EMPLOYMENT TRIBUNALS

Claimant: Dr S Shaw

Respondent:

Dr Thakkar	R1
Dr Caswell	R2
Dr Naheed	R3
Dr Bargate	R4
Partnership known as "The Bourne End and Wooburn Green Medical Centre"	R5

Heard at: Watford Employment Tribunal (In public; In person)

On: **30, 31 October and 1 to 3 and 6 to 8 November 2023**

Before: Employment Judge Quill;
Ms J Hancock;
Mr S Bury

Appearances

For the claimant: Ms S Keogh, counsel
For the respondent: Ms D van den Berg, counsel

JUDGMENT

(1) Complaints based on the factual allegations at paragraph 5.1.9 of the list of issues are in time. However, those complaints that there was
   (i) discrimination within the meaning of section 18 of the Equality Act 2010 ("EQA"),
   (ii) direct discrimination because of sex
   (iii) victimisation
   fail and are dismissed.

(2) Complaints based on the factual allegations at paragraph 5.1.11 of the list of issues are in time. However, those complaints that there was
   (i) discrimination within the meaning of section 18 EQA,

(ii) direct discrimination because of sex,
(iii) victimisation
fail and are dismissed.

(3) Complaints based on the factual allegations at paragraph 5.1.8 and 5.1.10 of the list of issues were brought later than the period defined by section 123(1)(a) EQA, even taking account of section 123(3). We do, however, extend time in each case in accordance with section 123(1)(b).

(4) The complaints that there was
(i) Pregnancy and maternity discrimination (s18 EQA)
(ii) sex discrimination
(iii) victimisation
based on the factual allegations at paragraph 5.1.8 the list of issues all fail and are dismissed.

(5) The Claimant was expelled from the partnership within the meaning of the definition in section 46(6)(b). That expulsion was not pregnancy and maternity discrimination, sex discrimination or victimisation and the complaints based on paragraph 5.1.10 of the list of issues therefore all fail and are dismissed.

(6) All of the remaining complaints are out of time, and we do not extend time for them. They are therefore outside the jurisdiction of the Tribunal and are dismissed.

(7) In summary, none of the complaints has succeeded.

REASONS

Introduction

1. This was a claim brought by a doctor, a GP, against the former partners with whom she had been in business.

2. There was agreement between the parties that even after the preliminary hearing, there were 5 respondents in total, one of which was the partnership itself.

3. It is common ground that R1 was a partner at all relevant times, and that R2 and R3 were partners at some relevant times. There is a dispute about whether R4 was a partner or not (with the Claimant alleging that she was, and all the Respondents saying that she was not).

4. Judgment and reasons were given orally during the hearing and written reasons were requested. These are those written reasons.

The Hearing and the Evidence

5. This was an 8 day final hearing conducted entirely in person. We had a bundle of documents (paper and electronically) of 702 pages, and we admitted some, though not all, of the items from the Claimant's supplementary bundle.

6. On the first day of the hearing, we allowed some amendments to the claim (having decided that what the Claimant was requesting was more than an amendment to the list of issues based on the existing claim form).

7. The Claimant was the only witness on her side. She gave evidence on oath to confirm the accuracy of her written statement and to answer questions from the other side and the panel.

8. The Respondents had produced 6 written statements. Dr Uzma Naheed, ("R3"), did not attend for the reasons communicated to the Claimant and the Tribunal in writing. The Claimant did not necessarily agree with the contents of R3's statement, and invited us to prefer her own evidence where appropriate, but made clear that, in the circumstances, she was not inviting the Tribunal to draw adverse inferences from R3's failure to attend. We read the statement and have given it such weight as we saw fit.

9. The Respondents' other witnesses all gave evidence on oath to confirm the accuracy of their written statements and to answer questions from the other side and the panel. These were:

   9.1 Dr Rajesh Thakkar ("R1")

   9.2 Helen Radcliffe, registered nurse and was the practice manager

   9.3 Dr Alison de Souza, salaried GP

   9.4 Dr Victoria Bargate ("R4")

   9.5 Dr Elizabeth Casewell ("R2")

The Issues

10. There had been a preliminary hearing on 29 April 2022 [Bundle 76]. Following our decision on Day 1 about the amendment, for closing submissions, the parties produced a jointly agreed list which was:

4. **Section 26: Harassment related to sex**

   4.1. Did the respondents engage in unwanted conduct as follows:

      4.1.1. Dr Thakkar's comments on 26 February 2018 regarding the Claimant's pregnancy (para. 3 of the Grounds of Complaint ("GOC"));

4.1.2. Dr Bhargava's comments on 30 April 2018 about the Practice only employing males (para. 5 GOC);

4.1.3. Dr Holy's comments about the Claimant's pregnancy in or around June 2019 (para. 9 GOC);

4.1.4. Dr Holy's reference to the Claimant "deliberately" becoming pregnant on 3 September 2019 (para. 19 GOC)

4.1.5. Dr Thakkar's aggressive treatment of the Claimant in September and October 2019, which she says was because she had tried to insist upon fair treatment as a pregnant woman about to go on maternity leave (paras. 22-23 GOC).

4.2. Was the conduct related to the claimant's protected characteristic of sex?

4.3. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

4.4. If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

4.5. In considering whether the conduct had that effect, the tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

5. **Section 13: Direct discrimination because of sex**

5.1. Did the respondents subject the claimant to the following treatment falling within section 44 Equality Act, namely:

5.1.1. the attempted imposition of the maternity clause in the partnership agreement on or about 29 April 2018 (para. 4 GOC);

5.1.2. Dr Thakkar's repeated emphasis to the Claimant of the negative costs of maternity to the Practice on 8 May 2018 (para. 6 GOC);

5.1.3. Dr Thakkar's criticism of the Claimant for challenging his discriminatory practices on 8 November 2018 (para. 7 GOC);

5.1.4. the Practice's refusal to allow the Claimant to alter her work pattern to alleviate the symptoms of her pregnancy from June 2019 onwards (paras. 10-14 GOC);

5.1.5. Dr Holy's refusal between July and September 2019 to arrange an occupational health assessment (para. 18 GOC);

5.1.6. the Practice's continued refusal in September 2019 to allow her to undertake business management because of her pregnancy and Dr Holy's reference to the Claimant "deliberately" becoming pregnant (para. 19 GOC);

5.1.7. Dr Holy telling the Claimant in September 2019 to go off on maternity leave at 29 weeks, rather than allow her to have a suitable work pattern (para. 20 GOC);

5.1.8. the decision by the partners at the Practice to invoice for "Covid Admin", which excluded the Claimant because she was on maternity leave and unilaterally reduced the Claimant's earnings (para. 24 GOC);

5.1.9. the aggressive response by the partners at the Practice to the Claimant when she challenged their practice of invoicing for "Covid Admin", which included telling her that her maternity disentitled her from bringing such a challenge (paras. 27-28 GOC);

5.1.10. by expelling the Claimant as a partner (within the meaning of section 46(6)(b) Equality Act) (para. 29 GOC);

5.1.11. on or about 7 May 2021, removing the Claimant's name from the website, because she had raised issues about how she had been treated during her maternity leave (para. 30 GOR);

5.1.12. Any of the treatment in paragraphs 4.1.1 to 4.1.5 not found to have been harassment.

5.2. Did the respondents treat the claimant as alleged less favourably than they treated or would have treated the comparators? The claimant relies on the following comparators: a male partner in the same circumstances as her (currently unidentified) and/or hypothetical comparators.

5.3. If so, has the claimant proved primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

5.4. If so, what is the respondents' explanation? Do they prove a non-discriminatory reason for any proven treatment?

6. **Section 18: Direct discrimination because of pregnancy and maternity**

6.1. Has the claimant proved that the respondents subjected the claimant to the alleged unfavourable treatment (falling within section 44 Equality Act) set out in paragraphs 4.1.1 to 4.1.5 and 5.1.1 to 5.1.11 above?

6.2. If so, has the claimant proved primary facts from which the tribunal could properly and fairly conclude that the treatment was because of her pregnancy?

6.3. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

7. **Section 27: Victimisation**

7.1. The respondents accept that the claimant carried out the two protected acts she relies upon namely:

7.1.1. on 26 April 2018**,** explaining to the partners that it was her belief that the maternity clause that they wished to impose was discriminatory (para. 5 GOC); and

7.1.2. on 18 June 2019, sending an email stating that requiring her to maintain her work pattern was creating a risk to her during her pregnancy (para. 11 GOC).

7.2. Did the respondents carry out any of the treatment set out in paragraphs 4.1.1 to 4.1.5 and or 5.1.1 to 5.1.11 (insofar as any of it occurred after the 30 April 2018 and/or 18 June 2019) because the claimant had done either of the protected acts?

8. **Time/limitation issues**

8.1. The claim form was presented on 4 June 2021. Accordingly, and bearing in mind the effects of ACAS early conciliation (which commenced on 26 March 2021 and a certificate being issued on 7 May 2021), any act or omission which took place before 27 December 2020 is potentially out of time, so that the tribunal may not have jurisdiction.

8.2. Does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

8.3. Was any complaint presented within such other period as the employment tribunal considers just and equitable?

9. **Partnership issue**

9.1. Was Dr Bargate in partnership with the other respondents within the meaning of section 1 Partnership Act 1890?

9.2. In the alternative, was Dr Bargate an employee personally liable for discriminatory conduct under section 110 Equality Act 2010 as set out in paragraphs 5.1.8, 5.1.9 and 5.1.10 above, and for whom the other respondents were vicariously liable under section 109 Equality Act 2010?

10. **Remedies**

10.1. If the claimant succeeds, in whole or part, the tribunal will be concerned with issues of remedy.

10.2. There may fall to be considered a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings and the award of interest.

The Law

Equality Act 2010 ("EQA")

11. The burden of proof provisions are codified in s136 EQA and s136 is applicable to all of the contraventions of the Equality Act which are alleged in these proceedings.

> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

12. It is a two stage approach.

12.1 At the first stage, the Tribunal considers whether the Tribunal has found facts - having assessed the totality of the evidence presented by either side and drawn any appropriate factual inferences from that evidence - from which the Tribunal could potentially conclude - in the absence of an adequate explanation - that a contravention has occurred.

At this first stage it is not sufficient for the claimant to simply prove that the alleged treatment did occur. There has to be some evidential basis from which the Tribunal could reasonably infer that there was a contravention of the act. The Tribunal can and should look at all the relevant facts and circumstances when considering this part of the burden of proof test.

12.2 If the claimant succeeds at the first stage then that means the burden of proof is shifted to the respondent and the claim is to be upheld unless the respondent proves the contravention did not occur.

13. In Efobi v Royal Mail Neutral citation: [2021] UKSC 33, the Supreme Court made clear that the changes to the wording of the burden of proof provision in EQA

compared to the wording in earlier legislation do not represent a change in the law. Thus when assessing the evidence in a case and considering the burden of proof provisions, the Tribunal can have regard to the guidance given by the Court of Appeal in, for example, Igen v Wong Neutral citation: [2005] EWCA Civ 142 and Madarassy v Nomura International Neutral citation: [2007] EWCA Civ 33.

14. The burden of proof does not shift simply because, for example, the claimant proves that there was a difference in treatment (in comparison to someone whose relevant protected characteristics were different) and/or that there was unwanted conduct and/or that there was a protected act. Those things only indicate the possibility of, as the case may be, discrimination or harassment or victimisation. They are not sufficient in themselves to shift the burden of proof; something more is needed.

15. It does not necessarily have to be a great deal more and it could in an appropriate case be a non-response from a respondent or an evasive or untruthful answer from an important witness.

16. As per Essex County Council v Jarrett [2015] UKEAT 0045/15/0411, where there are multiple allegations, the Tribunal has to consider each allegation separately when determining whether the burden of proof is shifted in relation to each one. That does not mean that we must ignore the rest of the evidence when considering one particular allegation. It just means that we assess separately, for each allegation, whether the burden of proof shifts or not, taking into account all of the facts which we have found.

Time Limits for EQA complaints

17. In EQA, time limits are covered in s123, which states (in part):

> (1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it

18. In applying Section 123(3)(a) of EA 2010, the tribunal must have regard to the guidance in Commissioner of Police of the Metropolis v Hendricks ([2002] EWCA Civ 1686; [2003] ICR 530); Lyfar v Brighton and Hove University Hospitals Trust [2006] EWCA Civ 1548. Applying that guidance, the Court of Appeal has noted that in considering whether separate incidents form part of an act extending over a period, one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents: Aziz v FDA 2010 EWCA Civ 304. The tribunal must consider all relevant circumstances and decide whether there was an act extending over a period or else there was a succession of unconnected or isolated specific acts. If it is the latter, time runs from the date when each specific act was committed.

19. A crucial distinction is between – on the one hand – an invariable rule which will inevitably result in a discriminatory outcome each time and – on the other hand – a discretionary decision made under a policy.

20. In considering whether it is just and equitable to extend time the Tribunal should have regard to the fact that the time limits are relatively short. That being said, time limits are there for a reason and the default position is to enforce them unless there is a good reason to extend. That does not meant that the lack of a good reason for presenting the claim in time is fatal. On the contrary, the lack of a good reason for presenting the claim in time is just one of the factors which a tribunal can take into account, and it might possibly be outweighed by other factors.

21. The Tribunal has a broad discretion to extend time when there is a good reason for so doing. Parliament has chosen to give the Employment Tribunal the widest possible discretion. Unlike, say, the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it is wrong to interpret it as if it contains such a list.

22. The factors that may helpfully be considered include, but are not limited to:

    22.1 the length of, and the reasons for, the delay on the part of the claimant;

    22.2 the extent to which, because of the delay, the evidence is likely to be less cogent than if the action had been brought within the time limit specified in Section 123;

    22.3 any conduct of the respondent which might have contributed to any delays

23. In particular, it will usually be important for the Tribunal to pay attention to (and, where necessary, make specific findings about) “whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the

claim while matters were fresh)": Abertawe Bro Morgannwg University Local Health Board v Morgan Neutral Citation Number: [2018] EWCA Civ 640. This does not mean that there will be an extension of time unless the Respondent can prove that it was prejudiced. It just means that, when considering whether it would be just and equitable to extend time, it should not be decided that there would be prejudice to the Respondent unless there is a proper basis for that decision.

Definition of Direct Discrimination – section 13 EQA

24. Direct discrimination is defined in s.13 EQA.

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

25. There are two questions: whether the respondent has treated the claimant less favourably than it treated others ("the less favourable treatment question") and whether the respondent has done so because of the protected characteristic ("the reason why question").

26. For the less favourable treatment question, the comparison between the treatment of the claimant and the treatment of others can potentially require decisions to be made about whether another person is an actual comparator and/or the circumstances and attributes of a hypothetical comparator. However, the less favourable treatment question and the reason why question are intertwined. Sometimes an approach can be taken where the Tribunal deals with the reason why question first. If the Tribunal decides that the protected characteristic was not the reason, even if part, for the treatment complained of then it will necessarily follow that person whose circumstances are not materially different would have been treated the same and that might mean that in those circumstances there is no need to construct the hypothetical comparator.

27. When considering the "reason why question" for the treatment we have found to have occurred, we must analyse both the conscious and sub-conscious mental processes and motivations of the decision makers which led to the respondent's various acts, omissions and decisions.

Harassment – section 26 EQA

28. Harassment is defined in s.26 of the Act.

> (1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

29. It needs to be established on the balance of probabilities that the claimant has been subjected to unwanted conduct which had the prohibited purpose or effect. However, to succeed in a claim of harassment, it is not sufficient for a claimant to prove that the conduct was unwanted or that it had the purpose or effect described in s.26(1)(b). The conduct also has to be related to the particular characteristic.

30. Section 136 EQA applies and so the claimant does not necessarily need to prove on the balance of probabilities that the conduct was related to the protected characteristic. If the tribunal finds facts from which it could conclude that the conduct was related to the protected characteristic then the burden of proof shifts.

31. The use of the word "or" in s26(b) (twice) is important.

32. "Purpose" and "effect" are two different things, and must be considered separately. Where it was the wrongdoer's "purpose" to do the things listed in s26(b), then the complaint can succeed even if the conduct did not successfully have that effect. Correspondingly, where the conduct does have the effect described in s26(b), then the complaint can succeed even if the Respondent (or the person whose conduct it was) did not have the intention of causing that effect.

33. In Land Registry v Grant Neutral citation [2011] EWCA Civ 769, the Court of Appel said that when considering the effect of the unwanted conduct, and when analysing s.26(4), it is important not to cheapen the words used in s.26(1).

> Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The claimant was no doubt upset … but that is far from attracting the epithets required to constitute harassment. In my view, to describe this incident as the Tribunal did as subjecting the claimant to a "humiliating environment" when he heard of it some months later is a distortion of language which brings discrimination law into disrepute.

34. When assessing the effects of any one incident of several alleged acts of harassment then it is not sufficient really to consider each instant by itself. We obviously must consider each incident by itself, but, in addition, we must stand back and look at the impact of the alleged incidents as a whole.

Victimisation

35. Victimisation is defined in s.27 EQA.

> 27 Victimisation
>
> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act—
>
> (a) bringing proceedings under this Act;
>
> (b) giving evidence or information in connection with proceedings under this Act;
>
> (c) doing any other thing for the purposes of or in connection with this Act;
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.
>
> (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

36. There is an infringement if a claimant is subjected to a detriment and the claimant was subjected to that detriment because of a protected act.

37. The alleged victimiser's improper motivation could be conscious or it could be unconscious.

38. A person subjected to a detriment if they are placed at a disadvantage and there is no need for either claimant to prove that their treatment was less favourable than a comparator's treatment.

39. For the Claimant to succeed in a claim of victimisation, we must be satisfied (having taken into account the burden of proof provisions) that the claimant was subjected to the detriment because she did a protected act or because the employer believed that she had done or might do a protected act.

40. Where there is a detriment and a protected act, then those two things alone are not sufficient for the claimant to succeed. The Tribunal has to consider the reason for the treatment and decide what consciously or otherwise motivated the respondent. That requires identification of which decision makers made the relevant decisions as well as consideration of their mental processes.

41. The claimant does not have to demonstrate that the protected act was the only reason for the detriment. Furthermore, if the employer has more than one reason for subjecting the Claimant to the detriment, then the claimant does not have to establish that the protected act was the principal reason. The victimisation

complaint can succeed provided the protected act has a significant influence on the decision making. An influence can be significant even if it was not of huge importance to the decision maker. A significant influence is one which is more than trivial.

42. A victimisation complaint might fail where the reason for the detriment was not a protected act itself but something else which (while being in some way connected to the protected act) could properly be treated as separate. See Martin v Devonshires Solicitors [2010] UKEAT 0086/10.

