RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr P Greenberg**

Respondent: **DPP Law Limited**

Heard at: **East London Hearing Centre**

On: **27-29 November 2018**

Before: **Employment Judge Ferguson**

Representation

Claimant: Mr J Stuart (Counsel)

Respondent: Ms A Beale (Counsel)

RESERVED JUDGMENT

It is the judgment of the Tribunal that:-

1. **The Claimant's complaint of unfair dismissal is dismissed.**

2. **The Claimant's complaint of failure to pay expenses is dismissed upon withdrawal.**

REASONS

INTRODUCTION

1. By an ET1 presented on 29 January 2018, following a period of early conciliation from 21-28 December 2017, the Claimant brought complaints of unfair dismissal, wrongful dismissal and breach of contract (failure to pay expenses). The Claimant does not pursue his claim for wrongful dismissal in this forum because the damages he seeks exceed the statutory limit for Employment Tribunals and he intends to bring proceedings in the High Court. The wrongful dismissal complaint is therefore withdrawn but not dismissed. The other breach of contract complaint, relating to expenses, was withdrawn on the final day of the hearing following a verbal undertaking by the Respondent to pay all properly payable expenses claimed.

2. The only live complaint, therefore, is unfair dismissal. The agreed issues to be determined are:

2.1 Was the reason (or principal reason) for the Claimant's dismissal a reason relating to the conduct of the Claimant (ERA s.98(2)(b)), as alleged by the Respondent? The Claimant contends that the reason for his dismissal was the Respondent's shareholders/ directors' personal animosity towards the Claimant and their wish to remove the Claimant in order to take his shares and profit share entitlement.

2.2 Did the Respondent hold a genuine belief that the Claimant had committed the act/ acts of gross misconduct alleged against him, namely (in summary):

2.2.1 Accepting a payment of £150 from John Walsh, the father of a legally-aided client;

2.2.2 Failing to report the payment to the company's COLP, disclose it to other Directors in the company, or consult the Law Society's ethics helpline for guidance;

2.2.3 And that in acting as set out above, he:

2.2.3.1 Breached paragraphs 8.41 – 8.43 of the company's Legal Aid contract;

2.2.3.2 Brought the company into serious disrepute with the Legal Aid Agency and other members of the legal profession;

2.2.3.3 Potentially put in jeopardy the company's Legal Aid contract;

2.2.3.4 Behaved in a way that was contrary to the rules governing the conduct of solicitors as set out by the SRA;

2.2.3.5 Fundamentally breached the duties of trust and confidence placed in him by other directors and shareholders of the company;

2.2.3.6 (In the event that he perceived the £150 payment to be a genuine gift) Failed to exercise reasonable skill and care in his role as a solicitor by not identifying that repeated cash payments by the father of a legally aided client were likely severely to compromise his integrity as a solicitor;

2.2.3.7 Allowed his judgment to be adversely affected by the opportunity for personal gain.

2.3 Did the Respondent have reasonable grounds for its belief?

2.4 Did the Respondent carry out as much investigation as was reasonable in all the circumstances of the case?

2.5 Did the Respondent follow a fair procedure in dismissing the Claimant, in the sense that the procedure followed fell within the range of reasonable responses?

2.6 Did summary dismissal fall within the range of reasonable responses?

2.7 Did the Claimant cause or contribute to his dismissal by means of his own culpable or blameworthy conduct?

2.8 If so, what if any reduction should be applied to the Claimant's basic and/or compensatory award to reflect that conduct?

2.9 If the Respondent is found to have failed to follow a fair procedure, should the compensatory award be reduced to reflect a % chance that the Claimant would have been fairly dismissed in any event had a fair procedure been followed?

3. On behalf of the Respondent I heard evidence from Stuart Nolan, David Kilty and Paul Lewis. I also heard evidence from the Claimant and from John Walsh on his behalf.

FACTS

4. The Claimant is a criminal defence solicitor with around 20 years' post-qualification experience. In September 2004 the Claimant joined David Phillips & Partners, a firm practising in criminal law mainly in Liverpool, as a Partner. The Claimant opened an office of the firm in Chadwell Heath, Romford, Essex. Initially the arrangement was that the Claimant was entitled to a percentage of the profits of that office only. Within a few years he was receiving 50% of the profits, which on his own evidence amounted to around £6,000 a month. In around 2010 the Claimant agreed to give up his profit share in the Romford office in exchange for becoming an Equity Partner. He was initially given an 8% share in the partnership, but this was later increased retrospectively to 10%.

5. The founding partners, David Phillips and David Norman, left the firm in 2012 following an acrimonious dispute with the other partners. In the course of that dispute Mr Norman wrote an email to the other partners making a number of very serious allegations of wrongdoing and professional misconduct on the part of some other partners. It is not in dispute that these allegations were not reported to the SRA. The Claimant's evidence was that he was not really involved in this because he was based in Essex and operated somewhat separately to the rest of the firm.

6. The Respondent company was incorporated in 2014, each of the partners of David Phillips & Partners becoming employee Directors. The equity partners were issued with a percentage shareholding in the company. Originally there was some variation in the level of shareholding, but it was always intended that there would be equalisation within a number of years. By the time of the Claimant's dismissal equalisation had, or had very nearly, been achieved and the Claimant's shareholding was approximately 14.3%. The Claimant's drawings were approximately £11,200 per month.

