may be said that the case for dismissal being within the band of reasonable responses, even to negligence, was a strong one. However there were features that the Claimant relied upon, as supporting the contention that he should not be dismissed for that; but no specific finding by the Tribunal, as to what Messrs E Kilty or Lewis in fact would have done, on that scenario.

119. It therefore appears to me that the Tribunal was not, in this respect, evaluating whether a F 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 G 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 H presented to them about it, founded their respective decisions. I conclude that the Tribunal's decision cannot therefore be upheld on this alternative basis.

Outcome

120. For the foregoing reasons, I have concluded that this appeal succeeds. Having seen this Decision confidentially in draft, counsel made submissions as to whether I should remit the matter, and if so, on what terms. Mr Stuart submitted that I did not need to remit and should substitute a finding of unfair dismissal. Ms Beale submitted that I must remit.

121. I agree with Ms Beale. The deficiency I have identified in the Tribunal Decision was the failure to make more specific and detailed findings about whatever may or may not have been Mr Kilty and/or Mr Lewis' more detailed thought or reasoning processes, than it did; and then to draw on these when coming to its final conclusion about whether this dismissal was fair or unfair. I had copies of the documentary evidence which the Tribunal had, but I do not have the record of the witness evidence. In any case, fact finding is the task of the Tribunal which hears the witnesses. I cannot say what further facts will or must be found; nor that there is only one conclusion about the overall fairness of the dismissal which could be reached.

122. Mr Stuart submitted that, if I did remit, it should be to a different Tribunal for re-hearing; Ms Beale submitted that I should remit to the same Judge to make further findings, and/or give further reasons, based on the evidence already heard, and then to proceed to complete the task of determining whether the dismissal was fair or unfair in light of *all* the findings. Both counsel developed their respective cases, of course, by reference to the guidelines in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. My conclusions on this are as follows.

123. I do not agree with Mr Stuart's submission that this was a fundamentally flawed Decision. While the Judge did take a wrong turn in the last section, as I have stated, the Decision was, overall, well-structured and, up that that point, well-reasoned. Most of the points of challenge on appeal have failed. Mr Stuart, while acknowledging that this appeal did not allege actual or apparent bias, also submitted that what I had found occurred amounted to something akin to bias. But I do not agree with that, at all. I also have no reason to doubt that, if the matter were remitted to her, the Judge would approach her task with complete professionalism and care, following my guidance. Further, it would be desirable, if possible, to avoid having to have a full re-hearing.

124. However, the Judge did, I have concluded, set out her own views about what view she considered the Respondent could fairly have taken, and did so in firm terms. It would, I think, be a tall ask, professionally though I am sure she would approach it, to expect the Judge to bring an entirely fresh eye to the task, having made further findings of fact. It is important also for the process – whoever wins – to command the confidence of the parties, and have the best chance of achieving finality. Further, it would appear to me that, on the issue of liability, there will be no need for any new witness statements or other evidence to be presented which was not before the Tribunal last time. The matter is essentially already prepared. I therefore remit for re-hearing before a different Judge. Further directions regarding listing, or otherwise, will be for the Regional Employment Judge, or the new Judge to whom the matter is assigned, to give.