43. S.136 applies and so the initial burden is on the claimant to demonstrate that there are facts from which the Tribunal might conclude that the detriment was because of the protected act.

44. Section 25 EQA defines Pregnancy and maternity discrimination – for the purposes of Part 5 – as discrimination within section 18.

> 18 Pregnancy and maternity discrimination: work cases
>
> (1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.
>
> (2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably—
>
> (a) because of the pregnancy, or
>
> (b) because of illness suffered by her as a result of it.
>
> .
>
> (4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.
>
> (5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (eve if the implementation is not until after the end of that period).

45. Subsection 25(6) defines the protected period, and in this case the parties agree that it was from May 2019 to November 2020.

46. Subsection 26(7) disapplies section 13 in certain circumstances.

47. Section 213 EQA defines the references to maternity leave in section 18. It does so by cross-referencing sections 71, 72 and 73 of the Employment Rights Act 1996. Those sections refer to the rights which employees, within the ERA definition of employee have. Neither side has suggested that we should decide that “maternity leave” - as mentioned in the EQA - should not apply to a partner exercising a maternity leave clause in the partnership agreement.

48. In any event, if that definition of "maternity leave" did not apply to the Claimant then section 18(7) would not disapply section 13 and we would have to analyse the treatment as alleged direct discrimination because of sex.

49. Section 18 uses the word "unfavourably". That is different to "less favourable". There is no requirement in section 18 for an actual or hypothetical comparator.

50. Furthermore, for those claims which are brought as direct sex discrimination (section 13 EQA), based on a woman's pregnancy or maternity leave (so, those claims not within section 18 and therefore not excluded by section 18(3)), we must take account of Commissioner of the City of London Police v Geldart 2021 ICR 1329. In that case, it was held that a female police officer claiming direct sex discrimination under s13 EQA – the claim being about refusal to pay a London living allowance during her maternity leave, but brought by a police officer, rather than an "employee" within the ERA definition - did not have to show that a man would have been more favourably treated. The EAT held that the principle set in Webb v EMO Air Cargo (UK) Ltd Webb v EMO Air Cargo (UK) Ltd 1994 ICR 770, still applied to direct sex discrimination complaints (that is, a complaint of discrimination withing the definition in section 13) notwithstanding the introduction of section 18 EQA, and therefore no comparator was required.

51. The fact that no comparator is required does not only mean that the Claimant does not have to show how a comparator would have been treated, it also means that it will not necessarily – in itself – be a defence for the Respondent to show that a man (or a woman who was neither pregnant nor on maternity leave) would have been treated in the same way had they been absent.

52. The fact that no comparator is required does not mean that the Tribunal is forbidden from considering how other people have been treated when deciding if the Claimant has been treated unfavourably.

53. The word "unfavourably" not specifically defined, and so the Tribunal will interpret it by giving it its ordinary meaning, as well as considering, EHRC Code of Practice and case law. If the treatment has put the Claimant at a disadvantage then she will have been treated unfavourably. The disadvantage might be one which is obvious as a matter of common sense, such as expulsion or self-evidently abusive behaviour. However, less obvious examples than these can still amount to treating someone unfavourably. If the Tribunal decides that the treatment was unfavourable, then the fact that the Respondent had thought it was acting in the best interests of the Claimant would be no defence.

54. The phrase "because of" demonstrates the reason to consider why the unfavourable treatment occurred. There might be more than one link in the chain. At para 8.22, the EHRC code gives a non-exhaustive list of motivations that could potentially fall within the prohibitions in section 18.

• the fact that, because of her pregnancy, the woman will be temporarily unable to do the job for which she is specifically employed whether permanently or on a fixed-term contract;

• the pregnant woman is temporarily unable to work because to do so would be a breach of health and safety regulations;

• the costs to the business of covering her work;

• any absence due to pregnancy related illness;

55. At para 8.23, the code lists some examples of the type of conduct that might amount to unfavourable treatment if "because of" the things listed in sections 18(2), (3) or (4).

• failure to consult a woman on maternity leave about changes to her work or about possible redundancy;

• assuming that a woman's work will become less important to her after childbirth and giving her less responsible or less interesting work as a result;

• depriving a woman of her right to an annual assessment of her performance because she was on maternity leave;

56. In relation to things such as failure to consult, or failure to carry out a performance assessment, a simple but for analysis is not sufficient. It is not necessarily enough to show that, but for the absence, the treatment would have been different. This is a point discussed by Court of Appeal in paragraph 61 of Geldart, and which cross-references Amnesty International v Ahmed [2009] UKEAT 0447/08

57. An illustration of the type of analysis which is required is found in Blundell v St Andrew's Catholic Primary School Governors [2007] I.R.L.R. 652

58. In that case, the reason that the teacher was not asked about her preferences for which class she would teach in a particular academic year was that she was absent on maternity leave. The EAT substituted its own decision for that of ET and decided that this was a contravention of the legislation. The fact that a teacher absent for a different reason at the same point in time would also not have been asked about their preferences did not prevent the treatment being discriminatory. Likewise, the fact that, if asked for her views, it would not necessarily have made any difference to the outcome, did not prevent a finding of discrimination.

59. However, on the facts, the lack of consultation did not merely meet the "but for" test. The Tribunal had actually concluded that the reason for the lack of consultation with the Claimant was the Claimant's absence itself.

60. This contrasts, however, to Johal v Commission for Equality and Human Rights [2010] 7 WLUK 42, which provides another illustration of the type of analysis which is required.

61. There had been a failure to notify the Claimant, during maternity leave, of a potential new job that she might have been interested in. The Claimant's manager had wanted the Claimant to be kept informed of such things, but, due to administrative error, the Respondent had failed to do so. The Respondent had kept at least one other employee, who was also on maternity leave, updated with lists of vacancies. On the facts, but for the Claimant's absence, she would have been made aware of the vacancies by communications from her employer. However, the EAT agreed with the Tribunal that it had been required as per Shamoon v Chief Constable of the Royal Ulster Constabulary (HL) [2003] ICR 337 to ask 'why was the Claimant treated in the way complained of?' The burden of proof provisions in section 136 are relevant. However, where the Tribunal was satisfied that the reason for the treatment was administrative error, not maternity absence, then the claim failed even though the treatment would not have occurred but for the absence.

62. There is also a detailed discussion of the "reason why" approach in paragraphs 61 to 65 of Geldart. The Claimant did not, in fact, receive a particular payment during her absence. Had she not been absent, she would have received the payment. However, the reason why she did not receive the payment was the decision-maker's genuine but mistaken interpretation of the rules for assessing whether she was entitled to the payment or not. The courts' decisions were that, in fact, she was entitled to the money, but, on analysing the reason for the non-payment of it, the direct discrimination claim failed.

63. As shown by Blundell, the fact that a claimant had no formal right to be consulted over a particular matter would not be fatal to a claim that, on the facts, the lack of consultation was discriminatory. However, the lack of a formal right is necessarily relevant to the issues of (i) has the Claimant been treated unfavourably, and (ii), if so, what were the reasons for that treatment. For example, in Smith-Twigger v Abbey Protection Group Ltd UKEAT/391/13, the employer's failure to proactively notify the employee of matters that she might have been interested in, and that she would have known about had she been attending work, was not discriminatory given that there would have been no obligation to inform her of the matters in question, or to take her views into account, even had she been at work rather than on maternity leave.

Contraventions of EQA

64. In so far as relevant to the claims before us, ETs have the jurisdiction conferred by section 120.

> (1) An employment tribunal has, subject to section 121, jurisdiction to determine a complaint
>
> relating to—
>
> (a) a contravention of Part 5 (work);

(b) a contravention of section 108, 111 or 112 that relates to Part 5

65. Part 5 includes sections 44 to 46.

44 Partnerships

(1) A firm or proposed firm must not discriminate against a person—

(a) in the arrangements it makes for deciding to whom to offer a position as a partner;

(b) as to the terms on which it offers the person a position as a partner;

(c) by not offering the person a position as a partner.

(2) A firm (A) must not discriminate against a partner (B)—

(a) as to the terms on which B is a partner;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by expelling B;

(d) by subjecting B to any other detriment.

(3) A firm must not, in relation to a position as a partner, harass—

(a) a partner;

(b) a person who has applied for the position.

(4) A proposed firm must not, in relation to a position as a partner, harass a person who has applied for the position.

(5) A firm or proposed firm must not victimise a person—

(a) in the arrangements it makes for deciding to whom to offer a position as a partner;

(b) as to the terms on which it offers the person a position as a partner;

(c) by not offering the person a position as a partner.

(6) A firm (A) must not victimise a partner (B)—

(a) as to the terms on which B is a partner;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by expelling B;

(d) by subjecting B to any other detriment.

46 Interpretation

(1) This section applies for the purposes of sections 44 and 45.

(2) “Partnership” and “firm” have the same meaning as in the Partnership Act 1890.

(3) “Proposed firm” means persons proposing to form themselves into a partnership.

(6) A reference to expelling a partner of a firm or a member of an LLP includes a reference to the termination of the person's position as such—

(b) by an act of the person (including giving notice) in circumstances such that the person is entitled, because of the conduct of other partners or members, to terminate the position without notice;

66. In so far as is relevant, sections 109 and 110 state:

109 Liability of employers and principals

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

110 Liability of employees and agents

(1) A person (A) contravenes this section if—

(a) A is an employee or agent,

(b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and

(c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).

67. It has not been argued that section 109(4) applies. We are asked to decide that Dr Bargate is a partner, or that, in the alternative, if she is an employee, that her employer is liable as a result of sections 109 and 110.

68. In relation to the alleged expulsion from the partnership, the words of the statute speak for themselves if we decide that the Claimant had the right to treat herself as expelled, and resigned from the partnership for that reason. The fact that she served notice, rather than resigning with immediate effect, does not prevent her relying on section 46(6) to allege expulsion.

69. If we do decide that there was a constructive expulsion, then the reasons for that expulsion are firm's reasons for the conduct that led to it. In particular, where the Tribunal has decided that there was any contravention of EQA, the correct question as to whether the constructive expulsion is also a contravention of section 44 is to analyse whether the discrimination or harassment or victimisation sufficiently influenced the overall repudiatory breach.

70. In deciding whether R4 is a partner or not, we have to have regard to the Partnership Act 1890.

1. Definition of partnership.

(1) Partnership is the relation which subsists between persons carrying on a business in common with a view of profit.

2. Rules for determining existence of partnership.

In determining whether a partnership does or does not exist, regard shall be had to the following rules:

(1) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.

(2) The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.

(3) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular—

(a) The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such:

(b) A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such:

(c) A person being the widow [, widower, surviving civil partner][1] or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such:

(d) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such.

Provided that the contract is in writing, and signed by or on behalf of all the parties thereto:

(e) A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the goodwill of the business is not by reason only of such receipt a partner in the business or liable as such.

Facts

71. The facts that we have found are as follows. Where ancillary issues have been raised which are said to be relevant to credibility, or as background information, we have only referred to those issues to the extent that we think necessary. More generally, we have considered the evidence as a whole, but we only need set of those findings of fact which are necessary to explain the decisions we have made on each of the complaints.

72. Since several of the complaints do, in fact, turn on disputed versions of particular conversations which were not contemporaneously the subject of a written record, it was reasonable – perhaps even inevitable – that satellite issues would be raised, with a view to seeking to persuade us that one or more witnesses was more/less credible than another. Our overall decision in relation to credibility is that we do not doubt the credibility of any of the witnesses; we are satisfied that each of the witnesses who attended the hearing did their honest best to answer questions truthfully and to the best of their ability. We are satisfied that, when a witness stated that they could not remember something, they were telling us the truth and that they genuinely could not remember.

73. Where witnesses have given answers orally which differ from their written statement (in particular, where they have stated in oral evidence that they cannot recall a particular incident, despite having purported to give some account of it in their written statement) we have accepted the accuracy of their oral account and, in particular, have accepted the assertion that they could not accurately recall. Naturally, where any witness gives oral evidence which differs from their written statement, then that fact is relevant to credibility; it has the potential to lead to a decision that we disbelieve that witness on some other point (for example, where their evidence conflicts with that of a witness whose entire oral evidence has remained consistent with what they had written). In this case, however, having considered whether we should draw any such inferences, we have decided that we will not do so, and our assessment of credibility is that mentioned in the previous paragraph.

74. The claimant has made comments about things that happened while she was a trainee GP, working for R5, prior to applying partnership in 2018. These are matters mentioned as background information, and from which we are invited to infer discriminatory motives for the actions which are the subject of the complaints in later years. Some of these are events from such a long period of time ago that we do not think that we can usefully make any findings about them.

75. For example, the Claimant alleges bad behaviour by R1 – Dr Thakkar. Dr Thakkar's account which we accept, was that an while he might well have played some so-called jokes on the claimant such as putting so-called "joke" entries in her appointment diary, he did similar things to other people and likewise other people did similar things to him. We could not safely draw any conclusions that he acted differently to the Claimant, in that period, than he would have acted had the Claimant been a different sex or had the Claimant not been a mother.

76. It is also too long ago for us to safely make any decision that the firm or Dr Thakkar decided to reject applications for jobs or for partner status because of pregnancy or maternity. Although raised as a background matter, rather than a direct complaint, it has been raised several years after the events in question and long

after, for example, Dr Bailey (a female GP who had been senior partner at the time of some of these alleged events) had left the practice.

77. In terms of the COC diet book, we are not satisfied that Dr Thakkar was influenced by the claimant's sex when he suggested that she read it. Dr Thakkar accepts that there are comments in the book that are insulting to women. However, the extracts included in the bundle also show passages that are insulting to men. It seems that the leaflet was making some attempt at humour and the type of joke that is intended is hinted at by the pseudonym "A Bigot". It seems to us that rather than seeking to proclaim himself as a (proud) bigot, he is implying that these were the things that a bigot would say. The comments made in the COC diet book, or the twitter account, or the comments he made to the Claimant about those things, do not persuade us that, when analysing the complaints before us, we should start from the basis that Dr Thakkar is inherently more likely to treat women worse than men, or inherently more likely to be insulting to women than to men.

78. More generally, in relation to things which the Claimant says she witnessed or experienced prior to 2018 do not seem to us to be sufficiently relevant to explain the motivations for any of the later events about which we need to make decisions.

R1's alleged comments on 26 February 2018

79. The Claimant, joined the Respondents' practice in 2015 as a GP trainee and completed post-graduate learning/training there in 2017.

80. There came a time when the practice wanted to have one or more new partners. The claimant was highly regarded by the business and the process of considering whether or not she would become a new partner commenced. In around February 2018, the claimant was to be interviewed by some of the current partners.

81. The partners who were to interview the Claimant were: R1 (male), Dr Pavan Bhargava (male), and Dr Sarah Buxton (female).

82. The Claimant had known Dr Thakkar since 2015. She alleges that immediately before the interview, when only the two of them were present, he said

> "off the record right, because its illegal and all that, you are not going to have another baby, are you? Because that would not be cool for the business."

83. In relation to these 26 February 2018 alleged comments, we have not been persuaded, on the balance of probabilities, that Dr Thakkar made a comment along those lines.

84. Over the years, R5 has had a significant number of female partners. At the time the Claimant applied, the senior partner, Dr Bailey was a woman.

85. The claimant did not make any contemporaneous written complaint about that remark. We do accept that it would be consistent with the Claimant's case for her to have refrained from making a formal objection/complaint at the time because she was seeking to become a partner. Furthermore, it would be consistent with the Claimant's case that, once she had in fact become a partner at some months later, she might have decided that there was not a good enough reason to "rock the boat" by formally complaining, in June or July 2018, or soon afterwards, about a remark made some months earlier. A person in that situation might have regarded the remark as best being left in the past. Furthermore, we accept the Claimant's account that she was not actually planning to become pregnant, and so it would be consistent with her case that she saw no reason to – for example – seek to refute any suggestion that there would be anything wrong with her becoming pregnant. We take into account that people do not always make written complaints after discrimination or harassment, and the absence of a contemporaneous written complaint does not prove it did not happen, or mean that a tribunal cannot find, on the balance of probabilities, that it happened.

86. However, in this case, we taken into account that, by the following year, after the claimant did become pregnant and was raising issues with Dr Holy about requests for the business to make adjustments, and/or to carry out occupational health assessments, and other things which she says (in these tribunal proceedings) the business was resistant to, then by that stage, any reasons she had previously had for not referring, in writing, to the alleged 26 February 2018 remark had fallen away. She sent several emails to Dr Holy, but, on her account (witness statement paragraph 102), she referred to the remark orally on 3 September 2019, but did not put it in writing, at the time. Having heard all of the evidence, and seen all of the witnesses answer questions during the hearing, our finding is that – had it actually been the Claimant's opinion at the time, in Summer 2019 – that R1 had made the comments (the previous year) that she now recollects him making, then it is far more likely than not that the Claimant would have made some reference in writing to the fact that one of the partners had made such an obviously discriminatory remark shortly prior to her becoming a partner.

86.1 The Claimant is an intelligent and articulate individual. Quite correctly and reasonably, she is willing to stand up for her rights, and for what she perceives to be her rights (and also the rights of others). Raising an allegedly discriminatory remark (about pregnancy) at the time that she was seeking to persuade the respondents to agree to certain things while she was pregnant would have been a perfectly appropriate thing for her to do so at that stage and we do not think it likely that she would have omitted to do so. Furthermore, once, on her case, she had recalled the remark in September 2019 and mentioned it to Dr Holy, we do not think it likely that she would have omitted to put it in writing after Dr Holy had, on her case, implied that R1 might have been making a reasonable point.

86.2 Furthermore there were several disagreements between the Claimant and Dr Thakkar over the later years, as discussed below, including where Dr Thakkar has accused her of bullying him. The Claimant denies behaving badly to R1, and indeed, relies on his bullying accusations in support of her complaints of discrimination. She denied the allegations at the time, including in writing. It would have been natural, in our opinion, for the Claimant to have commented in writing at the time that – on her case, far from she bullying him, he had "warned her" (as she has described it in this litigation) against becoming pregnant.

86.3 Since the claimant claims, in this litigation, that she has always remembered the alleged comment from February 2018 clearly (and since she claims to have recalled it, and mentioned it orally, on 3 September 2019), the explanation for her not putting it in writing (any earlier than her complaints to regulators in January 2021 and later) cannot be that she had forgotten about the remark or (in our judgment) that she failed to see the significance of it. She alleges, for example, that it played on her mind when she first found out she was pregnant.