7. The Respondent has a contract with the Legal Aid Agency ("LAA"). The 2017 Standard Crime Contract includes the following provisions:

> "2.2 You shall ensure that neither you nor any of your 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…
>
> …
>
> 7.15 You must comply with ay Relevant Professional Body rules."

8. The additional "Specification" includes the following:

> "Payment other than through this Specification
>
> 8.41 Subject to Paragraph 8.43 below, 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. This Paragraph does not apply to services you provide which cannot be paid under this Contract or the Act, but which are in connection with a Matter or Case.
>
> 8.42 Where you have been carrying out Contract Work on behalf of a Client, you may not accept instructions to act privately in the same matter from that Client unless the Client has been first advised by you in writing of the consequences of ceasing to be in receipt of services and as to the further services which may be available under criminal Legal Aid, whether from you or another Provider, (including the possibility of an extension of the limit for Advice and Assistance or Advocacy Assistance, an application for Representation or the availability of Advocacy Assistance or the Duty Solicitor and has nevertheless elected to instruct you privately.
>
> 8.43 Where an application for prior authority for costs to be incurred under a determination has been refused and the Client has expressly authorised you to:
>
> (a) prepare, obtain or consider any report, opinion or further evidence, whether provided by an expert witness or otherwise; or
>
> (b) obtain or prepare any transcripts or recordings of any criminal investigation or proceedings, including police questioning; or
>
> (c) instruct Counsel other than where an individual is entitled to Counsel (as may be determined by the court) in accordance with regulation 16 and 17 of the Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013,

then Paragraph 8.41 will not apply to payment by the Client on a private basis for that work.

8.44 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. You cannot be retained to act for the Client in the same Matter or Case under this Contract and on a privately paying basis at the same time. Where a Client elects to instruct you privately in relation to a Matter or Case in which you have been providing Contract Work, a copy of the letter dealing with the requirements of Paragraphs 8.41 to 8.44 must be kept on the file."

9. In late 2016 the Claimant was instructed to represent Jake Walsh, an 18-year-old charged with section 18 Grievous Bodily Harm with intent. It was a Legal Aid case that had been transferred from another firm. Shortly after the case had been transferred, Jake was granted bail. The Claimant's evidence was that Jake's family were delighted he was able to come home for Christmas.

10. On 18 January 2017 the Claimant attended a meeting with Jake and his father, John Walsh, at Canterbury Crown Court. The Claimant had instructed an advocate from the Public Defender Service ("PDS"), Charlotte Surley, who was also in attendance. At the end of the meeting, as he was leaving, John Walsh handed two envelopes containing cash to the Claimant and Ms Surley. After the meeting the Claimant and Ms Surley had a discussion about whether or not they could or should keep the money. That evening, at 8:52pm, Ms Surley emailed the Claimant as follows:

> "It was lovely to finally meet you today! I have spoken to the relevant people about the surprise gift and I have been told that we must return it to John Walsh securely. I am going into the office to do that tomorrow. I will ensure that a tactful covering letter is enclosed though as I do not wish to cause the family any offence after they have been so kind…"

11. Later that evening, at 12.32am, the Claimant sent an email to Stuart Nolan, the Managing Director of the Respondent. Mr Nolan was also the Compliance Officer for Legal Practice, and for Finance and Administration ("COLP" and "COFA"). The full text of the email is as follows:

> "Hi Stuart
>
> We recently won a transfer of LA on a S18GBH case which was referred by a good Solicitor contact friend.
>
> The defendant is 18 and was on remand in the Isle of Sheppey for 3 weeks until LA was transferred and we immediately got him bail.
>
> The clients dad has a successful builders business in Kent and since the transfer the father has been very active in his sons case and I've had many texts from him. At a con today he thrust an envelope into my hand and said

> "thank you Paul this is for your expenses". I only opened the envelope once the con was over and he had left.
>
> Just wanted to know what to do with it. Let me know.
>
> P"

12. A couple of minutes later the Claimant sent a further email saying, "Sorry, forgot to say there was £300 cash inside."

13. Mr Nolan replied at 9.59am the following morning saying, "I'll leave it to your conscience!"

14. After receiving Mr Nolan's email the Claimant discussed the matter with Rebecca Blain, another Director of the Respondent based in Essex. He then telephoned the Law Society ethics helpline and made a note of the advice, which was that they did not "have a massive problem with this as long as … the clients father is aware that it wasn't an inducement or an incentive and that I remain impartial throughout." In his oral evidence to the Tribunal the Claimant said that the adviser referred to Indicative Behaviour paragraph 1.9 of the Code of Conduct, which states:

> IB(1.9)
> refusing to act where your ***client*** proposes to make a gift of significant value to you or a member of your family, or a member of your ***firm*** of their family, unless the ***client*** takes independent legal advice;

15. On 31 August 2017 a meeting took place of the Respondent's Crime Team directors, namely the Claimant, Mr Nolan, Paul Lewis, David Kilty, Jeremy Coleman and Rebecca Blain. There was discussion about the fact that the Claimant's office had made a loss in the previous quarter. The Claimant attributed this partly to issues with police station representatives. It appears there had been a long-standing dispute about the appropriateness of the Claimant having agreed to pay some representatives 100% of the police station attendance fee, instead of 90% which was customary. Other directors were concerned this could be viewed as paying a referral fee, which is prohibited, and/or stealing other firms' clients. The Claimant denied that there was anything improper in his dealings with the representatives and claimed that the other directors were hampering his business. The meeting concluded with an agreement to review matters in four weeks' time and if there was no improvement they would consider making redundancies or closing the office.