86.4 Since the Claimant did raise other allegations about R1 at the time (for example, accusing him of wrongdoing in relation to being paid by cheque; accusing him of putting a patient at risk and of breaching confidentiality), the fact that the February 2018 remark was not referenced in writing cannot be because of a reluctance to criticise R1 before other people.

87. For these reasons, our finding is that the reason that the Claimant did not make any written complaint about the alleged February 2018 remark in 2019 is that, at the time, in 2019, she did not remember the alleged words in the same way that she now, in 2023, (and in 2021 when the claim was submitted) remembers them.

88. We do not suggest that the Claimant has deliberately been dishonest in her account on this issue. On the contrary, we accept that she has now genuinely come to recall the incident in the way she has described it more recently. However, as against the Claimant's 2023 recollection (and 2021 recollection), we consider that it would have been an odd thing for Dr Thakkar to say, given that, on the Claimant's own account, he was aware – and was acknowledging to her – that such remarks were a breach of the law, and given that there were several female partners who (i) were potentially going to have a vote on the Claimant's entry and (ii) to whom a complaint about R1's remarks could potentially be made. On balance of probabilities, given the lack of contemporaneous evidence, we are not persuaded that the comment was made.

<u>The terms of the partnership agreement: as offered, and as agreed</u>

89. In due course, in around April 2018, the Claimant was offered partnership and was sent a copy of the written agreement which, at the time, governed the existing

partnership arrangements. This document therefore represented the terms on which the Claimant was being offered partnership; the agreement wording was not specifically created in order to make an offer to the Claimant.

90. The tribunal panel does not have an actual copy of the agreement that was sent to the claimant in 2018, because neither side has been able to provide it. We do have the Claimant's email on [Bundle 327] sent on 26 April 2018 in which she made detailed comments about one of the clauses in the document.

91. It is clear that the email alleges the draft agreement was discriminatory because of sex, and that it would discriminate against a partner who became pregnant and wished to take maternity leave. It is accepted by the Respondent that the Claimant's email of 26 April 2018 was a protected act (as defined by section 27 EQA).

92. Relevant extracts from the email, and the "background" below the signature line include:

> The real bones of it though, are that it's discriminatory and that shouldn't be happening in 2018.
>
> The current maternity clause is written to effectively protect the Partnership should someone take maternity leave, but it heavily financially penalises the individual Partner. …
>
> It is essential that we collaborate to create a fair and equitable deal for maternity - which works for the Partner and the Partnership and embraces the changes occurring in the medical workforce …
>
> The clause has two major issues - which could be summarised as "not enough time and too much money" …
>
> It is brutally short at only 26 weeks maternity leave allowance. …
>
> … What are the real terms costs a Partner going on maternity leave would face? The current maternity clause makes any locum costs beyond those reimbursed by NHS England the sole burden of the Partner taking maternity.
>
> The argument has always been "but the Partner still gets their drawings and therefore they should pay the locum." However, this may of been fine in the era where Partners earned significantly more than locums, but times have changed and locum sessional rates outpace a GP Partners ability to pay. It is no longer feasible for an individual to solely fund a locum replacement. Another way of funding alternate doctor cover is needed in the current climate.

93. The email made clear that "too much money" referred to what the partner (who went on maternity leave) would be required to cover personally, instead of being treated as an overall cost to the business before drawings were calculated.

94. It is common ground between the parties that the draft sent to the Claimant proposed that the authorised absence from maternity would be up to 26 weeks.

The claimant wanted that clause to be amended so that the authorised absence would be up to 52 weeks. That was ultimately agreed in May 2018.

95. It has been (at least tentatively) suggested during the course of the hearing, on behalf of the claimant that the previously existing clause, as per the proposed agreement initially sent to the Claimant (which we do not have) suggested - either expressly or ambiguously – that, for the first 18 weeks of maternity absence, the locum costs would be borne entirely by the partnership.

96. We reject that argument.

96.1 On 26 April 2018 [Bundle 328], the claimant stated that the version of maternity clause sent to her made any locum costs beyond those reimbursed by NHS England, the sole burden of the partner taking the maternity.

96.2 Furthermore, as per the claimant's own account, when the issue had come up around 2016 in relation to a previous partner, the decision had been that the partnership would not bear the full costs of locum cover for the first 18 weeks of maternity leave.

96.3 The notes from the meetings relating to that 2016 decision, show there had been a question asked by the then practice manager about whether or not a claim on the sickness insurance policy could be used to cover the first 18 weeks of maternity absence. Although there is no answer expressly recorded in those notes, it seems safe to infer, and we do infer, that it was discovered or decided that the answer was “no”, the sickness absence insurance policy did not cover maternity absence.

96.4 The Claimant’s witness statement (paragraph 12) shows that she knew at the time, in 2016, that the partnership had decided that the first 18 weeks would not be covered, and that, the partners had decided that that was how their partnership agreement should be interpreted.

96.5 The Claimant was not of the opinion, in 2018, that the clause sent to her stated that the costs of cover for the first 18 weeks of maternity absence would be paid for by the partnership as a whole (rather than the individual taking the leave) and she was not of the opinion that this was a cost covered by sickness absence insurance.

97. The only version of the partnership agreement that we have is [Bundle 403 to 462].

97.1 Other than for clause 23.6, which was amended as a result of the Claimant’s requests, this is the best evidence of what the version of the agreement sent to the Claimant in around May 2018 actually said.

97.2 It is formally stated to have a commencement date of 1 April 2019. There were some changes in the partnership membership between June/July 2018 when the Claimant became a member of the partnership, and the date when this new written agreement was produced. There were some further changes to the membership before the Claimant's exit from the partnership too. (And there is a dispute in relation to R4's membership). There were also changes from time to Schedule 1 (which set out division of profits between the members). However, it is essentially common ground that the clauses within this written document were the written terms of the agreement for the entire duration of the Claimant's time as a partner.

97.3 Clause 23 deals with absence. Absence as provided for in that clause is "Authorised Leave", otherwise it is "Unauthorised Leave". An "Absent Partner" on "Authorised Leave" continued to receive their share of the profits.

97.4 Clause 23.1 set out general principles for how the costs of "Authorised Leave" would be allocated, including 23.1.3 which stated that the cost of providing locum cover would be as set out in the document (which, in effect, was the remainder of Clause 23). There is an obligation on the whole firm to try to recover - from other sources – the costs of locum replacement cover, before relying on the obligations (set out in Clause 23) of the Absent Partner to make good any shortfall.

97.5 Clause 23.1.5 authorised non-absent partners to act as locums. In other words, rather than hire an outsider (or pay for additional time to an existing employee), the agreement recognised that one of the other partners could provide cover for some or all of the shifts of the Absent Partner, and this would be on the basis that they would be paid as an individual for that from R5's funds; that is, it would not be treated as a saving of expenditure and benefit the general funds of the partnership (or profit shares of all partners).

97.6 Sickness Absence was "Authorised Leave", if in accordance with clause 23.5. That clause stated and that the first 28 days (in any rolling 12 month period) would be paid at the firm's expense (pro rata for part-time partners).

97.7 There is no specific reference to the partners agreeing jointly that the firm would purchase insurance cover in the name of the firm. As the Claimant pointed out, in closing submissions, there is an individual obligation on each partner, clause 19.34, to have suitable locum cover in place. The drafter of the agreement possibly had in mind that such a clause should be included to reduce the risk to the other partners that the Absent Partner would not be able to cover the liability for locum cover. However, clause 19.34, and the agreement as a whole, are silent was to what was meant by a "suitable" insurance policy.

97.8 The amended version of clause 23.6, as shown on page 438 of the bundle is headed maternity leave. The first subparagraph confirmed that 52 weeks would be authorised absence, and that the partner who was taking the maternity leave had the right to decide which portions of those 52 weeks would be for before and after confinement. The second subparagraph, said that the first eight weeks of locum cover would be at the expense of the partnership and the remainder were be borne by the absent partner (subject to the general obligations in clause 23.1.7, and the specific obligations in clause 23.6.2, that the firm would do its best to recover the costs from other sources, and in particular from NHS England.)

98. There was no direct evidence before us about what, if any, joint policy had been purchased to cover the costs of locums. In any case, there was nothing in the only version of the written partnership agreement that we have to say that the firm would purchase cover (as a general partnership expense) for locum cover for the first 18 weeks of absence. Furthermore during the course of closing submissions, and on instructions from the claimant, it was accepted on the Claimant's behalf, that insurance cover for the costs of maternity leave would not have been a practical option.

99. Thus, our finding is:

99.1 That both the version sent to the Claimant in May 2018, and the version eventually agreed by her, included that locum cover for sickness absence would be a partnership expense for 28 days (pro rata), and not 18 weeks, or any other period, and would be at the expense of the partner thereafter.

99.2 The version sent to the Claimant in May 2018 made no provision for locum cover for part of maternity leave to be paid by the partnership (where the cost was not met by NHS England, or other source).

99.3 The version eventually agreed by her, included that locum cover for maternity leave would be a partnership expense for 8, and not 18 weeks, or any other period, and would be at the expense of the partner thereafter

100. The agreement in the bundle stated that, as of 1 April 2019, the five partners, and their respective shares were:

Dr Shareen Hallas (female):	4/27
R1:	6/27
Dr Kristian Holy (male):	7/27
Dr Pavan Bhargava (male):	6/27
The Claimant:	4/27

101. As mentioned above, although not signed and executed, the Claimant had become partner in June or July 2018. When the membership of the partnership changed, a new written agreement was not necessarily created promptly. Furthermore, we accept the Claimant's oral evidence that from time to time there were agreed changes to the partnership shares, which were recorded in separate documents (not in the bundle), without a new agreement being formally executed.

102. The nature of the partnership agreement was that the partners would each agree how many clinical sessions they each would offer. This number of sessions was a key factor in what "Shares Of Profits And Losses" they would have as per clause 17 and Schedule 1. At the time of the written agreement, the Claimant was offering 4 clinical sessions and her share was 4/27.

103. More generally, as a result of its arrangements with funding bodies, R5 had obligations to provide certain numbers of clinical sessions and other services and was paid the agreed amounts. The partners (other than when acting as locum, as mentioned above) did not specifically get paid for their own clinical sessions, but any clinical sessions that a partner had agreed to do, and did not do, had to be covered by other means, and therefore at a cost to R5.

104. In June 2020, [Bundle 464 to 463], the Claimant took action to seek to create a new written agreement which would reflect the changes in the partnership membership. R2 and R3 had become partners by now, and there is a dispute about whether R4 had also joined by then (and about whether she ever became partner). R2 had previously obtained some advice on the existing written version, which she had shared, and the Claimant and R1, R2, R3, R4 were all included, in June, in the email trail. [Bundle 463 to 469].

105. An updated draft was seemingly provided by the solicitors. [Bundle 376-377]. We only have the emails discussing it and not the draft itself. As per the claimant's email of 12 October 2020, on page 376 of the bundle, the claimant wanted the maternity clause as per the written 2019 agreement (that is, the one she had negotiated) to be retained. She did not want it to be revised (as per the solicitors' draft or at all). We do not have a copy of the proposed revisions but the claimant was satisfied at that time that the clause should continue to be the one which she had negotiated and which the partners had agreed in May 2018.

106. Furthermore as the correspondence shows, R3 was alert to the fact that the insurance issue was not dealt with in the draft. R3 said that she believed that some sickness absence insurance (for the cost of locums) was purchased by the firm, but the written agreement was silent on that point. The Claimant did not claim, at the time, that the written agreement already provided that sickness absence of partners was a partnership expense for 18 weeks.

Dr Holy's reply (29 April 2018) to the Claimant's 26 April 2018 email

107. Following the Claimant's 26 April 2018 email, Dr Kristian Holy sent a response to the claimant copied to the practice manager and the other partners on 29 April late in the evening around 11 o'clock. [Bundle 325].

107.1 He thanked the claimant for the proposal and the fact that a lot of time and effort had been put into it. He also thanked her for her for the various suggestion she had made to solve the issue that she had identified. He said her approach reflected very positively on her in many ways as she had attempted to find solutions rather than just putting the ball in the partners' court.

107.2 As part of his lengthy reply (and attachment), he stated that he did not fully agree with the claimant's calculations. His suggestion was that for a 6 sessions a week partner, they would not have a cost in the first 26 weeks of maternity leave, although potentially they would have a cost the second half of a 52 week absence. He accepted there would be costs for partners who were 7 or 8 sessions per week partners.

107.3 He mentioned what he thought the costs would be for the other partners if they agreed to fully absorb the entirety of the costs of locum cover for maternity absence as a partnership expense.

107.4 In the fourth paragraph, he wrote:

> The issue to me however is summarised by the issue of at what cost. When it boils down to it what you are essentially, asking for is the burden of liability for an individual's maternity leave to move further toward the practice and away from the individual partner. This will be a· financial cost to the practice that will be offset by the services offered both before and after any pregnancy by women who would otherwise not have joined. The question then is how much do you value this, how much are you willing to pay for this.

107.5 Our finding is that in this passage, Dr Holy was clearly intending to acknowledge that he thought it was a benefit (or a "pro" in favour of the claimant's argument) that a revision, as suggested by the Claimant, might potentially attract women who might otherwise not have joined the partnership. He put in that in the "plus" column. He also made some counterarguments against the amendment, but a desire to avoid attracting female partners was not one of his counterarguments. He was pointing out that the clause would come at a cost, and therefore a decision was needed about whether the benefits of the clause were sufficient to justify that cost. (Both the Claimant and he did calculations about the cost; regardless of the fact that their calculations came out as different to each other, the Claimant's own arguments acknowledged that cost would be a factor in the decision).

107.6 Dr Holy commented on some of the Claimant's specific proposals such as for buffer funds and a cooperative approach. It was not unreasonable or inappropriate for him to make point by point replies. As he had said at the start of the email, the Claimant had not been obliged to suggest various options, but she had taken the time and effort to do so, and Dr Holy did not simply wave them away, but gave his considered response to each one.

107.7 Dr Holy said that he agreed with her, in principle, but then went on to say that in practice, did not agree to the claimant's specific suggestion. However, he ended his email by saying that he was hopeful that she would join surgery that she would be a massive asset and that he was confident that some acceptable middle ground would be found. That did in fact turn out to be the case.

The 30 April 2018 meeting

108. On Monday 30 April 2018, there was a meeting of all the partners, to which the Claimant made a presentation in support of her argument that there should be a variation of the maternity clause in the partnership agreement (such that she could agree to the terms, and become a member of the partnership).

109. On balance of probabilities, there was some a comment of some sort from Dr Bhargava about employing males. From the context, based on how the claimant describes the interaction, it does not seem likely he used the exact words that are alleged. (In Grounds of Claim, it is alleged that he said practice "will only employ males" and in the Claimant's witness statement the words in quotes are, "if that was the case, then we will only employ males"). The topic of the discussion was about partnership rather than employees.

110. In any event, in context even on the Claimant's own account, he was not stating a definite intention that the business would only employ male doctors in the future (or only take on male partners in the future, given that partnership was the topic of the discussion, not employees). Rather it seems that Dr Bhargava disagreed with something the claimant had said in her analysis and suggested that if that were the case (and if the claimant's proposals were adopted, presumably), then there be an incentive to be only employ males in the future (or to only have male partners, perhaps, though those are not the alleged words).

111. Furthermore, on the Claimant's own account, regardless of his exact words the other partners did not express agreement with him, and two of them objected to what he (is alleged to have) said.

112. The objections raised by the other partners (on the Claimant's account) seems to have been the end of the matter. In any event, the claimant was taken on as a partner, and R5 did not operate a ban on either female partners (R2 and R3 later joined; the Claimant alleges R4 did too) or female salaried GPs.

May 2018: Discussion the Claimant and R1

113. We accept the claimant's account that there was a discussion around 8 May 2018 between her and Dr Thakkar. We do not need to decide if it was on exactly 8 May. R1 does not recall it, but we accept they discussed the partnership agreement, and the Claimant's amendment request.

114. The discussion took place when the Claimant chose to visit R1 in his office; he did not call her to see him or start the discussion. In the course of that discussion, the claimant put forward again her arguments, in a similar way to how she had presented her case on 30 April about why her proposed revisions were reasonable.

115. On the Claimant's own account, Dr Thakkar said that he personally was in favour of her arguments, but that he did not think others would be, and he sought to persuade her to join the partnership without this point becoming a "dealbreaker"; that is, even if the partners did not agree to her request.

116. We are not persuaded, on the balance of probabilities, that he was speaking to the claimant angrily. If the conversation did go on as long as 45 minutes (and, like Dr Thakkar, the panel thinks it unlikely that two GPs would have spent so long in conversation in the middle of a busy day) that clearly was on the basis that the Claimant was content for it to go on for that length of time. The claimant was not prevented her from bringing an end to the discussions if she wanted to, or from leaving R1's office and returning to her own.

117. On the basis of the Claimant's own account, during the discission each person was seeking to persuade the other to change their minds.

118. In May, the claimant had a discussion with Dr Bailey, who praised the Claimant on the presentation.

119. The Claimant received a revised wording for the maternity clause. On 17 May 2018, [Bundle 320], the Claimant sent an email to the practice manager and the partners saying that the new clause was reasonable and offered a way forward she would be delighted to accept the offer of a partnership and the claimant ultimately became a partner on these amended terms.

October 2018: Dr Thakkar's secondment and cover

120. Because R1 was to be on secondment on Mondays, he would either have had to reschedule his clinical sessions from that day to another day, or reduced his partnership share (to reflect that he was doing fewer clinical sessions) or (his preferred option) arrange for those sessions to be covered. The organisation to which he was seconded provided funds to pay for this cover. Dr Holy informed R1 that he, R1, would be personally responsible for making up any shortfall between

the amount the partnership received from the other organisation, and the amount it had to pay out to cover R1's Monday sessions.

121. The practice reached an agreement with Dr Aabi Merali to provide locum cover for those Monday sessions. We accept the Claimant's evidence (not disputed) that "Dr Merali was a newly qualified, female GP, who had just completed her GP training at the Respondent's practice" and that she was a salaried GP for other sessions.

122. The amount which the other organisation was willing to pay was a fixed amount, out of which R5 was obliged to pay all salary and oncosts, including pension contributions. For whatever reason, Dr Merali had been quoted a payment rate which would have used up all of the available funds, without leaving anything for pension contributions. During the negotiations, on 8 November 2018, [Bundle 308] R1 suggested to Dr Merali that R5 could either reduce the salary offer and pay pension contributions, or else she could opt out of pension for these locum hours.

123. The Claimant protested to R1 that either course of action would be unfair to Dr Merali [Bundle 520]. The Claimant's email was sent to all the partners and the practice manager. It read:

> Raj,
>
> Having recently locumed, can I respectfully point out this is a rubbish deal for Aabi. We owe it to her and our good relationship with her as our employee to pay fairly for work done.
>
> You are asking her to either take a sub-market rate for doing the work of a Partner,
>
> ...or asking her to not take the pension contributions which she is entitled too.
>
> Either way it's bad form.
>
> Harish gets about £640 a day for two sessions and does no admin /bloods /meds man/home visits.
>
> If she realises what a poor deal she's been manoeuvred into by comparison it will ruin our relationship with her.
>
> You need to pay her £80/hr for a 10 hour day plus pension.
>
> If SCN does not cover this you will need to cover the costs yourself .
>
> Selina

124. As the tone and wording of the email demonstrates, the Claimant was willing to express herself forcefully, and let all the other partners see her doing so, if she believed that there was a matter that had to be addressed, including where that matter related to the behaviour of any of the other partners, including R1.

125. The Claimant was acting reasonably by expressing her views. The reference to "Harish" was to a male locum who was getting the same amount (£640) quoted to

Dr Merali but for work which was, in the Claimant's opinion, less onerous in terms of both duties and hours.

126. Later that day, the Claimant and R1 had further discussions when they happened to bump into each other off-site in the afternoon. In the course of those discussions, the Claimant came up with a suggestion which R1 thought was a good one (and told the Claimant so) and which formed the basis of Dr Merali's eventual agreement with R5. That was that she would do R1's clinical sessions for the Monday, but she would limit that to around 6 hours work per day, and the remaining 4 hours per day that R1 would otherwise have done on a Monday (if not on secondment) would be done by R1 at the weekend or on other days of the week.

127. In the course of those discussions, R1 objected to the tone of what the Claimant had written. He was still feeling sufficiently aggrieved to write, at 9.20pm:

> Hi Selina
>
> Did you re-read your email?
>
> Aabi is fine Re pension issue. Sweetener was my admin, good idea!
>
> No hard feelings but please please consider how your emails are received
>
> Kind regards
>
> Raj

128. The Claimant sent a calm and measured response, which included "*I apologise again if my email came across as offensive. I hope no hard feelings too!*" to which R1 replied, two minutes later: "*Did you read it!*"

129. The Claimant replied:

> Yes! Ok, ok it's a bit overly blunt, apologies for that! Emails and texts are easy to misinterpret , we should try to use partner meetings to make sure these things are sorted face to face

130. R1 sent a brief reply not long afterwards, at 10.16pm: "*Indeed! Have a good one!"*

<u>March 2019: Finance Issue</u>

131. In around February 2019, the Claimant became the Finance Partner. She was informed by the practice manager that R1 was receiving payments for certain matters by cheque, and then not cashing the cheque. The Claimant became concerned about the potential effect on the accuracy of R5's records, and also about whether R1 was dishonestly hiding the money (and seeking to falsely understate his income in family court proceedings). R1 denies any dishonesty, and denies any understatement of income. The Claimant raised the matter at a partners meeting and it was resolved.

132. R1 did not like the fact that (in his opinion) the Claimant had had discussions with the other partners behind his back, and then raised the matter in front of all the partners (and practice manager) without prior notice to him. The Claimant believes that R1's reaction was unfair, and in her statement she comments:

> I had previously been criticised by Dr Thakkar for e-mailing him to resolve difficult matters (such as the disagreement over Dr Merali), so I had raised it with him in a partners' meeting to avoid any misunderstanding (that I appreciate can occur with e-mails). I do not consider myself an "aggressor", as the Respondent has suggested: I am an assertive, fair, and forthright woman, which has been labelled by the Respondent as negative behaviour. I have only ever treated Dr Thakker, and my other colleagues, professionally and with respect.

June 2019: management sessions request

133. Following Dr Bailey's departure (around February 2019), Dr Kris Holy became senior partner. The then practice manager (Ms Radcliffe's predecessor) became ill. It was agreed that Dr Holy would take on some of that work, and that he would have some clinical sessions converted to management sessions to do so.

134. In May 2019, the Claimant discovered that she was pregnant. Around the end of May, she began feeling ill and needed some time off. This ended up being around 3 weeks in total. During the absence, she informed Dr Holy that she was pregnant.

135. The Claimant is not sure of the precise date that she informed Dr Holy, but she believes that it was prior to her Wednesday 5 June email [Bundle 302-303] and potentially during the call "last week" which she mentions in that email. If she is correct about that, then it would place it in the last week of May 2019. In any event, the exchange of 5 and 6 June 2019 between the Claimant and Dr Holy shows that he was already aware that the Claimant was pregnant prior to the 5 June email.

136. The Claimant's email of 5 June 2019, referred to a discussion which had already commenced with Dr Holy about the claimant potentially having a management session on Friday morning. She asked him if there was any news about whether the other partners would agree to this.

137. Amongst other things, she also set out her plan for how her four sessions could be reallocated across the week. This was to be one session each on Tuesday and Thursday, and two on Friday. Her plan included that of her existing 4 clinical sessions, one would be converted to a management session, and so she would do 3 clinical and 1 management session (for the same partnership share). She explained in the email that those three days (Tuesday, Thursday, Friday) were necessary because they were the days that she had childcare arrangements in place.

138. Dr Holy replied very early the following morning at 5.55am on 6 June to say that her return to work plan sounded doable. He said however that the issue about one of her four clinical sessions being converted to a management session had not yet been discussed between the partners as only himself and Dr Thakkar had been available earlier in the week. In the email, he did not seem to suggest that the decision could not be taken without more of (or all of) the partners being in attendance; rather, he seemed to believe that he and R1 alone could have made the decision, but he did not think that the Claimant's request would have been approved. His email also implied that he was potentially in favour of the idea, and he would produce a "pleading email" to seek to persuade the others.

139. The claimant's pregnancy had not been revealed to anybody else, and Dr Holy suggested that it might be preferable for that information to be revealed to other partners, so that the decisions could be made. The claimant agreed to that in her long email later the same day, 6 June, [Bundle 299]. In that email, she said that she decided that it would be necessary for her to do four sessions (three clinical, one management) rather than continuing to do four clinical sessions, and adding a fifth session, as a management session.

140. In other words, the email made clear that the management session would be a replacement for an existing clinical session. If agreed that would mean that the partnership would need to replace the clinical session. We infer that there were various options, such as paying one of the employees to do it, or hiring an outside locum or having one of the other partners doing it on some agreed basis.

141. Dr Holy's email of 7 June 2019, [Bundle 299] forwarded the whole email trail to the other partners. He announced to the other partners that the claimant was 9.5 weeks pregnant and that this information was to be kept confidential to the partners. He summarised the claimant's proposals for her working week. He sought an email response to the change in days to help her return to work, and said he thought it "vey doable". He said that the proposal to convert a clinical session to a management session would be decided at the next partners' meeting.

142. Since the whole trail was forwarded, had the other partners read through it, they would have seen and that in the claimant's 5 June email, she explained that the reason for Tuesdays, Thursdays and Fridays was that she had childcare in place on those three days. The Claimant was still off sick at this time because of pregnancy-related illness.

143. On the evening of 17 June, the claimant was informed by Dr Holy by telephone that the partners had not agreed to allow her to change one of her for clinical sessions to a management session. As a result, the claimant sent her email at 22:57, [Bundle 298]. The email was sent to all the other named partners (as per the written agreement on [Bundle 403]) and also to Dr Bargate (R4) and to the then practice manager.

143.1 The Claimant stated that she could not physically sustain 14.5 hour days in pregnancy and referred to the health of herself and her unborn child.

143.2 She said that while she acknowledged that she would be swapping a clinical session for a management session, her opinion was that since Dr Hallas scheduled to be leaving the partnership shortly (and was a four session partner), it would be possible to hire a salaried GP for five sessions and that this would replace the one clinical session that the claimant would be ceasing to do.

143.3 In the email, she referred to Dr Holy as being a "6+1". This was because her understanding was that of the 7 sessions that he had agreed to do as per the partnership agreement (Schedule 1, [Bundle 459]), one of those had been converted to management. She asked to become a "3+1".

144. The claimant's email did not expressly acknowledge that the claimant had already been told by Dr Holy, before she sent it, that the request for a management session had been discussed by the partners and that they had decided against it. At 5.57am the following morning, Dr Bhargava replied to tell the claimant (thinking that he was telling her for the first time) that her request had already been considered and that the consensus had been that it was not tenable. His email expressed the view that administration was part and parcel of being a partner and that all of the partners were doing that without taking extra sessions for management.

145. In her reply later the same morning, [Bundle 297], the claimant acknowledged that she had in fact already been told by Dr Holy that the request had been declined. The claimant reiterated that her solution had been to spread her 14.5 hour Tuesday over Tuesdays and Thursdays and that part of her suggestion had been agreed. She also said that part of her solution was to change Friday into a management/clinical day. (The part that had not been agreed was having Friday session as a management session.)

146. Dr Holy replied the following day, to say that the issue would not be resolved over email and he said that that Friday he would work a clinical session and therefore the claimant would not need to do that particular session; he said that the following Friday the Claimant was due to be on annual leave. He suggested that this would mean that there would be a couple of weeks, perhaps to resolve the matter. In that 19 June email, [Bundle 297], Dr Holy wrote that there was expected to be an evening meeting of all the partners shortly and suggested that it would be discussed then.

147. On Saturday 22 June [Bundle 296], Dr Holy sent an email to the claimant to say that there were potentially three options that could be considered:

147.1 One was that the claimant continued to do for clinical sessions and what she do them one session per day over four days in order to avoid any long days.

147.2 The second was that she reduce from three sessions to four for the duration of the pregnancy. Although not expressly stated in the email, it seems clear and our finding - on the balance of probabilities - is that he intended this to mean and that she would reduce her share of the partnership from 4/27 to three either out of 26 or out of whatever other denominator resulted from Dr Hallas's departure.

147.3 The third option was that the Claimant should become salaried rather than partner for the duration of the pregnancy. Dr Holy said that this would mean that she would not have the extra workload of a partner. Although not expressly stated, it is implied, and our finding is, that the intention was that she would resume as a partner in due course at following her return to work after maternity.

148. The email said that he and Dr Hallas and Dr Bargate came up with these suggestions, and there had not been any agreement to change the stance in relation to allowing the claimant to stay as a four session partner, with one of those as a management session. His email implied that he was personally in favour and was open to the matter being re-visited in the future (by implication, on the basis that he and the Claimant would seek to persuade others to agree).

149. On 24 June, the claimant telephoned the BMA for advice. Their written reply is on [Bundle 295]. It seems to have been written on the basis that the author thought the claimant was an employee rather than a partner (and we are not saying that was the Claimant's fault). The suggestion was that the ratio of clinical work to administrative work would usually be in the region of 3 to 1 for salaried doctors who had no practice development role and this ratio did not include any time spent in meetings. The email went on to suggest that the proportion of clinical work (as par compared to overall working time) would be reduced further for certain salaried roles where the post-holder had effectively like a salaried partner.

150. The email said that health and safety at work legislation gave employers responsibility to carry out a work risk assessment for employees. It also suggested to the claimant that she should obtain an occupational health assessment and then potentially take the above information about the need to carry out risk assessments to the *employer*. It said that she could contact BMA again in the future if the *employer's* solution was not satisfactory to her. The Claimant did not supply any of the respondents with a copy of this email.

<u>July 2019</u>

151. On 5 July 2019, the Claimant wrote to Dr Holy with a detailed medical update, which – amongst other things - stated that she was experiencing "Pyrexia of

Unknown Origin" which was being investigated. She used detailed medical terminology which the two of them would understand. She made clear that she was receiving medical treatment and advice, and that she was not seeking advice from the respondents. She said she did not know when she would be fit to return to work.

152. On 14 July at 22:06, the claimant wrote to Dr Holy [Bundle 292] supplying a further updates.

152.1 She said that she would continue to be off sick but she had improved compared to previous weeks; she was getting better in small increments.

152.2 The Claimant gave an update on some recent tests and said her temperature was getting back to normal.

152.3 She said that she thought it was right for her to be off sick at present as she did not feel well enough to make clinical decisions.

152.4 She said she did not have any specific time estimate for when she would be able to return

152.5 She said that she thought that she needed some kind of occupational health assessment at some point before she came back so that there could be a plan for how to manage work when she did come back. She did not say (and we find that she did not mean) that there should be an assessment immediately. She made no request to Dr Holy to arrange such an assessment (that is, the email was silent about whether she would might the arrangements in due course, whether Dr Holy should do so, or whether some other person would become involved and would make the arrangements).

153. Dr Holy's reply on 15 July made no comment on the suggestion of occupational health assessment. He said he appreciated the updates and hoped to see her back soon. He said that the most important priority was to look after herself first of all.

154. Although the Claimant referred to the possibility of an occupational health assessment (in the email mentioned above) and it was not something she firmly requested, and the suggestion had not been that she attend an assessment immediately. The email made clear that she was not yet fit to return to work and expressed the opinion that when she believed that she was potentially well enough to return to work, there could be an occupational health assessment at that stage, and to provide any advice specifically in relation to a return.

155. There no express reply to the claimant at any stage from Dr Holy (or any of the other partners) commenting at all on whether or not they thought that a occupational health assessment was necessary or desirable. She was not told

that there was a refusal of her suggestion that an assessment be obtained once she believed that she was fit to return to work.

156. Dr Holy apparently did mention the possibility of OH assessment to the other partners. According to Dr Thakkar's recollection, it had been decided that, at the time the Claimant was experiencing "Pyrexia of Unknown Origin", an occupational health assessment would not tell them anything more than they already knew, as doctors: which was at the claimant's symptoms were unpredictable and that Pyrexia of Unknown Origin that could come and go without any specific pattern.

157. In closing submissions, it was pointed out that the claimant had never had any feedback at all in relation to any decision about the occupational health assessment and we accept that that is factually accurate. However, had there been repeated requests for an occupational health assessment which resulted in no response at all (or an outright refusal without reasons for the refusal) then our finding is that the Claimant would have put something in writing about it at the time, either chasing for a reply, or seeking that reasons for the refusal be given. Furthermore, Dr Holy sent careful and detailed responses to the Claimant over various matters; if the Claimant had been making repeated requests for him to make any arrangement for OH assessment, then we think it likely that (if refusing) he would have explained in writing.

158. Our finding is that the Claimant made the suggestion in the email, but time passed, and by the time that she did feel well enough to return, she did not repeat the suggestion that there should be an OH assessment to provide advice about the specific details of that return. Her evidence on the point is truthful from her point of view, but we find that her recollection is mistaken. The claimant did not repeat the request by telephone and she was not told that it had been refused.

159. We do find that an OG referrral was something that the Claimant could have arranged herself, and then requested that it be funded by the partnership. She was not an employee reliant on her employer to make the arrangements. The clause in the partnership agreement gives out the other partners the right to insist upon an occupational health assessment and that (in those circumstances) it be done at the partnership's request. The clause goes no further than that, and so an occupational health assessment (for a partner) in other circumstances was a matter to be addressed on a case by case basis, and the agreement placed no obligation on any particular partner (or set of partners) to make the arrangements for one of the other partners to have an assessment.

<u>Dr Holy's alleged remarks in June to September 2019</u>

160. [Bundle 293] contains Dr Holy's email of 9 July 2019 to the Claimant. This contains the comment:

> It is certainly a mystery, with all that normal hard to look past the pregnancy as a cause, quite literally cooking a baby 😂. Bad joke but I could not resist.

161. What he refers to as a “bad joke” was a reference to the claimant saying that she was having high temperatures (that is, “Pyrexia of Unknown Origin”).

162. On 14 July, the Claimant replied to that email, and made no comment about the so-called "joke”. She commented that her temperature seemed steady, but that she remained too unwell to return to work.

163. The panel does not regard the comment as amusing, and we do not regard it as an appropriate joke to make about a colleague who was suffering ill-health that was keeping her away from work. We do find, however, that – generally speaking – the Claimant and Dr Holy were on reasonably good terms and that, given the nature of their profession, they discussed medical issues in more detail than might be typical in other workplaces. We find that he thought that this was the type of so-called "joke” with the Claimant without offending her; that is, he did not intend to offend her or insult her or injure her feelings.

164. On 19 July 2019 [Bundle 292], following an intervening email from Dr Holy, the claimant replied provided an update and an expected return date of 19 August unless something changed in the meantime. The claimant said that she was happy for the other partners to be kept informed. She did not repeat any suggestion that an occupational health assessment would be needed prior to the middle of August and/or prior to her return to work.

165. As mentioned in paragraph 95 of the Claimant’s statement, the claimant returned to work in August 2019. There was no phased return to work. She made a request that she would have two clinical sessions a week and two management sessions per week. In other words, her plan was to remain as a 4 session partner, but with the sessions not all being clinical.

166. There had been changes to the partnership. Dr Bailey had retired from the partnership. Dr Hallas had submitted her resignation, giving six months notice, which was due to take effect around 30 September 2019. Dr Bhargava that had been suspended from the partnership and, in September 2019, was removed from the partnership.

167. Because of the practice manager's illness, Dr Holy had taken on some of the functions of that role and was having management sessions in order to do that work. In August 2019, Dr Holy indicated his intention to leave the following March. We note the correspondence – particularly between the Claimant and Dr Thakkar – about whether the partnership agreement enabled him to give notice at this time (since Dr Hallas’ notice period had not yet expired) and about whether his end date would need to be later than March 2020 (and about the desirability of retaining him

as a partner long term, as opposed to merely delaying his departure). It is a fact that he did leave the partnership around March 2020.

168. The partners did not agree to the Claimant's suggestion that her 4 sessions would be 2 clinical and 2 management each week. At paragraphs 99 and 100 of her statement, the Claimant suggests that she believes that part of the reason for that is that mistakes were being made in the way that the business was being run (by Dr Holy, in particular) and that this was part of the reason for refusing her request for management sessions. By implication, she suggests that mistakes were being made, they knew that she would be critical of these mistakes if she had more information about them, and they hoped that refusing to allow her to convert clinical sessions to management sessions would avoid/reduce that.

169. On 3 September 2019 [Bundle 290], Dr Holy responded formally to the request for "two clinical and two management sessions until you go maternity leave". There was nothing suspicious or sinister about the fact that his email was sent at 7.35am. This is in keeping with the timing of other emails sent by him and other partners. His reference to time being of the essence was simply his explanation for why he was sending an email at all, rather than having a face to face conversation.