16. On 1 September 2017 the Claimant attended Canterbury Crown Court for a meeting in relation to Jake Walsh's case. By this time a trial date had been set for mid November 2017. After the meeting the Claimant drove to a pub near where the Walsh family lived to speak to some potential witnesses. He was unable to take statements because there was a funeral wake taking place and the pub was very busy. The Claimant gave the following account to the Tribunal of subsequent events:

> "After I had finished I went to my car which was parked outside the pub and rolled the window down. John Walsh lives very near that pub. He had come along to introduce me to the witnesses. We had a chat and then just before John Walsh turned to walk away he literally dropped £150 through the open window of my car. I had not requested any monies from John. I did not

> suggest that I needed or wanted any money for expenses. I have never once suggested that if he gave me money it would improve his son's case or cause me to give priority to his son's case over any other case. I believed, and still believe (as he has in fact confirmed) that this was simply another show of his gratitude for what he considered to be my good efforts and service. I told Mr Walsh that he really did not need to give me any gift. However, he just walked off. I was 80 miles from home and it was Friday afternoon and I needed to be home for 6.30 as my wife and I were holding a dinner party for friends. I did not want to cause any offence to John Walsh and I knew that it was not improper to receive an unsolicited insignificant gift – as Nolan had implicitly confirmed in relation to the previous, larger gift."

17. On 19 October 2017 the Respondent's Chief Executive, Sue Christopher, received an email from the LAA enclosing a statement by Charlotte Surley expressing concern that the Claimant appeared to be "topping up" his fees in Jake Walsh's case. The covering email asked Ms Christopher to confirm within 7 days:

> "1. Whether two or more cash payments were received by Mr Greenberg
>
> 2. How this demonstrates compliance with sections 8.41 to 8.43 of the crime contract specification"

18. Charlotte Surley's account extends to five closely-typed pages and may be summarised as follows. She described the incident on 18 January 2017 in some detail, referring to the cash as a "gift". She said that John Walsh had referred to her and the Claimant "not getting much on Legal Aid" at some point during the conversation when he handed over the envelopes. She said they each picked up an envelope at random after John Walsh had left and that the one she picked up contained a card with "thank you" written inside and £480 in cash. The one the Claimant picked up contained an identical card and around £300 in cash. She said she discussed the matter with the Claimant and explained that she would have to report the gift and that the Claimant said his COLP colleague "would probably tell him to keep his gift so long as it wasn't 'silly money'". She said that at one point the Claimant asked her if there was anything she needed "so maybe he could get that for me instead of me taking the cash". She said she refused and explained she had to report any gift at all.

19. Ms Surley then described a meeting with John Walsh at Canterbury Crown Court on 3 October 2017. Jake's case had been listed for a Pre-Trial Review on that day. The Claimant did not attend. She referred to the earlier client conference, after which the Claimant was due to meet with the defence witnesses to take their statements, wrongly giving the date as 5 June 2017 instead of 1 September 2017. She said that she had chased the Claimant on several occasions for the details of the witnesses to insert into an addendum Defence Statement, and that these had only been provided late at night on 2 October 2017. She said that these matters were discussed during the conference on 3 October 2017 with Jake and his father. She described the conversation as follows:

> "This discussion about the addendum DS and the late arrival of the witness details caused Jake's father to make an off the cuff expression of frustration about Paul using words to the effect of 'I wouldn't mind but I even paid his expenses to go and see them [the witnesses]' I told John Walsh that he didn't need to do that as the case was Legally aided and the LAA would pay

> Paul's expenses. John then responses with words to the effect of 'I know but I thought it might get him to hurry up a bit'."

20. Ms Surely said that because of her concerns that the Claimant appeared to be topping up his fees in a Legally Aided case, she had reported the matter to the head of the PDS, David Aubrey QC.

21. The email from the LAA was passed to Mr Nolan, who forwarded it to the Claimant the same day, 19 October, saying that he had opened an immediate formal investigation and that he required a written response by 10am on Monday 23 October. The Claimant was told that while the investigation was ongoing he must not attend the Romford branch or any other branch of DPP Law and must not contact "any colleague, client or other person or agency associated with DPP Law in person by phone, email or any other medium". Later the same date Mr Nolan emailed the Claimant to say that he had disconnected his work phone.

22. The Claimant responded at 3.59pm on 23 October. He said that he treated the matter very seriously, and that he was "acutely conscious of the need for punctilious compliance with my professional obligations in all respects", referring to his "exemplary and unblemished career to date". As regards the first incident, he broadly agreed with the account given by Ms Surley, but said he never discussed legal aid rates with the client or his family, and he did not recall John Walsh saying that they get little on legal aid. He said he did not, and has never, requested a "top up" in relation to any legally aided matter. He denied offering to take Ms Surley's cash gift, but accepted that he had discussed with her whether it would be acceptable if the client bought her a gift rather than offering cash. As to the second incident, the Claimant gave the following account (assuming that the date given by Ms Surley, 5 June, was correct):

> "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."