170. The email was copied to Dr Hallas and Dr Thakkar (only). It said that we have been discussing this amongst "ourselves", which was – we infer - a reference to himself, Dr Hallas, and Dr Thakkar (only). It said:

> Apologies for sending you this as an email, but me is slightly of the essence...
>
> We have been discussing among ourselves re: your request for two clinical and two management sessions until you go maternity leave. I am sorry for this but we all agreed that this was not really doable, both from the point of view of fairness to the partnership and also benefit to the partnership. I'm aware that your rationale was to use this time to get to know the surgery prior to going on maternity leave, however firstly partners joining do not generally get admin sessions to learn the business, this is something that is done if osmotically over time by being immersed in the business. Secondly whatever knowledge gained will lie dormant for your year of maternity leave, firstly making it likely to be forgotten and secondly, quite possibly if not probably out of date when you return. Thirdly, if we say yes to this we then have to cover you for those sessions, increasing workload for all others here (and it's high enough already). So, for the avoidance of doubt your request for management sessions for the remainder of your me before maternity leave has been rejected.
>
> The question then turns to how to go forward from here. Obviously this is something for which there is no definite roadmap and all options possible. The three however that we agreed would be acceptable are:
>
> 1. Four clinical sessions over four days - I know this has been suggested previously and was not doable with childcare but is still an option
>
> 2. To reduce the number of clinical sessions that you do to 2 or 3, again these would be clinical

> 3. To stay off on sick leave until you are 29 weeks pregnant when you can take maternity leave - The rationale for this is that if you are not fit to return to your full duties then the interests of the practice are best served by being signed off sick, and indeed you are not fit by your own admission to return to full duties
>
> My initial plan was to talk with you today when you came to the surgery, however in some ways this might be too late and hence this email.
>
> Let me/us know your thoughts, and apologies not able to talk with you about this in person in the 1st instance

171. We find that it is factually accurate that Dr Holy, Dr Hallas and Dr Thakkar had discussed the Claimant's request, and decided against it for the reasons stated in that email. It was also factually accurate that partners joining did not generally have admin sessions to learn the business and that they were expected to acquire that knowledge over time and by being immersed in the business. It was their genuine opinion that – while the sessions might provide the Claimant with an opportunity to gain an increased knowledge of business matters – that knowledge might be forgotten, and/or become outdated before she was able to implement it following return from maternity leave.

172. It was also their genuine opinion that the Claimant's suggestion would mean an increased workload for others, and that the workload was already high. The email accurately stated that also said that if the Claimant's request was approved, then the practice would have to find cover for the two clinical sessions that she was not doing.

173. The Claimant's suggestion having been rejected, the email suggested alternatives that the partners genuinely thought were "doable". As acknowledged, the first was identical to one been previously suggested. The second one was similar to a previous suggestion, but updated to allow the Claimant to do either 2 or 3 clinical sessions; again, we infer that the that this meant that her equity share would be reduced accordingly (subject to negotiation, but presumably to 2 parts, or 3 parts, of whatever the appropriate denominator was, taking account of Dr Hallas' and Dr Bhargava's departures, etc). The third suggestion was one that the partners genuinely thought was legitimate (in keeping with their obligations to NHS and their insurers), for the reasons stated in the email. Our finding is that Dr Holy was not purporting to insist, and did not intend this email to imply, that there was an insistence from the other partners that her maternity leave start at 29 weeks, but rather he was seeking to point out that starting the maternity leave then was an option that was open to the Claimant.

174. Later on 3 September 2019, having read Dr Holy's email, the Claimant met him. At paragraphs 101 to 105 of her witness statement, the Claimant gives a detailed summary of the meeting, including placing quotation marks around several lengthy extracts of what she or Dr Holy is alleged to have said. Sometimes she comments

that it was “words to the effect of” and other times, she implies she is giving an exact quote.

175. We have not been provided with any evidence that this conversation was audio recorded at the time, or that the alleged quotes were written down at the time or shortly afterwards. Our finding is that the Claimant was doing her best to be truthful to the Tribunal, but we do not accept that her memory is so perfect that she was able to recall the conversation (or lengthy portions of it) word for word four years later (when she signed her statement, and gave evidence to the Tribunal). It is inevitable that her memory has been affected in part by subsequent events (even if she is unaware of that).

176. On the balance of probabilities, if Dr Holy had actually said something to the claimant along the lines of “*Well, Selina, you have to see from the partners’ point of view: you came here less than a year ago, and you insisted on changing the maternity clause, and you told us you were not having another baby, and then you deliberately got pregnant and went off sick for 12 weeks*”, the claimant would have raised that in writing promptly after the alleged comments had been made. Whether she raised it with Dr Holy only, or whether she raised it with the other partners only, or whether she raised it with all of them, she would have raised it. Likewise, whether she raised it as a formal complaint or objection to the remark having been made, or whether she instead simply raised it more neutrally to confirm the falsity of the comment (that is, to tell the other partners, truthfully and accurately, that she had not deliberately become pregnant), she would – we find – have done so in writing. The reason that she did not put something about this remark in writing on, or soon after, 3 September 2019 is – on balance of probabilities – that on, and soon after, 3 September 2019, the Claimant did not believe that he had said this.

177. Dr Holy has not been a witness. Had the Claimant made this allegation (either orally or in writing) to him soon after 3 September 2019, Dr Holy would have had the chance to respond promptly as to whether or not he admitted that making any such comments. Furthermore, if in writing, the Tribunal would have had the opportunity to consider the terms of any denial, or else lack of response, as the case may be.

178. However, on the basis of the evidence available to us, on the balance of probabilities, we find that he did not use the specific phrase attributed to him by the claimant, and did not accuse her of deliberately becoming pregnant.

179. It is also alleged by the Claimant that, in or around June 2019, Dr Holy said: *"Well, we never thought you'd have a fourth child*" and also, "*I'm surprised with three children you have found time to do the necessary to make another baby*”. As per the Claimant’s statement (paragraph 79), she does not recall the exact date, but recalls it was by phone, and in the conversation when she first told him that she

was pregnant (and that this was the reason for her absence in late May/early June). We do not agree with the Claimant's suggestion that her email of 5 June 2019 at 13:31, or Dr Holy's reply of 6 June 2019 at 5.55am, provides any corroboration for the remarks having been made. We do agree with her that they show that the phone call in which she told him that she was pregnant was probably during the week commencing 27 May 2019, but they go no further than that. On the contrary, there is no hint that there had been any dispute or unpleasant remarks in any prior telephone conversation.

179.1 If he said that he and/or the other partners had not expected that the Claimant would have another baby, then he is doing no more than expressing the same opinion that the Claimant gives in her evidence to the Tribunal (that she had not expected to either) and the opinion that the Claimant says she expressed during the maternity clause discussions. It is not inherently implausible that he said this.

179.2 Taking into account the so-called "joke" about pyrexia of unknown origin, and taking account of the Claimant's evidence that she and Dr Holy were on reasonably good terms, it is not inherently implausible that he said something along the lines of "surprised you found the time" as an attempt at humour.

179.3 For each of these comments, even on the assumption that the Claimant's recollection is accurate (again, we are satisfied that she is seeking to be truthful), we are satisfied that the Claimant was not offended by such comments at the time.

3 September 2019 meeting, and aftermath

180. During the conversation between Dr Holy and the claimant in the morning of 3 September 2019, the Claimant expressed the intention to resign from the partnership. She said this was because of the refusal to agree to her, allow her to have two clinical sessions and two management sessions per week.

181. This proposed resignation led to Dr Holy coming up with another alternative suggestion. Dr Holy spoke to that Dr Thakkar about it and Dr Thakkar said that he agreed in principle, subject to the details being worked out.

182. The proposal that was discussed between Dr Holy and Dr Thakkar is the one that Dr Holy submitted by email to the claimant, Dr Hallas and Dr Thakkar later that evening [Bundle 285]. That email was sent shortly after 10 o'clock that night.

> Hi all,
>
> I know this is causing quite a bit of discussion and upset at the moment. The decision of the partnership has always been to state no, primarily to Selina's request for 1 then 2 admin sessions from now until maternity leave.

> I would like to suggest a compromise of sorts:
>
> That all partners have 1 to 2 admin sessions a week ensuring we are clinically covered/can afford. This has the benefits of:
>
> 1. Allowing transition/handover for when I leave in March
>
> 2. Sharing the management load from me, as to be frank I am struggling to keep up with all that is required with the sessions I have at present (and in truth I often don't get them as I cover when we are short)
>
> 3. Allowing time for all the extra admin that we get as partners (which is a lot!!) - we can then also likely lose the clawbacks that we take for extended hours as they would be more than covered with admin sessions
>
> 4. It will also incentivise others to become partners knowing that there is this management me in place
>
> Raj, I am aware we talked about this this evening, and you were agreeable in principle although of course we need to know we are clinically covered to do this.
>
> This way would hopefully as well as finding a solution to this impasse also allow for some transition planning and allow a little breathing room for us all to help with management.
>
> What does everyone think? My thought as we are left with 3 of us would be to take one day each (my suggestion, Raj on Tuesday, Myself Thursday and Selina Friday)
>
> Kris

183. The reference to "3 of us" was because Dr Hallas was leaving at the end of the month, and no new partners had so far joined.

184. Dr Holy's about turn, having previously been one of the partners who had said "no" to the Claimant's most recent request, was because the Claimant had had said she would resign. No doubt, his comments that this would assist him, and that it would potentially be beneficial in the run up to his departure are also genuine.

185. It is notable that he commented on the extended hours scheme, and the fact that the partners were invoicing for that. By implication, he saw some similarity between the work that would be done in the admin sessions and that which was done when the partners were invoicing the business under the extended hours agreement.

186. Prior to Dr Holy's 10pm email being sent, there had been attempts made by Dr Thakkar to contact the claimant.

187. [Bundle 497], at around 7:08, R1 sent a message:

> Hi you have calls booked this eve, did you know?? What did you and Kris agree Re clinics

188. This seems to have been in their own personal WhatsApp group (that is, just the two of them).

189. Dr Thakkar cannot recall if he got a reply, but we infer that he did not because [Bundle 485], he put a message in the Practice's WhatsApp group at 7.19pm:

> Hi all. Doing 8-8. Seen a 8-8 clinic for Selina too. Selina I think you've gone so I've started doing yours

190. Dr Abbas replied to say that the Claimant had still been on site at 6.30pm. Dr Thakkar wrote back, at 7.20pm, to say that the Claimant was not doing calls, and then, between 7.23pm and 7.28pm posted some more messages to say that he could now see that she was on "messenger" and he was (therefore) aware she was on site.

191. His contact with the Claimant via "messenger" is Bundle 286 to 287. These are photos which the Claimant has taken of messages that she received from Dr Thakkar. If she sent any to him, she has not provided copies of those.

192. Dr Thakkar must have had some interaction with the claimant before the first of these, because it said (at 7.27pm)

> "this is what I was getting up before partners haven't agreed to this as per Kris email this a.m."

193. His next message, 32 seconds later, said "*it's a partnership decision*". It is likely that this was a continuation of his first comment rather than a response to an intervening message from the Claimant.

194. We infer (from the reference to Dr Holy's email that morning) that he was referring to the discussions that been ongoing about whether the claimant would have two clinical sessions and two admin sessions per week. Dr Thakkar has no recollection of whether the Claimant had started her clinical sessions that evening (or was doing admin) and the Claimant was not asked about that in her oral evidence.

195. At 19:35, he wrote to the Claimant

> what was agreed without me?

196. We do not have the claimant's responses in the bundle. According to her recollection, she indicated that nothing had been agreed so far and that it was to be a partnership decision shortly or in due course.

197. Dr Thakkar made three attempts to call the claimant between 7:45pm and 8pm on 3 September as per page 289 of the bundle. These calls were not answered. There was no oral discussion between the claimant and Dr Thakkar prior to Dr Holy's email shortly after 10 o'clock that evening.

198. [Bundle 284] is Dr Thakkar reply, at 10.29pm, to Dr Holy's email. He made several comments and thanked Dr Holy, and discussed some matters that might need to be taken into account. At the top of the email, he said:

> Can I also add
>
> 1. We are a partnership
>
> 2. therefore we work for the greater good of the business
>
> 3. we also make joint decisions and dont bulldoze each other into submission - that will cause untold damage to the business

199. Our finding is that R1 was referring to the claimant's request for management sessions, and her proposed resignation, which had ultimately led to Dr Holy's 22:09 email, when he made these remarks.

200. We do not regard it as important to decide whether Thakkar and Holy spoke before the interaction between Thakkar and the Claimant between 7pm and 8pm. Regardless of whether R1 spoke to Dr Holy before 7pm or later than 8pm, it was earlier than 10pm, and he expressed his provisional agreement to Dr Holy's suggestion in that discussion.

201. If we did have to decide, then, on the balance of probabilities, Dr Thakkar and Dr Holy spoke after 8pm, because (presumably as a result of something the Claimant had written to him) between 7.20pm and 8pm, he was seeking information from the Claimant about what had been agreed between her and Dr Holy.

4 September 2019 WhatsApp exchange; email exchange

202. On 18 August 2019, the Claimant and Dr Thakkar had had the following exchange in their own WhatsApp group:

> R1: We also need to work out how you and I operate together in terms of decision making.
>
> Claimant: We will be fine, we are of synergistic ideas the vast majority of the time! And actually Kris is here for 7 more months and in that time hopefully Liz & Victoria come on board so the group will be restored

203. "Liz" referred to R2 and "Victoria" to R4.

204. On 4 September, the Claimant messaged Dr Thakkar to say that they needed Dr Holy to stay. R1 replied:

> This is why we all need a bit of admin so we get a handover , esp me as you'll be off soon

205. The Claimant replied to say that her needing to learn Dr Holy's role, before starting maternity leave in 11 weeks time, was part of her reason for needing the two admin

sessions per week. Dr Thakkar said that he also needed to understand Dr Holy's role, and that a face to face discussion was needed. The Claimant replied that R1 would have to cease his secondment.

206. The messages between [Bundle 497 and 500] demonstrate to us that Dr Thakkar misinterpreted the claimant's comment or at least saw it in a bad light. He formed the opinion that the claimant was saying that unless he agreed to her having two management sessions per week then she would not agree to his secondment continuing. We think she was saying that she not agree to his secondment continuing regardless of whether she had management sessions or not.

207. We also infer that the claimant also potentially misinterpreted what Dr Thakkar was saying. He was stating that there should be admin sessions for everybody: rather than asserting in the email that he was objecting to Dr Holy's proposal (which, as the Claimant knew from Dr Holy, R1 had agreed in principle before the email was sent) his comments were consistent with it.

208. After he had said "no" to ceasing his secondment (or ceasing his CCG role), the Claimant repeated the suggestion (in firmer terms). R1 said the conversation was over and asked her not to message him. This was 6.59pm.

209. After the Dr Thakkar had asked her to stop messaging him and the claimant carried on messaging him. He did reply further. The last of his replies was after midnight. His later replies were comparatively short and simply standing his ground on the suggestion that the claimant had blackmailed him. The Claimant sent two further messages, one denying blackmail, and one commenting on the secondment. R1 replied at 7.40pm to stand by his "blackmail" comment and to say he was upset. An hour later, the Claimant sent two messages, and an hour after that (9.38pm) she sent a third. This final message was:

> ..we've ended up in a scrap again over WhatsApp , let's try sorting it out as a Partnership , I'll email the team !

210. R1's 6pm message had suggested a face to face discussion. R1 seemingly sent two messages at 11pm, but we (and the Claimant) do not know what they said as they have been deleted.

211. He sent a final message at 9 minutes past midnight which said:

> Doing it by effectively blackmailing me has fractured the partnership, this is NOT the behaviour of a partner

212. At 10.09pm, as foreshadowed by her 9.38pm WhatsApp, the Claimant sent an email to Drs Thakkar, Holy and Hallas. In it, she stated (amongst other things):

> This evening Raj and I had a conversation on WhatsApp and in this discussion he has said no to returning from secondment next month- Raj sorry if I've misunderstood you

> can you please officially confirm I have understood your intentions as I know we frequently misunderstand each other especially online!
>
> AND
>
> I know you have all previously declined my suggestion for me to do 2 management sessions but urge you all to reconsider so I can learn my share.
>
> AND
>
> I have said to Raj that because we need him I couldn't agree to further extend the secondment anymore and he is very upset with me about this.
>
> It is a Partnership decision of course , but I have made my view known- I don't think the secondment should be extended because we need all hands on deck.

213. His email reply at 11pm asserted that the Claimant was being disingenuous and asserted that the secondment discussion "*was off the back of Selina being upset that we didnt grant 2 admin sessions. I feel im being blackmailed*". Six minutes later, he sent a further email to say that he felt stressed, bullied and blackmailed, and that he thought the approach was damaging the partnership.

214. The following day by email [Bundle 482] to the partners at 6.27am and WhatsApp to R1 at 8.49am [Bundle 500], the claimant denied blackmail, and said she was sorry R1 was upset and reiterated her suggestion that there would need to be a partnership decision in relation to Dr Thakkar's secondment. The WhatsApp message repeated, and amplified, the suggestion that it would be appropriate for them (Dr Thakkar and the Claimant) to try to persuade Dr Holy not to leave.

215. In due course, it was an decided by Dr Holy, the claimant and Dr Thakkar that all of the partners were in agreement that they would each do management sessions from that point onwards. The Claimant did commence working with two management sessions per week.

Subsequent Discussion between the Claimant and R1

216. Not long after this, there was a conversation between the claimant and Dr Thakkar in which, according to the claimant's recollection, Dr Thakkar said that she had been "pushy" and that her behaviour had been not what partners do. Each of these alleged comments are consistent with his written messages around that time (in which he said that partners should not bulldoze each other and that the partnership was fractured).

217. Around nine months later, in around June 2020, the claimant made a handwritten note to herself. As of June 2020, her recollection was that, in this early September 2019 conversation, Dr Thakkar had said that she was like a dog with a bone.

218. The claimant's witness evidence also states that - in the same early September 2019 conversation - Dr Thakkar said he had spoken to Dr Holy and Dr Hallas and they had each suggested that the claimant had acted like a bully. This alleged remark is consistent with what Dr Thakkar said in re-examination, namely his assertion Dr Hallas had told him that part of her reason for leaving the partnership was the claimant's behaviour. [Correspondingly, the Claimant asserts that Dr Hallas told the Claimant that she, Dr Hallas, was because of Dr Thakkar's behaviour. There is, of course, no logical reason that makes it impossible that Dr Hallas did say each of these things to her respective fellow partners.]

219. Dr Thakkar's account is that he does not recall the early September 2019 conversation. We place little weight on the note made nine months later. That being said, the general tone of the conversation, and the remarks attributed to Dr Thakkar are consistent with other evidence about the opinion he had of the Claimant's behaviour in early September 2019. It is difficult to be sure whether it is more likely that the Claimant has mis-remembered the exact words, or that she has recalled them accurately. However, they are not denied by Dr Thakkar, and, it is not inherently implausible that he used the phrase "like a dog with a bone". He may well have said it.