23. The Claimant said he did not consider he had acted contrary to paragraphs 8.41 to 8.43 of the 2017 Crime Contract specification or any other Legal Aid provisions. He said he had a recollection that a gift of significant value proposed by a client should be refused unless the client took independent legal advice. He did not consider that either of the gifts were of "significant value", but if he was wrong about that he apologised and would return the money to Mr Walsh. He also pointed out that he had spoken to Mr Nolan and Ms Blain about the first gift and that Mr Nolan did not have a problem with it. He said that had informed the position in relation to the second gift.

24. Mr Nolan wrote a statement in response, saying that he recalled being told in general terms of a payment to the Claimant by a client's father. He said that he assumed after he had advised the Claimant to follow his conscience that he had returned the payment.

25. By letter dated 25 October 2017 Mr Nolan invited the Claimant to a disciplinary hearing at 2pm on 30 October, to be conducted by David Kilty, a Director and fellow shareholder. The allegations against the Claimant were as follows:

"1. That you accepted two separate cash payments from the father of a publicly funded client in the sum of £300 (on 18th January 2017) and £150 (on 5th June 2017) respectively.

It appears that all parties understood the first payment of £300 had been offered to you as a gift.

In respect of the second payment, which you have accepted you received in the sum of £150, it is suggested in the statement from Charlotte Surley (Counsel) that she had been told by the client's father that he had made the £150 payment to you as "expenses" to go and see witnesses and to speed up your work. This was in the context of the client's father telling Ms Surley that he was frustrated with the delay on your part having previously made this payment o you to get you to "hurry up a bit".

2. That having received the payment of £150 from the client's father, which was the second cash payment he had made to you in the same matter within the space of 6 months, you did not see fit to:

   a. Refuse the payment;
   b. Report the payment to me as the company's COLP;
   c. Disclosure the payment to any other Directors within the company; or
   d. Consult the Law Society's ethic helpline for guidance.

3. That by acting in the way described above, you:

   e. Breached paragraphs 8.41 to 8.43 of the company's Legal Aid contract;
   f. Brought the company into serious disrepute with the Legal Aid Agency and other members of the legal profession;
   g. 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.
   h. Behaved in a way that was contrary to the rules governing the conduct of solicitors, as set out by the Solicitors' Regulatory Authority.
   i. Fundamentally breached the duties of trust and confidence placed in you by the other directors and shareholders of the company.
   j. 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.
   k. You allowed your judgment to be adversely affected by the opportunity for personal gain."

26. The letter said that the allegations, if proven, could amount to gross misconduct and may result in disciplinary action up to and including summary dismissal.

27. Ms Blain sent an email to Mr Nolan on 25 October responding to what was said about her in the Claimant's email of 23 October. She said she recalled speaking to the Claimant about the first incident and that he mentioned having spoken to Mr Nolan about it. She had no knowledge of the second incident.

28. Also on 25 October Ms Christopher responded to the email from the LAA saying that the Claimant had been suspended and invited to a disciplinary meeting. She said she would let them know the outcome.

29. On 30 October solicitors acting for the Claimant sent a letter to Mr Nolan by email. It said that the Claimant was suffering from stress related anxiety and low mood, and that his doctor had certified the previous Friday (27 October) that he was not fit for work due to stress at work. The medical note was attached, signing him off for four weeks. The letter said that the Claimant was not going to be able to cope with the further stress of a hearing, which would endanger his health. It was requested that any further investigation/ hearing take place in writing only. They said they would need to take further instructions from the Claimant in due course, and requested copies of a number of documents relating to the Claimant's employment and the company. They also asked for confirmation of whether DPP Law has an internal anti-bribery and/or gift policy, and for a copy if one existed. They objected to the appointment of Mr Kilty on the basis that "the relationship between our Client and Mr Kilty makes it effectively impossible for Mr Kilty to be impartial".

30. In his evidence to the Tribunal the Claimant relied principally on two matters to demonstrate Mr Kilty's alleged antipathy towards him:

30.1 Mr Kilty's behaviour in a meeting in September 2014. There had been a dispute at this meeting about whether to bid for new criminal contracts in Essex. The Claimant was in favour, but others including Mr Kilty were opposed to the idea. The Claimant's evidence was that Mr Kilty launched into a vitriolic attack, saying that the Claimant's appointment as a Director was questionable because he had got in by default, not by their design. The Respondent accepted that there was a heated discussion, but did not accept the Claimant's version of the meeting and Mr Kilty was not cross-examined about it. In those circumstances I cannot make a finding that Mr Kilty acted as alleged.

30.2 Two emails in which Mr Kilty referred to the Claimant in offensive terms. The first, in February 2016, was part of an email chain relating to the Claimant having recruited a new duty solicitor without the approval of the directors. Mr Kilty emailed Mr Nolan, copied to two other directors, as follows:

> "Sorry I have just read this properly and understand why you were unhappy yesterday.
>
> This was not approved by the directors and Sue with the greatest respect is not a director. So why don't we just tell him as much, he need to get it in to his arrogant head that he emails you not Sue and roger. He is a complete cunt!"