220. In messages around this time, R1 said he felt bullied by the claimant. The claimant's recollection is that there was a discussion about drawings in which Dr Thakkar said drawings would go down as a result of the decision that the partners would do fewer clinical sessions (replacing them with management sessions). We find that this was Dr Thakkar's opinion at the time, and it is not implausible he mentioned it to the Claimant. On the contrary, it is highly likely that he did so.

221. The Claimant's recollection is that he went on to say that the reduction in drawings did not matter to the claimant because hers was a second income in a household. On the balance of probabilities, he did not make that particular comment.

    221.1 Our analysis is that, had he done so, the claimant would have put something in writing at the time, raising it as a complaint seeking action from the other partners, or, at least, making the other partners aware that this remark had been made, and suggesting that it would be an improper approach to the decision-making process for R1, or for any other partner, to take that into account.

    221.2 Given that there was already (on the Claimant's account) a big disagreement between the Claimant and R1 at this point in time, we do not think that the absence of any contemporaneous written allegation that he had made this comment can be explained by a desire to avoid rocking the boat, and/or by an assertion that the Claimant was too intimidated by R1 (or anyone else) to circulate details of this allegation.

WhatsApp discussion in October 2019

222. As per [Bundle 278], on 24 October 2019 around 8:10am, in the practice's WhatsApp group, R1 named a patient and made reference to the patient's medical condition and suggested that somebody needed to call the patient.

223. Around six hours later, the claimant replied. We infer from her reply that she was not the duty doctor that day. She stated that Dr Thakkar ought to have called the duty doctor and done a handover. The Claimant told him that he should do that. Over several paragraphs she suggested that what he had done would be regarded as unsafe practice and broke information governance guidelines.

224. Dr Thakkar replied about 20 minutes later, stating that he did not appreciate the Claimant's publicly chastising him. He said that, if she had an issue with him, she should discuss it with him personally. He said that the rights and wrongs of how to use the WhatsApp group would be a separate issue.

225. The claimant replied disagreeing with his comment, and, in particular, denying that she had intended to publicly chastise Dr Thakkar. Dr Thakkar replied stating (and this was his honest and genuine opinion) that hospitals and other health organisations did use WhatsApp for sharing clinical information with those who needed it, and that it was considered to be encrypted and safe for data protection compliance.

226. The claimant replied stating that one issue was that WhatsApp messages could flash up on a device, and be seen by unauthorised persons. She said that the second issue was that handing over sick patients by a WhatsApp group was not safe.

227. Dr Thakkar replied, suggesting that they should not discuss it further in the WhatsApp group. He said that he agreed with the Claimant in relation to patient information and safety, but his issue was how the claimant was communicating with him.

228. The claimant replied further to him just before 4pm, and he replied again at 6.40pm. R1 said that he thought the claimant was not hearing him and she was not recognising and that she was upsetting him and (he suggested) other people to by her communication style. He reiterated that he had said that he agreed with her substantive points and he repeated that they should draw a line under it.

229. At the claimant replied again at 8:25pm. Dr Thakkar did not reply further that day.

230. [Bundle 276] is Dr Holy's email the following day, Friday, 25 October at 7.13 a.m. In this tribunal's opinion, Dr Holy's reply was careful and rational and made three very sensible points.

1. WhatsApp is very secure, hence in principle to communicate using WhatsApp and divulging clinical details is fine. We have no practice policy and have not had any discussions regarding this in the past to the best of my knowledge, and hence while we may wish to make a decision on whether to use it as Raj did yesterday, to decree we can't at this stage is I would suggest one step too far (to suggest would have been the right level of intervention, and perhaps in private so that after deciding what we are doing as a surgery we could then come out as a partnership group to give a unified stance/guidance without any suggestion of discord).

2. To have a public argument on the WhatsApp forum looks incredibly unprofessional and is a very poor example to those who are our employees, the salaried GPs. It publicly displays fragmentation among the partnership (obviously bad), and while difficult conversations can and should be had, in private please.

3. I do wonder as an aside how advisable it was to send the message to a group, as the chance of it being overlooked by all as the assumption will be the next person will deal with it is high. Indeed, I called the chap last night fairly late (safe to say everyone else had gone home) which sort of highlighted the point, as despite plenty of activity around the post nobody actually actioned it.

Not our finest hour all

231. The final point, that no-one had called the patient, was telling. On the one hand, it supported the Claimant's position that no-one might pick up on the action from the WhatsApp group. On the other hand, the Claimant *had* picked up on it, and had sent several messages to R1 (criticising him), some quite lengthy, but had not contacted the patient.

The Claimant's maternity leave

232. In around November or December 2019, the claimant commenced her maternity leave. During her maternity leave, in March 2020, the Covid pandemic hit. That had a significant effect on the all of the respondents.

233. During her maternity leave, the Claimant remained as finance partner (that is, no-one else was appointed to temporarily perform this role during her absence) and undertook some activities in relation to that role during her maternity leave.

234. One of the things the claimant was involved with during her maternity leave was correspondence in relation to Dr Thakkar's secondment. On 28 January 2020, she sent an email [Bundle 475] to Dr Thakkar, Dr Holy, Dr Caswell and Dr Bargate. This followed on from earlier exchanges in which it was stated that R1 proposed to continue his secondment, asserted the practice was reimbursed for his time away, and in which Dr Holy suggested that the partnership could accommodate this.

235. The Claimant said she wanted to add her thoughts are a debate ahead of the next practice meeting. She set out what (in her genuine and honest opinion was) the history of the secondment, and its intended duration. The Claimant said that Dr

Caswell and herself should have been consulted fully on the secondment topic prior to any agreement being made. She noted that a decision in in October 2019, had been made to extend the secondment for a further six months. She objected to a proposed further extension of a further 12 months. She said that, amongst other things, the partnership had some financial issues that were damaged by the secondment. Amongst other things she suggested that, if the secondment was to continue, it should either be on the basis that R1 reduced his sessions (and, by implication, his partnership share) or, alternatively, that he do the same number of sessions, but do extra sessions on Friday to make up for the ones at that he was missing on Monday.

236. Dr Thakkar replied on 29 January disagreeing with several of the claimant's points. and he suggested that the claimant's comments about his missing partnership meetings were in his opinion, an example of another “anti-Raj stance”, rather than reflecting a fair and objective position. He said that he would prefer that they forge a collaborative trust in a supportive partnership rather than the aggressive and personal undertones unfairly directed at him.

237. Another activity during the Claimant’s maternity leave was that she liaised with the other partners in February 2020 in relation to the appointment of a finance manager, and she carried out various other tasks in the role of Finance Partner. During her maternity leave, she was not doing clinical sessions, and nor doing any of her notional 4 sessions as management sessions. The sessions that she would otherwise have performed (if not on maternity leave) were carried out by other people, and the Claimant’s partnership share remained the same as if she had actually been performing them herself.

Improved Access Funding

238. R5 participated in an “improved access” scheme. It was paid additional sums for providing 7 hours per week of additional GP appointments, later than 6.30pm (and R5 had agreed to do these extra hours spread over 3 days each week).

238.1 Any GP who did these extra appointments received a payment.

238.2 Although it is not in writing in the bundle, it is common ground between the parties that - as an exception to the general rule that partners were not paid specifically for their sessions (with the general rule being that money which the practice received for the partners’ work became partnership income, and the payments to the partners were their calculated profit share) – the agreement was that if a partner did these additional appointments, they could invoice for them and be paid directly by R5.

238.3 The sessions were entirely voluntary; none of the salaried GPs or partners was obliged to do them. The practice paid the doctors who performed the additional work around £150 for around a 1.5 hour session, and the amount

paid out was less than the income received. In other words, there was a surplus which potentially benefited the partners.

238.4 The Claimant tended not to do (and therefore not to invoice) for these sessions, but she was aware of the arrangement, and sometimes she did participate. R1 to R4 tended to do these sessions more often than the Claimant.

239. There was also an "extended hours" scheme. This was similar to "improved access" in that R5 received additional funding for providing additional clinical services outside normal hours (so later than 6.30pm on a weekday, and/or at a weekend). However, these were not additional GP appointments.

240. While these were different schemes (and while a GP would not do the "extended hours" and therefore would not be paid for them), the "improved access" ("IA") and "extended hours" ("EH") funding were often discussed together in relation to the issues and disputes that are relevant to this claim.

241. Furthermore, the expression "8-8" was also used. Early in cross-examination, R1 accepted that this expression was synonymous with "improved access/extended hours". Later in his cross-examination, he sought to draw a distinction. However, our finding is that, from the context, "8-8" was often used loosely to refer to the "improved access/extended hours" schemes, and the additional GP appointments, and additional work.

Frailty Coding

242. Around 1 April 2020, the local CCG sent out a memo to all GPs in the area, inviting them to prioritise "frailty coding" [Bundle 678-687]. This required an analysis of the patient's health, and the production of a score which would help decide if the patient would be admitted to hospital if they acquired Covid. The memo referenced the fact that "Practices will be funded via unutilised improved access/extended hours which can be used to deliver this work".

243. Around 9 April 2020, the medical director (Dr Rebecca Mallard-Smith) of the relevant LMC (the Local Medical Committee for Buckinghamshire) sent a letter intended for all GP practices in the area. In R5's case, this went to the email account of the former practice manager who was absent on long-term sick leave, and it was not immediately noted and acted upon. This spoke about the importance of the frailty coding work, and, amongst other things, said:

> 1. There are no targets to this work and as such will not be monitored and the CCG has accepted that we will as professionals always try our best to support our patients and deliver the most appropriate setting for there EOL and care due to Covid- 19

> 2. We also negotiated that due to the significant nature of this work we would stand down improved Access and Extended Hours requirements with no loss of funding so that this tune capacity can support the work
>
> 3. We agreed this work was ethical as it was being approached on a case by case level and the governance behind the decision was correct to protect the workforce from unnecessary risk.

244. So, as of early April, the situation was that the additional GP appointments (Improved Access) were not being done (and nor were the Extended Hours clinical services), but the funding for both continued to be paid to the GP practices. Since the partners (like the other doctors) were not doing the additional appointments, there was no invoicing of the practice for them.

245. For the avoidance of doubt, it is not this employment tribunal panel's role to decide whether NHS funding has been used appropriately, or whether any practice or any GP has fulfilled their contractual obligations to NHS. We comment on these letters only to the extent that it is necessary for us to analyse the motivations and thought processes of various individuals as relevant to this employment tribunal claim.

245.1 However, our interpretation of numbered paragraphs 1 and 2 (cited above) (along with the entirety of the 9 April letter and the 1 April memo) is not that the practices were being given a firm and specific instruction "stop doing IA and do frailty coding instead, and the IA money is now ring-fenced for frailty coding and must not be used for anything else".

245.2 Rather, Frailty Coding was acknowledged to be an onerous task, and (by implication) one which might require a significant amount of doctor time. There was no specific additional budget for it, but the suggestion from the authorities was that a practice could fund the required doctor time by spending the money that the practice was saving as a result of the extended hours/improved access services not being carried out.

246. It was not until later in April that the respondents became aware of the 9 April advice from LMC. This led to the following WhatsApp conversation [Bundle 674]

> [27/04/2020, 14:47:56] Victoria Bargate: Ok today's embarrassing PCN moment was that everyone realised we dont need to be doing our extended hours or improved access work. An LMC letter from 3 weeks ago which was only sent to [absent practice manager] told us they had negotiated this.
>
> We are still being paid as if we were doing them so no fall in income
>
> [27/04/2020, 14:48:19] Liz Caswell: So no more evening calls?!
>
> [27/04/2020, 14:48:21] Liz Caswell: Woohoo
>
> [27/04/2020, 14:48:24] Victoria Bargate: This means we dont need our physio, early morn nurse appointments or evening calls

[27/04/2020, 19:58:15] Uzma: That's fine.

[27/04/2020, 20:00:38] Liz Caswell: So are we doing 1pm partners tmrw and 2pm with salaried?

[27/04/2020, 20:01:56] Liz Caswell: Or shall we just do salaried at 2pm tmrw and partners with Helen and Ally on Thursday 1pm

[27/04/2020, 20:05:09] Victoria Bargate: I thought we could have a quick 1pm tomorrow then 2pm with salaried to let them know any updates from the 1pm.

Do you know how to set up on teams Liz

[27/04/2020, 20:05:32] Liz Caswell: I'll get husband to teach me now

[27/04/2020, 20:26:22] Raj: Aren't we getting paid for 8-8 calls tho?

[27/04/2020, 20:28:15] Liz Caswell: Yes but we get paid for them even if we don't do them

[27/04/2020, 20:28:48] Liz Caswell: The money will just go into the partnership rather than us claim it personally

[27/04/2020, 21:51:37] Raj: So do we need to increase drawings?

[27/04/2020, 21:57:22] Selina Shaw: I would suggest waiting for the accountants to do a drawings forecast as planned

[27/04/2020, 21:58:02] Selina Shaw: It never got done in jan/Feb and now it's so close to year end I'd tie it in with that

[27/04/2020, 21:59:07] Selina Shaw: But potentially we needed to inc drawings anyway as what's currently drawn is based on a model from May 2018 and it's out of date

[27/04/2020, 21:59:17] Selina Shaw: Very out of date!

[27/04/2020, 22:03:00] Liz Caswell: We should have a good idea now what sessions partners/salaried are doing as it's only Kris who is our uncertainty and so we could have two forecasts, one without or without his 4 sessions

[27/04/2020, 22:03:18] Liz Caswell: *With or without!

[27/04/2020, 22:04:12] Raj: I've got 8-8 booked for a few weeks

247. Around March 2020, Ms Radcliffe had taken over the role of practice manager. After she had obtained a copy of the 9 April letter, she circulated it to the partners. She also specifically contacted CCG to check that it was still appropriate to submit invoices which stated that a specific number of hours additional work (for IA and EH) was being done even though, in reality, it was not. She received confirmation that that was the correct approach, and so the practice continued to submit (and be paid for) such invoices for "7 hours per week".

248. The exchange on [Bundle 674] shows that R1, R2 and the Claimant all seemed to have a clear understanding of the fact not actually doing the IA hours (specifically as extra GP appointments) would potentially decrease the sums paid out to those partners (as well as other doctors) who had been doing the extra appointments,

whilst increasing amount of “partnership income” (such income not necessarily all representing an increase in the profit to be shared between partners, because the circumstances and correspondence made clear that there was work which was unanticipated and which was covid-related which needed to be done, and, therefore, needed to be paid for by the practice).

249. [Bundle 674] also shows that some meetings were taking place remotely at that time. From June onwards, the Claimant made a point to attend every partners meeting that was formally and specifically arranged. Prior to then, during her maternity leave, she attended some but not all such meetings. In the early months of the pandemic (March to June 2020), the doctors in the practice were arranging various ad hoc meetings and discussions, some in person, some remote, some via WhatsApp, some via Teams, or other platform. Some were just quick discussions which took place immediately, between whoever was at work at the time. Some were planned in advance. There was no rigorous approach to which were official partners meetings, which were practice meetings (to which all doctors could potentially attend) and which were informal discussions between colleagues to exchange news and opinions.

250. In the documents included in the hearing bundle, the next discussion of the topic (after 27 April) in the Partners WhatsApp group (which included Dr Bargate, about whom there is a dispute) appears to be on 14 May, [Bundle 672].

> [14/05/2020, 13:03:13] Victoria Bargate: Before emailing PCN can we go thought the PCN lead (me) as we had agreed. We already had the info penny has sent and I'm very conscious the rest of the PCN think we are behind with things already so trying to do my best to show them we are up to date and know what's going on!
>
> [14/05/2020, 13:04:41] Liz Caswell: Yes it doesn’t enhance our reputation to be honest...
>
> [14/05/2020, 13:14:13] Uzma: Please see my email re appointments. Thanks
>
> [14/05/2020, 14:03:10] Uzma: I'm having problems logging into my NHS mail
>
> [14/05/2020, 14:03:34] Uzma: ... trying to join the meeting
>
> [14/05/2020, 14:49:12] Liz Caswell: Partners meeting now
>
> [14/05/2020, 14:50:22] Liz Caswell: Raj are you joining
>
> [14/05/2020, 15:23:04] Raj: Sorry I struggle to make thurs meetings
>
> [14/05/2020, 16:39:27] Victoria Bargate: Just a reminder uzma that I heard theres a lot of partner admin at PH so can you make sure you look in file tomorrow thanks
>
> [14/05/2020, 19:08:24] Uzma: Yep. Will do.
>
> [14/05/2020, 19:49:00] Uzma: Can anyone remind me of the date we would agree to invoice the practice from for £150 for COVID work please?
>
> [14/05/2020, 19:49:35] Victoria Bargate: From 1st May?
>
> [14/05/2020, 19:50:16] Uzma: Ok. Thank you

> [14/05/2020, 19:50:31] Victoria Bargate: That was a suggestion, maybe wait for someone else to agree!
>
> [14/05/2020, 19:50:37] Uzma: Ok!
>
> [14/05/2020, 19:53:37] Liz Caswell: Yes agreed
>
> [14/05/2020, 19:55:57] Uzma: Thank you
>
> …
>
> [14/05/2020, 22:33:47] Raj: Can I double check we def shouldn't be doing 8-8? Another GP in London/ a mate has been told they have to. …

251. A decision had been made that the partners would invoice the partnership for £150 per week for doing what was loosely described as Covid admin work. [Bundle 674] and [Bundle 672] demonstrate that the decision was made no earlier than 27 April 2020 and no later than 14 May 2020. We do not agree with the submission that the fact that the decision was that the invoicing would be with effect from 1 May 2020 shows that the decision was made on or before 1 May. Since the partners (and Dr Bargate, about whom there is a dispute) were invoicing and being paid £150 per week, that money did not remain as partnership income to potentially be distributed to the partners as profit (or to potentially be available to pay out to other doctors or clinicians for services that R5 was obliged to, or wished to, offer).

252. There is a dispute between the parties about the exact circumstances in which this decision was made. What is not in dispute is that the Claimant was not present when the decision was made. Furthermore, the decision was not that all partners (regardless of whether they were on Authorised Absence or not) could invoice. It was that the partners who were actually attending work could do so. As of 1 May 2020, all of R1 to R4 were considered eligible to invoice £150 per week for "Covid admin" and did so.