The second email, in July 2016, was a response to Mr Nolan forwarding to Mr Kilty a letter before action from another duty solicitor regarding the payment of invoices. The Claimant had agreed to pay the solicitor 100% of the police station attendance fee in order to prevent him going to another firm. Mr Kilty responded to Mr Nolan:

> "What a prick. He (PG) creates all the problems down there by his lack of any ability."

The Claimant did not know about these emails until they were disclosed pursuant to a subject access request after his dismissal.

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.

32. The LAA were informed of the outcome on the same day.

33. On 31 October Mr Nolan sent an email to all staff enclosing a document entitled "gift guidance". This included extracts from the Solicitors' and Barristers' Codes of Conduct and advised that "offers of money or particularly expensive gifts should always be refused".

34. On the same day Mr Nolan also notified Companies House of the Claimant's removal as a director, and reported him to the SRA.

35. On 6 November 2017 the Claimant appealed against his dismissal. He repeated many of the points made in his email of 23 October. He also corrected the date of the second incident, confirming that it took place on 1 September 2017, not 5 June. He said that he had spoken to Ms Blain about the second payment while driving back to London that day. He believed dismissal was disproportionate and that there was "another agenda at play". He said he had felt for months that the other Directors were undertaking a "witch hunt" against him. He was not given reasonable time to deal with such a serious disciplinary hearing and was unable to defend himself. It was also inappropriate for Mr Kilty to chair the hearing.

36. The Claimant enclosed two statements from John Walsh obtained by solicitors acted for the Claimant. The first referred to the two gifts and said:

> "At no time had either gift been requested by either Paul or the barrister, Charlotte. At no time had any money payment been mentioned whatsoever. It was a voluntary act which I did to show my appreciation for what I considered to be the very good work undertaken by both of them.
>
> At no time was it to top up any expenses that they may be received from the Legal Aid Board. At no time was it 'to hurry Paul up' which I understand has been suggested."

37. The second statement corrected the date of the second payment, confirming that it was 1 September 2017, not 5 June, and expressed his dissatisfaction with DPP Law, who had by that time ceased to act due to professional embarrassment.

38. The Claimant was invited to an appeal hearing, to be chaired by Paul Lewis, another Director and shareholder, on 22 November 2017. Solicitors acting for the Claimant emailed Ms Christopher the day before the hearing saying that listing the appeal during the period covered by the Claimant's sick note did not "inspire confidence in the fairness of your procedures", but they agreed for the matter to be heard in the Claimant's absence given that he was unlikely to be fit to attend a hearing in the immediate future.

39. Mr Lewis wrote to the Claimant on 23 November 2017 confirming the outcome of the appeal. He concluded that both the investigation and the disciplinary process were conducted fairly. He was also satisfied that Mr Kilty's conclusions were correct. Mr Lewis said he gave particular consideration to the timing of the second payment, the statement attributed to John Walsh in Ms Surley's account and the fact that Mr Walsh had not denied making this, or a similar statement, the failure to report the second payment to the COLP or COFA and the "failure to consider how accepting repeated cash payments from a third-party might compromise your integrity as a solicitor". He also considered that dismissal was an appropriate sanction given that the proven allegations raised questions as to the Claimant's integrity as a solicitor, and breached the trust and confidence placed in him by the other directors and shareholders.

40. Sometime after the appeal the Respondent was advised that it had not followed the correct process for terminating the Claimant's directorship. They therefore convened a

board meeting on 10 January to discuss the matter and the Claimant was expelled as a director on that day.

41. The Claimant's dismissal and removal as a director triggered a transfer of his shares. The Shareholders Agreement provides that if shares are transferred from a shareholder less than seven years after the incorporation of the company, the seller is only entitled to a certain proportion of their value, graded from nil to 50% depending on the number of years. Because the Claimant ceased to be a director and shareholder after three years, he was only entitled to 20%. The Claimant's share, calculated by adding the balance of his Director's Loan Account and his share of retained earnings, adjusted according to an updated valuation of the company, was £385,895. The amount payable was therefore 20% of that sum, namely £77,179.

42. Following the Claimant's referral to the SRA, an investigation took place and the SRA wrote to the Claimant alleging various breaches of the SRA Principles and the Code of Conduct. It was also alleged that the Claimant had accepted a financial advantage in circumstances which bore the hallmarks of bribery, that he had acted contrary to the Legal Aid Standard Crime Contract and was dishonest. The Claimant responded via his solicitors and enclosed a more detailed statement from John Walsh. The statement gave the following account of the second payment:

> "After attending Canterbury Crown Court, I met Paul at the pub and introduced him to the witnesses. There was a Wake going on inside and it was extremely busy. It was also a very hot day. Paul spoke to all three witnesses briefly and informed me that it was not possible for him to take Witness statements given that the staff were so busy dealing with the Wake. Paul therefore said that he would deal with this another day.
>
> Just as he was about to leave, I put £150 in notes into Paul's car through the open window. Paul told me through the window that I didn't need to give him any money but I walked off quickly. This was a thank you to Paul for what I continued to believe was excellent service that he had provided. He did not ask me for any money. I gave it to him voluntarily. It was nothing other than a gift. It was not intended to be ay favouritism or priority in my son's case or to hurry him up."

43. Mr Walsh also denied saying the words attributed to him by Ms Surley about paying the Claimant's expenses. As to saying anything about "hurrying up", Mr Walsh said 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".

44. On 25 September 2018 the SRA concluded its review of the allegations against the Claimant and decided to close the matter with no further action. Under the heading "Outcome", the SRA's letter states as follows:

> "There is no rule in the Code of Conduct, which prohibits a solicitor receiving gifts.
>
> Indicative Behaviour 1.9 states that you should '*refuse to act where your client proposes to make a gift of significant value to you or a member of your*

family, or a member of your firm of their family, unless the client takes independent legal advice'. Although no definition of 'significant value' is given within the Code of Conduct, we have noted that in October 2014, the Law Society issued guidance and suggested that gifts of more than £500 may be determined to be of 'significant value'. Mr Greenberg received the total sum of £450. On this basis and taking into account the Law Society guidance, we do not consider the payments he received to be 'significant'.

That said, however, 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.

In coming to the outcome below, we have carefully reviewed all of the information provided to us. In particular we have noted the following documents which recorded the monies received by Mr Greenberg as a gift:

- [Three matters relating to the first payment and references to it as a gift]
- the two statements provided by the client's father, Mr Walsh. He has confirmed that he intended the cash sums as gifts and that they were not to act as a bribe or inducement of any kind. We accept that he is the only person who can say with confidence to what the money related.

We have seen no evidence to suggest that Mr Greenberg acted differently in relation to the client matter, following receipt of the cash sums. We also note that, upon receiving the first sum of cash, Mr Greenberg raised this issue with the Firm's compliance officer for legal practice ("COLP") and the Ethics helpline. We accept that he took some limited steps to do the right thing in the circumstances.

Having reviewed the information currently available to us, I am not satisfied that there is sufficient basis for us to take any further action. Accordingly, we are closing the matter with no further action.

Mr Greenberg is reminded that he should exercise caution at all times when offered payments in cash and gifts in connection with his role as a solicitor. If Mr Greenberg is offered a gift again, he should seek clear, categoric advice from the relevant firm's COLP. If the advice is too brief, open to interpretation or is not clear, Mr Greenberg should seek immediate

> clarification from the COLP. Mr Greenberg should also consult the relevant firm's policies and procedures."

45. The Claimant had been suspended on 15 January 2017 by the LAA from conducting legally aided work pending the outcome of the SRA investigation. On 11 October 2018 that sanction was lifted in light of the SRA's conclusion. The original letter from the LAA stated that the LAA was "still of the view that the conduct of Mr Greenberg was not what would be expected of a lawyer working under the Contract", but following an objection by Mr Greenberg the LAA agreed to remove that sentence and an amended letter was issued.

THE LAW

46. Pursuant to section 98 of the Employment Rights Act 1996 it is for the employer to show the reason for the dismissal and that it is a potentially fair reason. A reason relating to the conduct of an employee is a fair reason within section 98(2) of the Act. According to section 98(4) the determination of the question whether the dismissal is fair or unfair "depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee" and "shall be determined in accordance with equity and the substantial merits of the case."

47. In misconduct cases the Tribunal should apply a three stage test first set out in *British Home Stores Ltd v Burchell* [1980] ICR 303 to the question of reasonableness. An employer will have acted reasonably in this context if:-

> 47.1 It had a genuine belief in the employee's guilt;
>
> 47.2 based on reasonable grounds
>
> 47.3 and following a reasonable investigation.

The Tribunal must then consider whether it was reasonable for the employer to treat the misconduct as a sufficient reason for dismissal in respect of each aspect of the employer's conduct the Tribunal must not substitute its view for that of the employer but must instead ask itself whether the employer's actions fell within a range of reasonable responses (*Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439).

CONCLUSIONS

Was the reason (or principal reason) for the Claimant's dismissal a reason relating to the conduct of the Claimant (ERA s.98(2)(b)), as alleged by the Respondent?

48. The Claimant contends that the reason for his dismissal was the Respondent's shareholders/ directors' personal animosity towards him and their wish to remove him in order to take his shares and profit share entitlement. There is very little evidence of such motivation, other than the undisputed fact that the Claimant's dismissal triggered the clause in the Shareholder's Agreement entitling him to only 20% of his share in the business. To that extent, therefore, his dismissal was financially beneficial to the other shareholders. The Claimant suggested that this was linked to the shareholders' agreement to move towards equalisation, in that the redistribution of the Claimant's shares

would enable equalisation without diluting the shareholding of those with the largest share. He accepted, however, that at the time of his dismissal the shareholders had reached, or had very nearly reached, equalisation. The fact that the Claimant's dismissal was financially advantageous is relevant, but insufficient on its own to demonstrate that it was the reason for his dismissal.

49. There is nowhere near enough evidence to demonstrate a "witch hunt", or a campaign of undermining the Claimant in order to force him out. The Claimant points to two meetings, one in 2014 and one in 2017, in which there were disputes between him and other directors. I do not accept in either case that they are evidence of personal animosity, as opposed to professional disagreement. The 2017 meeting reflected a long-standing dispute about the use of police station representatives and their fees. Whatever the rights and wrongs of the Claimant's practices, the contemporaneous email exchanges about this issue demonstrate genuine concern on the part of the other directors. As to the two emails from David Kilty containing offensive language, these were immediate responses to situations where he believed the Claimant had acted unprofessionally. Although such language is obviously inappropriate in a professional context, again I do not consider that they are sufficient to demonstrate general personal animosity of such a degree that the directors would orchestrate the Claimant's dismissal.