253. The Claimant had the opportunity to read what was in the WhatApp exchanges. However, she was not told, in express terms, about the decision. On the balance of probabilities, the Claimant did read the entirety of every WhatApp exchange within a day or two of each message being posted. She did not always have her phone on (with the application open), but when she did turn on her phone (and open the app), she did not just read the most recent entries but looked back over all of the unread messages.

254. Thus, on balance of probabilities, the Claimant did read the entirety of the 14 May exchange [Bundle 672]. However, at the time, she did not perceive this to relate to the 27 April discussions about "drawings" or IA funding.

255. The four named respondents are all very unclear about exactly how this decision was reached. They are unclear about the exact date of the meeting, whether the meeting was in person or remote, and about who was present.

255.1 No written “minutes” of any such meeting or decision have been provided to the tribunal.

255.2 According to their evidence, Dr Thakkar and Dr Bargate seemed to be confident that the meeting happened on WhatsApp, but not clear whether it took place by exchange of written messages or via video.

255.3 Dr Caswell was not sure whether it took place on WhatsApp or in person.

255.4 Our finding is that the decision did not take place at a formal partnership, convened in accordance of the requirements of the written partnership agreement.

255.5 Although the bundle contains some notifications of intended meetings (in the WhatsApp exchanges) to which the claimant had access. There were other meetings too. The evidence is unclear about whether the decision was made at a meeting to which the Claimant had access to the notification. In any event, our finding is that the decision was not made at a meeting to which the Claimant had been sent an agenda, and it was not made at a meeting which had been designated in advance as a formal partners meeting, and it was not made at a meeting to which any of the partners had received a formal notification/invitation, and no agenda for the meeting had been circulated in advance of the meeting. Furthermore, no minutes were produced after the meeting/decision. The claimant received no specific written notification of the decision shortly after it was made. She was unaware of it until January 2021.

256. During the Claimant’s maternity leave, there were some other WhatApp exchanges that are relied on. We do not need to address each one in detail. However, we note, and take into account, that [Bundle 668] contains an exchange on 25 June 2020 about the possibility of the “8-8 work” resuming:

> [25/06/2020, 21:14:16] Raj: Just realised is 8-8 starting next wed?
>
> [25/06/2020, 21:42:23] Uzma: Fine with me
>
> [25/06/2020, 21:52:43] Victoria Bargate: 8-8 not been confirmed by anyone yet so we are still waiting to confirm
>
> [25/06/2020, 21:54:40] Raj: Coolio
>
> [25/06/2020, 21:54:50] Uzma: So we carry on invoicing for COVID work until that starts, and then those of us who aren't doing it, stop invoicing for COVID work?
>
> [25/06/2020, 21:55:05] Victoria Bargate: Yep
>
> [25/06/2020, 21:55:35] Uzma: Ok. Thanks
>
> [26/06/2020, 10:39:21] Liz Caswell: image omitted
>
> [26/06/2020, 10:39:50] Uzma: Great!

257. The Claimant had access to this exchange. It shows that R3 and R4 (at least) saw a close relationship between the fact that they were invoicing for "covid admin" and the IA funding and the fact that the additional GP appointments had temporarily been paused in April.

258. Regardless of the contents of this exchange, the eventual decision was to continue with the £150 per week for "covid admin" arrangement. This was alluded to in an exchange in September 2020, to which the Claimant also had access.

259. The evidence shows that each of R1 to R4 was doing the invoicing from May 2020 onwards. They were not taking measures to conceal this from the Claimant. The Claimant was the Finance Partner, but that did not mean that, as a matter of routine, she saw every invoice, or was involved in routine decisions for every outgoing payment. She had access to R5's accounts and bank statements, but she was not obliged to, and did not, study each one of the thousands of transactions. (As well as a Finance Manager, the Respondent had accountants.)

260. The invoices were submitted to the Finance Manager, Wendy Roels, and the payments authorised by her. The Claimant was not cc'ed into any emails from the respondent submitting the emails to Ms Roels. However, there was nothing surprising or suspicious about that; she had not been copied into the corresponding emails which invoiced for the IA work.

261. As per [Bundle 665], a couple of hours (and about half a dozen messages) after the exchange:

> [28/09/2020, 09:53:47] Liz Caswell: Are you guys still invoicing Wendy for COVID work every month?
>
> [28/09/2020, 10:00:41] Uzma: I thought Helen was going to look into an MJOG?

the Claimant had replied in the Group (on a different topic). On the balance of probabilities, she had read the above-mentioned exchange, before she sent a message (which said that there would be no meeting that day.)

262. At the partnership meetings from June 2020 onwards (which the Claimant attended), this Covid admin invoicing issue was never expressly discussed. None of R1 to R4 expressly addressed their mind to what (if anything) should be put in writing to the Claimant about it; it did not occur to any of them that the Claimant knew nothing about it.

<u>Claimant's return from maternity leave</u>

263. The claimant returned from maternity leave around November 2020. At that time, she was not told that if she wished to do Covid admin work and invoice £150 per week for doing so, then that was an option available to her. Our finding is that the Claimant was not aware that anybody had that arrangement with the practice.

264. In connection with her role as finance partner, while preparing documents to go to the accountants and as part of the process for producing a financial plan for the business, the claimant asked if there were any staffing costs that she was unaware of. Nobody specifically drew to her attention that this £150 per week invoicing arrangement was in place.

265. Following the Claimant's return to work, R1 to R4 created a WhatsApp group for themselves which did not include the Claimant. The Claimant has invited us to infer (from, amongst other things, the absence of specific evidence of the date of creation, as well as comments made in the Grounds of Resistance) that this WhatsApp group was created no later than May 2020, and it was the location in which the "Covid admin" decision was discussed and made (and that this was part of a conscious and deliberate course of action to exclude her from that particular decision, and keep it secret from her). However, we reject that argument. Our finding is that what the Respondents have said on oath is true, and that this group was only created near the end of 2020, and that the reason no earlier documents from this WhatsApp group have been disclosed is that it did not exist before then.

266. The new WhatsApp group was used to discuss the Claimant, in the knowledge that she could not see what was being written. The purpose of creating this group was to enable R1 to R4 to have discussions about the Claimant to which she did not gave access.

<u>January 2021 discussions about the Covid Admin invoices</u>

267. From [Bundle 649 to 659] are various versions (the copy accessible to different participants) of WhatsApp exchanges between the Claimant and the Respondents between 12 January 2021 and 14 January 2021.

268. 12 January 2021 was a Tuesday, and there had been some oral discussions the previous day which had included the Claimant telling the Respondents about her plans for how the Extended Hours funding could be utilised.

269. At 12:09pm on 12 January, R1 wrote:

> Hi Selina, i think there is confusion Re 8-8 money. To clarify, We are all claiming via invoice £150/week for it given the extra work for covid admin as per CCG advice. If you're not doing this you should backdate payment from nov. this will help your tax!

270. Our finding is that it was the discussions the previous day which had prompted R1 to send this message. He had come to the realisation that the Claimant's comments the previous day took no account of the £600 per week (£150 for each of R1, R2, R3, R4) from the IA/EH funding that had been paid to the partners (not including the Claimant) from May 2020 onwards. Furthermore, he had come to the realisation that the reason her analysis took no account of that was most likely to be that she was unaware of this fact, rather than that she had made a mistake.

271. This is confirmed by his response(s) to what the Claimant wrote back to him:

> Claimant: I've never heard of that Raj
>
> R1: I thought there was some confusion.
>
> R1: We're still getting the income from 8-8

272. In their next exchanges, the Claimant reiterated that she had never heard of this before, and Dr Thakkar maintained that (in his opinion) it had been openly discussed "several times". The Claimant's comments included:

> I think you are talking about Victoria last week said to use the extended hours slots for Covid patient follow up? These are not paid

273. R1's comments included that "we're all" (meaning R1, R2, R3, R4) invoicing, and claimed it was in line with CCG advice to use the funds for general covid work, rather than specifically for extra appointments. It is true that, as of January 2021, this was a surprise to the Claimant. While she had read the May, and June, and September exchanges cited above, she had not understood that R1 to R4 were invoicing £150 per week for "covid admin". That is, without specifically doing the extra GP appointments as per the agreement which had been reached about IA.

274. We also accept that, until January 2021 exchanges, R1 (and the other respondents) had not realised that the Claimant was unaware of the arrangement.

275. One of the respondents (most likely Dr Caswell, but it does not necessarily which) added:

> [To be honest] I get confused between extended hrs and 8-8 but I remember when covid struck and the CCG said don't bother doing the calls but well keep paying you to cover the covid admin you will have to do

And

> So now you are back selina you can back date it to December and claim it too or we could leave it in the pot to get equally divided in the profit share, although Victoria can keep invoicing for it until she is a signed-up partner

276. Dr Caswell expressed the view that there was enough money to pay for all of the physio and the nurse and the Covid admin. The claimant disagreed said that the "8-8" funds of £6595 per month would not cover it. Dr Caswell stood by her opinion. She expressed the view that she was sure that the covid admin invoicing arrangement had been mentioned on the WhatsApp group, but acknowledged it was sometimes difficult to follow everything on the thread.

277. Dr Caswell said that the decision had been made while the claimant was on maternity leave, but it had not been kept from the claimant. The claimant replied that she had gone to every partners meeting from June or July onwards. Dr

Caswell's response was that Covid started in March or April. The implication in the January 2021 reply was - therefore, been that the decision had been made prior to that. As we have mentioned, our finding is that it was made no later than 14 May 2020.

278. Dr Caswell and the Claimant agreed that it would not been on the claimant's radar (though they were not necessarily agreeing about why that was the case).

279. Dr Caswell also added that there had been no attempt to keep things from the Claimant. We accept that comment is Dr Caswell's genuine opinion.

280. The discussion continued the following day, 13 January 2021 [Bundle 658 to 659]. At the time, the Claimant accepted and acknowledged that R4, Dr Bargate, was not actually a partner, but was an employee of the practice.

281. The Claimant's and Dr Thakkar's comments included:

> [13/01/2021, 13:10:39] Selina Shaw: Thanks for that, but I'm pretty shocked you are all claiming 4-5 hours a month for this.
>
> What exactly are you all doing every month?
>
> You all have a management session at great expense to the organisation to cover the running of the business with what ever crops up and Victoria you have 2 sessions.
>
> This is totally excessive on top of that to spend £3k a month on yourselves on "additional work", how on earth the 4 of you have justified this I have no idea but I'm horrified and I'm furious.
>
> We need a big discussion on Monday
>
> We need to discuss this and it needs putting right
>
> The IA budget is to deliver additional patient care, it has been used to enhance partner pay
>
> [13/01/2021, 14:19:35] Raj: We made a majority partnership decision Selina. We're all doing a a lot
>
> [13/01/2021, 14:20:15] Selina Shaw: It's a complete misuse of practice funds
>
> [13/01/2021, 14:20:26] Selina Shaw: It's all needs putting back
>
> [13/01/2021, 14:21:28] Selina Shaw: Write me a list of the 25 hours of "Covid admin " you 4 have completed and claimed for in the last month
>
> [13/01/2021, 14:21:37] Selina Shaw: Utterly unjustified
>
> [13/01/2021, 14:23:24] Raj: Selina this is message is inappropriate and very upsetting to put on a WhatsApp group. We made a majority partnership decision.
>
> [13/01/2021, 14:23:40] Selina Shaw: Ok let's speak now
>
> [13/01/2021, 14:24:38] Raj: I'm really upset how I've been treated by these messages. I'm in meetings.

> [13/01/2021, 14:25:45] Selina Shaw: The patients would be equally upset to know that money for their care has been spent on the partners

282. Dr Thakkar expressed the view that he felt bullied and that he would sign off from the WhatsApp discussion. Dr Bargate at 14:28, said that WhatsApp was not the place for the discussion she believed the line had been crossed when it was suggested that the four named respondents had been taking money from their patients and their integrity was questioned. The claimant said there was no justification for how the IA funded been used. Dr Caswell said that she believed that had already been decided that there would be a discussion the following Monday. Dr Caswell also said that she resented the accusation that they had enhanced their pay unjustifiably at the expense of patient care. She remarked that while the claimant was saying that she had no idea why these payments were justified, she, the Claimant, had been on leave. Dr Caswell said that the claimant should moderate her remarks until she gain full possession of the facts and could make an objective assessment.

283. On Thursday 14 January 2021, the claimant and notified the other partners hat she was ill and that she would not be able to come to work. She also had a conversation with Helen Radcliffe.

284. On Friday 15 January 2021, the four named respondents sent a letter to the claimant which is [Bundle 365]. One part of their reasons and motivations for sending this letter Helen Radcliffe had told them that, the previous day, the Claimant had told Ms Radcliffe that the Claimant was proposing to report them to the regulators for allegedly fraudulently invoicing the CCG for the IA funds.

285. This is an allegation which the Respondents strongly deny.

286. The 15 January letter said that the Respondents had taken advice from the head of primary care at the CCG and also the medical director at the LMC. The letter claimed that both of those individuals had supported the stance that the invoicing had been lawful and appropriate.

287. The letter made a couple of references to the claimant's maternity leave.

287.1 The first was under the heading “decision-making”, where it simply refers to her maternity leave as a reference point for the time at which the decision was made. It went on to say that there been no intention to mislead the claimant. It claimed that the decision was made by the four remaining partners and our finding is that that was intended as a reference to the four signatories to the letter. Ie the four respondents to this claim.

287.2 The other reference to the maternity leave was in the third last paragraph under the heading “conclusion”. It said

> To have our motivations, probity and very integrity so disputed, by someone who, (through no fault of her own), was neither present nor engaged during our most critical months, we feel is egregiously shocking and completely unacceptable.

287.3 Our finding is that this is a reference to the fact that the claimant did not have direct information about what work they had been doing between March and November as she herself had not observed what work they had been doing in that period. It was not their conscious intention to assert that a partner who was on maternity leave did not have a write to comment on / criticise things that happened during the maternity leave.

287.4 The letter went on to say that the Respondents believed that there had been a gross oversight by the claimant in relation to the work that they had been undertaking. It suggested that there would not be a meeting the following Monday because the Respondents did not feel confident that it would be a productive use of their time.

288. The Claimant sent two replies to this letter.

289. The letter was sent at 10.20am, and the Claimant's first reply was about an hour later [Bundle 364]. She stated that she was contacting the GMC regarding the fitness to practice of the four named partners. She said they had fraudulently obtained £25,000 by invoicing the business for services that they had not performed.

290. Her second, longer, reply was sent about an hour after that, at 12.13pm [Bundle 646]. In that, she mentioned more than once that R4 was not a partner. She disputed that it was appropriate to charge for "covid admin" work, even on the assumption that the work was actually done, and expressed the view that it had not been (at least, not to the extent for which – in the Claimant's opinion – the invoices implied that it had been done). She implied that there had been deliberate conduct to conceal the matter from her, and stated:

> Clearly this is invoice fraud and this is professional misconduct. This is unjustified and totally explicable to the public, to the staff, to the CCG, and to NHS England.
>
> The GMC sets out clear standards for doctors including being honest in all your business affairs.

291. Later that day, the Claimant had a discussion with the Medical Director of the LMC, Dr Mallard-Smith. This led to the Claimant forwarding the Respondents 10.20am letter to Dr Mallard-Smith, and Dr Mallard-Smith sending a reply which suggested that the matter was potentially an internal partnership dispute rather than a matter of fraud which required a report to GMC (while making clear that it was not her role to decide, and come to concluded opinions, on such matters).

292. The same evening, the Claimant replied to Dr Mallard-Smith. She listed various wrongdoing by Dr Thakkar (in generic terms, not with specific examples) over 2.5 years, and one of those heads of wrongdoing was “maternity discrimination”.

293. A meeting took place on Monday 18 January 2021. As per [Bundle 363], the heading on the minutes was “Partners meeting”. All four named respondents plus Helen Radcliffe attended. The Claimant did not. The correspondence the previous week had suggested that the respondents did not think a meeting with the Claimant was appropriate, and the Claimant agreed that, in the absence of a mediator, she did not wish to meet the Respondents.

294. On the afternoon of 18 January, Dr Mallard-Smith wrote back to the Claimant, stating that she was to speak to the other partners the following day. It seems clear from the context, that she was intending to speak about the Covid admin issue, and the Claimant’s concerns about it, and whether there could be an agreed resolution. Our finding is that she was not intending to, and had not been asked by the Claimant to, pass on to the Respondents any allegation of maternity discrimination. Apart from anything else, the Claimant had supplied no details of any such discrimination.

295. The Claimant sought an update from Dr Mallard-Smith later in the week. She mentioned nothing about discrimination. Both the Claimant’s correspondence to Dr Mallard-Smith, and Dr Mallard-Smith’s replies, show that the Claimant had not reached the opinion yet that there had been an irretrievable breakdown in the partnership relationship. Furthermore, Dr Mallard-Smith’s 21 January 2021 reply informed the Claimant that the other partners also wanted to preserve the partnership.

296. On 22 January 2021, the Claimant sent the following email:

> Dear Dr Thakkar
>
> Please take this note as confirmation of my resignation as Partner from the Bourne End & Woobum Green Medical Centre as of today, Friday January 22nd.
>
> As previously stated, I am very disappointed by the use of Improved Access funds to support 'Partner overtime' beyond the months of March through to May when admittedly workload was abnormally high due to the Covid crisis. There is a full audit trail of system data and medical record updates which, in my opinion, fully support my position. I am however moving on and appropriate running of the business and it's accounts will be your responsibility.
>
> Given you are now the sole remaining Partner, you are of course free to form a new partnership of your choice. I'll be in touch to confirm my final date of employment.
>
> Best regards,
>
> Dr Selina Shaw

297. In her witness statement, the Claimant asserts that the reason that she did not mention discrimination in the email is that she did not write the email, and she was unable to do so.

298. We accept the Claimant's account that there was a discussion with her husband and that, as a result of that discussion, he sent a draft to her. (We have a copy of the draft, added to the bundle as late disclosure). However, the Claimant was capable of writing lengthy correspondence around this time. Furthermore, less than an hour later, she was able to write to Dr Mallard-Smith to say:

> Hi Becky
>
> As a courtesy I am just letting you know that I have resigned. I cannot work with integrity in that group ongoing so I am moving on. I came to the conclusion that even with your help on mediation the relationship is fundamentally never going to work since the value base is opposed. To be honest this is the last in a long line of insults to me so I've decided to leave.
>
> I appreciate you help over the last week
>
> Selina
>
> Dr Selina Shaw

299. The resignation email was worded in a way that the Claimant was satisfied with. Furthermore, on her own account, her husband was aware of the events of January 2021, and her reasons for wishing to resign. The Claimant had the opportunity to, and the ability to, re-word the draft resignation, and add to it, had she wished to do so.