50. Further, if the shareholders had an ulterior motive, then either Ms Surley must have been part of a "set-up", or her report to the LAA was at the least extremely fortuitous for the Respondent. Although there was a suggestion of a possible set-up in the claim form, the Claimant has not maintained any such allegation. It is absolutely clear from the emails Ms Surley sent to Mr Aubrey, head of the PDS, immediately after her meeting with John Walsh on 3 October that she was making a genuine report of suspected serious wrongdoing. Her statement attached to the LAA email of 19 October 2017 would lead any responsible managing solicitor to investigate possible breaches of the solicitors' Code of Conduct and/or the terms of the Standard Crime Contract.

51. The Claimant relies on the difference between the response to the serious allegations made by Mr Nolan in 2012 and the response to the LAA's email of 19 October 2017 as evidence of a predisposition to dismiss him. I do not consider that there can be any meaningful comparison. Mr Nolan's email was sent in the context of a very bitter partnership dispute. It is unsurprising that those named by him as having committed acts of wrongdoing did not self-report to the SRA. It cannot be compared to an external report of potential wrongdoing, supported by a detailed statement by an independent professional.

52. The Claimant also relies on the haste with which the Respondent dismissed him and then sought to remove him as a director as evidence of an ulterior motive. Since this overlaps with the issues of fairness, I will return to the question of the reason for dismissal after considering the reasonableness of the Respondent's conduct.

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.

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.

Did the Respondent have reasonable grounds for its belief?

56. It was a matter of some surprise to me that the only potentially relevant provision in the solicitors' Code of Conduct to which I was referred was Indicative Behaviour 1.9. This appears to be directed principally towards gifts in wills, and concerns the circumstances in which a solicitor should refuse to act. It does not specifically address the question of whether a gift from an existing client may be accepted. It was common ground between the parties that there is no more general provision on gifts from clients, and nothing at all about cash gifts. Further, although the SRA's outcome letter refers to Law Society guidance on what is considered to be a "significant" gift, neither party produced any such guidance.

57. Mr Nolan's evidence was that he would never accept cash from any client. That is reflected in the gift policy issued the day after the Claimant's dismissal. It is not in dispute that the Respondent had no gift policy before this.

58. I must therefore proceed on the basis that there is nothing inherently improper in the Claimant accepting a cash gift from a client, or the family member of a client. It is also relevant that the Respondent accepted that the first payment of £300 was a gift and the Claimant was entitled to accept it. The question of whether a gift is of "significant value" is something of a red herring in this case. The issue was not its value, but whether it was genuinely a gift. Of course, the amount of money might be relevant, however, to determining whether a payment is genuinely a gift.

59. I was not referred to any provision(s) of the solicitors' Code of Conduct that would be breached by taking a cash payment that was *not* a gift. The Respondent relied only on the provisions of the LAA Contract Specification. At one stage during the hearing it was suggested on behalf of the Claimant that there could be no breach of paragraphs 8.41-8.43 unless a fee was "charged" or reimbursement "sought" by the solicitor, so a payment that had not been sought or requested could never constitute a fee for these purposes. Mr Stuart accepted in his closing submissions, however, that *receiving* money for doing work on a case (e.g. visiting witnesses), even if not specifically requested, would breach these paragraphs. The essential point, as set out in paragraph 8.44, is that all payments for contract work must go through the LAA. Any other payment from a client for work on a case would constitute a "top-up" and would breach of the firm's obligations to the LAA.

60. The issue for the Respondent, therefore, was whether the Claimant knew, or should have known, that the second payment from Mr Walsh was, or might be perceived to be, a top-up payment. In other words, did the Claimant reasonably believe that the payment was a gift and did he act reasonably in accepting it? Even if he genuinely believed it was a gift, it could be grossly negligent to accept it if doing so could compromise his integrity and/or jeopardise the legal aid contract.

61. The evidence before Mr Kilty consisted of Ms Surley's statement, the Claimant's own account provided in his email of 23 October, Ms Blain's email and Mr Nolan's statement.

62. Ms Surley, an independent professional person, had given a detailed account which suggested that John Walsh had intended the payment to "hurry up" the Claimant in obtaining witness evidence, and that he was frustrated by the lack of progress. That was not implausible, given that the Claimant had, on his own account, been unable to take the witness statements on that day, and by 3 October, some six weeks before the trial date, the statements had still not been produced.

63. Even on the Claimant's own account, the circumstances of the second payment appeared very different to the first. The first was cash given to both the Claimant and Ms Surley simultaneously, with a card saying "thank you", shortly after Jake Walsh had been granted bail. The second was cash given only to the Claimant after an unsuccessful attempt to obtain witness statements, and there was no mention of any accompanying card, note, or even any words said that would indicate it was a gift. I note that the Claimant did not say anything about the money having been put through the car window.

64. The Claimant's contention that he relied on the advice given in relation to the first payment was either not credible or was wholly unreasonable. Mr Nolan's "advice" ("I'll leave it to your conscience") was not helpful, but it was certainly not express approval to accept the first payment, let alone the second. A further cash payment was bound to give the impression that these were, in fact, top-up payments intended to ensure that the case was given particular attention or priority. That was especially so when there was no apparent indication of it being a gift on the second occasion and there was no obvious reason for John Walsh to thank the Claimant at that stage.

65. The Claimant relies on the SRA's decision not to take the matter further as evidence that the Respondent's decision was unreasonable. There are at least three reasons why the SRA's approach is of limited relevance. First, the SRA's remit was to consider possible breaches of the Code of Conduct only. The disciplinary process was wider than that and

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

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

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

Did the Respondent carry out as much investigation as was reasonable in all the circumstances of the case?

68. The Claimant alleges that it was unreasonable of the Respondent not to speak to John Walsh as part of its investigation. He contends that this was necessary in order to reach a conclusion about the nature of the payment and what he had said to Ms Surley. I do not accept that. As noted above, Mr Walsh's intention in making the second payment was of limited relevance; it was the Claimant's perception that was in issue. The Claimant was in as good a position as Mr Walsh to explain the circumstances of the payment and there was no challenge to the account that he had given. The content of Mr Walsh's conversation with Ms Surley was relevant, but it was reasonable for the Respondent to

rely on a detailed account of an independent professional without verifying it with Mr Walsh. As it happens, when the Claimant obtained witness statements from Mr Walsh, he did not deny using the words alleged. Even in his later statement to the SRA he accepted he may have said something about hurrying up the Claimant.

69. In the circumstances of this case, and given that the Claimant largely accepted the account given by Ms Surley, I accept that the Respondent carried out as much investigation as was reasonable.

Did the Respondent follow a fair procedure in dismissing the Claimant, in the sense that the procedure followed fell within the range of reasonable responses?

70. The Claimant makes two principal criticisms of the procedure: first that the original disciplinary officer, Mr Kilty, was not impartial, and secondly that the Claimant did not have a fair opportunity to respond to the disciplinary allegations.

71. I have already noted that the evidence of personal animosity towards the Claimant is limited. I accept that the two emails in 2016 suggest that Mr Kilty bore some resentment towards the Claimant arising out of professional disagreements, but they are not sufficient to demonstrate that he could not approach the disciplinary process in an impartial manner.

72. The refusal to postpone the disciplinary hearing on 30 October is, however, difficult to justify. I accept that the Respondent had good reason to treat this as a serious matter that needed to be dealt with as swiftly as possible, but there was no reason why the disciplinary hearing could not have been postponed for a few days until the Claimant had been able to respond in writing to the disciplinary allegations set out in the letter of 25 October. The Claimant had provided a doctor's note saying he was unfit for work and his legal representatives had made a reasonable request for more time to take instructions. By this stage the Claimant had provided an account in response to Ms Surley's statement but had not provided any response to the disciplinary allegations. I consider that any reasonable employer would, at the very least, have allowed a few more days for a written response. The documents relating to the Claimant's employment and the company were not obviously relevant, but it was perfectly reasonable for the Claimant to enquire whether the Respondent had a gift policy before providing a response to the allegations.

73. Having said that, looking at the procedure as a whole I do not consider that there was any unfairness to the Claimant. The response given to the allegations in the Claimant's appeal did not differ in any significant way from the response he had given on 23 October. Further, Mr Lewis considered the matter afresh and gave his own reasons for concluding that the allegations were made out. Although the invitation letter described the appeal as a "review", it was said in *Taylor v OCS Group Ltd* [2006] ICR 1602 that it is not helpful to distinguish between a review and a rehearing. The relevant question is whether the overall process was fair, notwithstanding any deficiencies at the early stage. By the time of the appeal the Claimant had had a fair opportunity to respond to the allegations, and had done so.

74. Further, although I have found that the refusal to postpone the disciplinary hearing was unreasonable, I do not accept that it demonstrates the process was a sham or that Mr Kilty was biased, as alleged by the Claimant. Mr Kilty was not experienced in dealing with disciplinary proceedings and I accept that he genuinely considered he was entitled to proceed in the Claimant's absence. The Claimant was asking for the process to be

conducted in writing and he had provided a lengthy written response to Ms Surley's statement. Further Mr Kilty did not consider the documents requested to be relevant. He should have recognised that it was necessary to give the Claimant an opportunity to respond to the allegations as set out in the letter of 25 October, but I accept that his decision, albeit unreasonable, was not made as a deliberate attempt to prevent the Claimant from participating or pursuant to any pre-determined decision to remove him from the company.

Did summary dismissal fall within the range of reasonable responses?

75. It is of course an extremely serious matter to dismiss a solicitor, particularly one or 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 reason for dismissal

76. Returning to the reason for dismissal, given that there were reasonable grounds for the Respondent's conclusions and the process, looked at as a whole, was fair, there would need to be very compelling evidence of an ulterior motive to demonstrate that the Claimant's conduct was not the reason for his dismissal. The Claimant has not produced such evidence. As noted above, the existence of a financial advantage is not sufficient to show that it was the motivation. The email from the LAA was unexpected and the Respondent's response to it was reasonable. I accept that the Respondent has established that the reason for the Claimant's dismissal related to his conduct.

77. For the reasons given above the unfair dismissal complaint fails. It is therefore unnecessary to address the issues relevant to remedy.

Employment Judge Ferguson

2 January 2019