300. The claimant's husband drafted the email based on information he had received from the claimant and we are satisfied that the claimant would have only put her name to this document (or any other document) if she was satisfied with the contents. The Claimant places weight on the fact that there is only 16 minutes between the draft being sent to her and her sending the final version to Dr Thakkar. We are confident that that is because the claimant and her husband had discussed the matter previously insufficient detail, prior to the draft, that the Claimant did not require a longer period of checking or contemplating the contents.

301. One of the reasons that the claimant resigned - as is clear from the correspondence - is the invoicing issue. The claimant strongly disagreed with the fact that the partners were receiving this money. She also strongly disagreed with the fact that she had not been informed of it earlier.

302. The Claimant remained a partner during the required 6 month notice period. She was on sick leave for the entirety of the notice period. She submitted fit notes during the notice period.

303. One of the Claimant's allegations relates to the fact that her name was removed from the Respondent's website during (as opposed to after) the notice period.

304. This was done by Helen Radcliffe. She did not do it on the instructions of any of the respondents. She believed that it was the correct thing to do and she believed would be uncontroversial. Her decision was that, since the claimant's last day as a partner had been fixed, and since the claimant's fit notes made clear that she would not be returning to work before the end of the partnership, it was appropriate to remove the claimant from the website so that patients would not be the opinion that Dr Shaw was one of the GPs that they might see. She did not expressly consult the Claimant about this particular decision (though she had been in correspondence with the Claimant about whether the Claimant would return to do any clinical work before the end of her time as a partner), but she had regarded the matter as being routine.

Analysis and Conclusions

305. Our decisions on each of the complaints brought by the Claimant follows the list of issues which is cited in full above.

306. Paragraph 8.1 the list of issues accurately states the position in relation to the dates of presentation of the claim form, and of ACAS early conciliation. It accurately states that complaints about acts/omissions on or after 27 December 2020 are in time, but more analysis is required for those earlier than that.

307. Paragraph 7.1 of the list of issues records that the Respondent accepts that there were two protected acts. We will refer to the 26 April 2018 email [Bundle 327] as "PA1" and to the 18 June 2019 email [Bundle 297] as "PA2" (and we take into account that it was part of the same email trail which included her email just before 11pm the previous day, which is [Bundle 298]).

308. The parties are in agreement that the "protected period" (as defined in section 18 EQA) was between around May 19 (when the claimant discovered she was pregnant) and November 2020 (when the claimant returned from maternity leave). Nothing turns on the exact date within either month.

309. Paragraph 4 of the list of issues sets out the harassment allegations, which in the alternative, are said to be allegations of direct discrimination because of sex (paragraph 5.1.12 of the list of issues) or allegations of pregnancy/maternity discrimination (paragraph 6.1 the list of issues). They are also alleged acts of victimisation (paragraph 7.2).

310. In relation to each of the items 4.1.1 to 4.1.4 of the list of issues:

310.1 As per the findings of fact, we were not satisfied that the particular alleged comments were made.

310.2 For the reasons stated, we decided that it was more likely that the comments in paragraphs 4.1.1 and 4.1.4 were not made, than that they were, because we thought there would have been something in writing nearer the time had they been made.

310.3 For the reasons stated, we decided that the exact words as per paragraph 4.1.2 were not used.

310.4 The words attributed to Dr Holy from June 2019, where not inherently implausible, but we disagreed with the Claimant's opinion about corroboration, and we cannot be confident that she has remembered the words with the accuracy that she asserts. Even if made, we are satisfied that she was not offended by the comments.

310.5 Had any of these comments been made, complaints of contraventions of EQA would have been out of time, subject to us either deciding they formed part of a continuing act (that was in time) or else exercising the just and equitable extension.

311. In relation to paragraph 4.1.5 from the list of issues and the part which refers to Grounds of Complaint paragraph 22 (dog with a bone, etc, early September 2019), we found that, on balance of probabilities, the comments were made. The complaint are out of time, subject to us either deciding it formed part of a continuing act (that was in time) or else exercising the just and equitable extension

312. In relation to paragraph 4.1.5 from the list of issues and the part which refers to the Grounds of Complaint at paragraph 23 (the WhatsApp discussion on 24 October 2019), we have the exchange in the bundle and have discussed it in detail in the findings of fact. The complaints are out of time, subject to us either deciding it formed part of a continuing act (that was in time) or else exercising the just and equitable extension

313. Paragraph 5.1 of the list of issues sets out the direct sex discrimination allegations. In the alternative, they are allegations of pregnancy/maternity discrimination (paragraph 6.1 the list of issues). They are also alleged acts of victimisation (paragraph 7.2).

314. In relation to the alleged treatment itemised in paragraph 5.1 of the list of issues, we have addressed each subparagraph in the findings of fact.

315. We have taken our findings as a whole into account when we analyse items 5.1.9 and 5.1.11 first. We set those decisions out first in our exposition because complaints about those alleged matters are in time. Therefore, our decisions about whether there is a contravention of EQA in relation to either of these subparagraphs will be relevant to the approach to the time question for the other matters.

316. Our decision is that the letter at [Bundle 365] (LOI 5.1.9 alleged aggressive response) was not victimisation, pregnancy/maternity discrimination and not sex discrimination.

316.1 We have considered the burden of proof provisions for each of these alleged contraventions.

316.2 There are no facts from which we could conclude that either of the protected acts motivated, to any extent, consciously or unconsciously, the authors of the letter.

316.2.1 For PA1, the maternity clause issue (the subject matter of PA1) had been resolved in the Claimant's favour 2.75 years earlier, at a time when three of the authors had not even joined the business. Dr Thakkar, R1, was involved in R5's business/practice at the time of PA1; however, the passage of time between April 2018 and January 2021, and the number of events in that period, including the covid pandemic, make it unlikely that PA1 was operating on his mind at the time.

316.2.2 For PA2, similar comments apply, albeit PA2 was 15 months later than PA1 and was, therefore, about 18 months before the Respondents' January 2021 letter (rather than 30 months before it, like PA1).

316.3 There are no facts from which we could conclude that the Claimant's sex motivated, to any extent, consciously or unconsciously, the authors of the letter

316.3.1 The fact that three of the signatories are female (and one is male) does not mean that the letter could not be because of sex (that is, at least partially motivated by sex, even if unconsciously). However, there are no facts from which we could conclude, in absence of explanation from the Respondent, that the letter was because of the Claimant's sex. The subject matter of the letter had nothing to do with anyone's sex.

316.4 The letter was not sent in the protected period (May 2019 to November 2020). The letter was not the implementation of a decision taken in the protected period. A decision to write to the Claimant in these terms was not made until shortly before the letter was sent and after the WhatsApp exchange (which started 12 January 2021) and the Claimant's discussion with practice manager (around 14 January 2021).

316.5 The reason why the letter was worded the way it was is that the authors were angry about the accusations, and thought the Claimant's accusations against them were unjustified. The Claimant's allegations, as per the WhatsApp exchanges from 12 January to 14 January 2021 were not about sex, or pregnancy/maternity, discrimination, or any other form of discrimination, and

were not protected acts. They were allegations of financial wrongdoing. Further, allegations of professional misconduct had been made to the practice manager, and the Claimant had threatened to report them to regulators (and not for alleged breaches of EQA), and at least part of the motivation for sending the letter (and wording it in that way) was to set out their position in writing.

316.6 The Respondents did refer to the Claimant's maternity leave in the letter, but the Claimant's maternity leave was not the reason that the letter was sent (even in part). The Claimant's maternity leave was part of their argument to the Claimant that the Claimant was making accusations without evidence. That is, the Claimant had expressly suggested that they had not done the work. The argument put forward in the letter is that anyone who had been present in the practice at the time would have observed that they were working hard. The criticism of the Claimant is not that she was on maternity leave while they were working hard. The criticism is that – according to the authors' genuine opinion, expressed in the January 2021 letter – there was no basis for the Claimant to allege that the work had not been done. [As an aside, we take into account, that the Claimant strongly disagrees with that argument. The Claimant believes that firstly she had enough data to assess what work had, and had not, been done; secondly, that she had been back for a couple of months and the invoicing had continued, and so she had her own direct observation for that period at least; and thirdly that, even if they were working hard, it did not follow that such work was distinct and different from that which they were obliged to do in any event, without extra payment. However, while the Claimant is entitled to all of those opinions, for the point at hand, we have to decide what motivated the Respondents to send the letter, not whether the Claimant or the Respondent are "right" or "wrong" about whether the Claimant had sufficient evidence for the accusation.]

316.7 We are satisfied by the evidence in the employment tribunal hearing, that the Respondents did not send the letter because the Claimant had been on maternity leave. They did not word the letter in the way they did because the Claimant had been on maternity leave.

317. The January 2021 letter (and the events leading up to it) are closely connected to item 5.1.8 in the list of issues. On the facts, the four named respondents did not make a deliberate and conscious decision that they would fail to inform the claimant about the covid admin decision that had been made.

318. On the facts, we do accept that the Claimant did not know about the covid admin decision until 12 January 2021. (She had read WhatsApp messages which referred to it; we are not criticising her for the fact that she did not investigate further to find out exactly what the Respondents were referring to in those messages).

319. Had an employment tribunal claim been presented on 12 January 2021, about the covid admin issue (item 5.1.8 of the list of issues) it would have already been out of time by then as the decision had been made more than 6 months earlier (no later than 14 May 2020). However, even though the Respondent did not deliberately conceal the information from the Claimant, we consider it to be just and equitable to extend time. The actual covid admin decision itself is so closely related to a claim which is in time (namely the contents of the 15 January 2021 letter), that the Respondent is not significantly prejudiced by having to deal with the allegations based on item 5.1.8 of the list of issues. The fact that the Claimant did not present the claim very promptly after 12 January 2021 is a relevant factor, but not a conclusive one. We are not required to analyse narrowly whether the claimant brought the claim within a reasonable "further period" as per the reasonable practicability test, but we have a broader discretion. Although extending time is the exception rather than the rule, we are satisfied that it is appropriate for the complaints based on item 5.1.8 of the list of issues.

320. In relation to the merits of the complaints based on paragraph 5.1.8 of the list of issues:

320.1 There were not many references in the WhatsApp exchanges, but there were some. We reject the claimant's argument that these were accidental mentions, and that the Respondents had intended to keep all discussions about the Covid admin decision to another WhatsApp group (or another medium) to which the Claimant did not have access, but they sometimes forgot, and mistakenly mentioned it in the partners group (to which R4, Dr Bargate, had access, though there is a dispute about whether she is a partner). [For completeness, we do not think it likely that the Respondents – or any of them – decided to make some deliberately vague references to give themselves plausible deniability later on.] The reasons for the mentions in the WhatsApp group is that the Respondents did not think they were doing anything wrong, or hiding anything from the Claimant.

320.2 It is inconceivable that any of the named respondents thought that the Claimant – who was the Finance Partner – was never going to find out. This, of course, is a separate issue to whether they ought to have proactively told her, or consulted her, or arranged a formal partnership vote. However, we are satisfied that, in around April or May 2020, they had not formed a deliberate plan to try to conceal the matter from the Claimant and it is inherently implausible that any of them would have thought that such a plan would have succeeded.

320.3 The Respondents had no conscious belief or opinion that they were referring to any decisions or payments that the claimant was unaware of. They knew that the Claimant commented in the WhatsApp group sometimes, and specifically responded to some points that were made (including on 27 April

2020). They also knew that, from June 2020 onwards, the Claimant was regularly attending partnership meetings

320.4 Our conclusion from the evidence is that the reason why the claimant was not formally invited to a partnership meeting to discuss payments to/invoices from the partners, for Covid admin, is that none of the partners were formally invited to any such meeting.

320.5 In the early months of Covid, the partners were not formally invited to partnership meetings for all decision-making. Various ad hoc decisions were made in the light of new evidence, and communications, which were being received in a rapidly changing and unprecedented situation. The evidence clearly demonstrates to us that none of the named respondents were consciously giving any thought to which meetings were management meetings, which were clinical meetings and which were partnership meetings. They were making decisions rapidly and with little formality because that believed that was necessary. Lawyers (for example) might well have thought that more formality and rigour was required, and that the legal basis for each decision should have been properly analysed to ensure that the purported decision-maker(s) did actually have the requisite authority to make particular decisions. However, at the time, the Respondents were not thinking like lawyers; they were thinking like doctors in an emergency.

320.6 Any formal and binding decision about whether the partnership agreement was breached and, if so, what the contractual remedy for that would be, are outside our jurisdiction. Any comments we make on the topic are purely for the purpose of deciding the EQA claims in front of us

320.7 On the basis of the evidence before us, we do think that there was a clear breach of the partnership agreement to make this particular decision, namely a decision to pay £150 per week to all named respondents and call it “covid admin”, in the absence of a partners’ meeting/decision.

320.8 For the purposes of analysing the EQA claims, we conclude that it would not have been a breach of the partnership agreement to authorise additional payments to non-partners. (Again, we caveat that by saying it is outside our jurisdiction and we are not purporting to make a formal and binding finding.)

320.9 However, the breach that we identify was that the partnership agreement was clear that partners could not receive extra payments (other than when acting as a locum covering for a colleague on sickness absence, as per the written agreement, or other than when doing the extra appointments as per the IA scheme, which is a variation that does not appear to have been formally included in the only version of the written agreement which we have seen).

320.10 Staffing costs (for non-partners) were an expense for the business, and a formal partnership decision would not necessarily have been required to allow an employee of the practice to be paid £150 per week extra for doing extra work. However, it does not follow that – therefore – a partnership decision was not required before a partner could claim such a sum. Furthermore (and we are not purporting to tie the hands of any court of competent jurisdiction which might have to deal with different claims in due course), for the purpose of determining the EQA complaints, we do not consider that the facts that additional invoicing for IA work was allowed, and that practices had been told they could place extra appointments on hold, and use the funds for other (covid-related) required work, carried with them an implication that R5's partners could invoice the same amount (£150 per week), or any amount, for replacement (covid-related or otherwise) work.

320.11 In summary, before partners could invoice, and be paid, for the "covid admin" work, we consider that a formal partnership decision was required, and that in turn required a formal partnership meeting (clause 21.6 of the agreement).

320.12 Had it been necessary for us to decide the point, we would not necessarily have been satisfied that it was the type of decision which (had to be a unanimous decision because it) fell within Clause 21.2.8. However – and this amounts to much the same thing – we would have been likely to have decided that it had to be unanimous as a variation of the agreement or else a decision within clause 21.2.4.

320.13 However, notwithstanding the contents of the Grounds of Resistance, and the Respondents' witness statements, we are satisfied that that there was no formal decision that met the requirements of Clause 21.1 and 21.6 in any event, and so there is no need to decide whether a majority decision would have been sufficient.

320.14 The reason that the Respondents believed that they could authorise themselves to be paid £150 per week is that, as far as they were concerned, what they were doing (extra hours on Covid related work) was a direct replacement for the IA/EH work for which they had previously been able to invoice £150 per week. This understanding was based on the communications that they received at the time, and which they discussed between 27 April and 14 May 2020. As far as they were concerned, they had been able to invoice separately - regardless of whether they were a partner or not – for the old work, and they thought they could, on that basis, carry on with the same arrangement for what (they perceived as) the direct replacement for that work. Regardless of the fact that – in this tribunal's opinion – they were not contractually authorised to make such a decision (that partners could invoice), we are entirely satisfied that, at the time, each of the Respondents believed that they had the authority for the decision to be

made. As mentioned, they gave no thought to what – if any – formality was required to make the decision, and properly record it in writing, and circulate to anyone who needed to know.

320.15 As mentioned, they gave no particular thought to expressly contacting the Claimant to ensure that she knew. However, after the decision had been made, and the invoicing commenced, they genuinely believed that the Claimant was aware of what they were doing. None of them addressed their mind to the possibility that the Claimant did not know. Whether reasonably or not, they knew that there were messages in the WhatsApp group, knew that the Claimant was Finance Partner, and did not consider that this decision – one of many they were making at the time, in the early months of the pandemic - was one they needed to specifically contact the Claimant about.

320.16 While this was not a trivial decision, the Respondents genuinely considered it to be routine, and simply one of the many micro-decisions that had to be made to adapt to the Covid environment compared to the pre-Covid environment.

320.17 In summary, although they were mistaken – in this employment tribunal's opinion – at the time none of the Respondents believed it was necessary to formally put a proposition (about £150 per week for Covid Admin) to a partnership meeting, for there to be a vote, or for their to be minutes, or for the decision to be formally circulated (to all partners) after it was made. There was no conscious desire to exclude the claimant from the decision-making process, either because she was on maternity leave or because of any protected acts or at all.

321. We have extended time for the allegations based on item 5.1.8, and the decision did occur in the "protected period". However, even taking into account the burden of proof provisions in section 136 EQA, all the complaints based on this allegation fail. There are no facts from which we could conclude that either the purported decision about Covid Admin payments, or the fact that it was made in the Claimant's absence (and without express notification to her, either before or after the purported decision) was because of PA1, because of PA2, because of sex, or because of pregnancy, illness suffered because of pregnancy, or maternity leave.

321.1 There are no facts from which we could conclude that either of the protected acts motivated, to any extent, consciously or unconsciously, the makers of the decision. Our analysis is similar to that in relation to the 15 January 2021 letter, albeit we take into account that there was about a 7 month shorter gap.

321.2 The fact that the Claimant was on maternity leave is part of the background information. Had the Claimant not been on maternity leave, it is more likely that the decision would have come to her attention, either because the

proposal was first raised at an ad hoc meeting which she attended, or because she was more likely to be involved in an oral workplace discussion in which it was raised. However, the fact that the Claimant was on maternity leave was not the reason (even in part, or even unconsciously) that she was not invited to a meeting on the topic.

322. In terms of item 5.1.10 of the list of issues (alleged expulsion from the partnership), although this is an event which occurred after 27 December 2020, it is still an allegation to which time limit arguments are relevant, because it was not part of the original claim form, but was added by way of an amendment, for which we gave permission during this hearing. We do decide that we will extend time for it on the basis that it – and the evidence about it - is so closely linked to other issues (especially, but not only, items 5.1.8 and 5.1.9) and there is such an overlap about the relevant evidence, that we do not consider that the Respondents' are so disadvantaged (in comparison to the disadvantage to the Claimant if we refuse to extend time) that we should refuse the extension.

323. We do not think that the contents of the Respondents' 15 January 2021 letter can be seen as a breach of contract. In any event, we do not see it as such a serious breach of contract that justified the Claimant as treating it as a repudiation of the contract.

323.1 In the letter, the named respondents were objecting the claimant's accusation(s) against them that they had acted fraudulently. They were putting their side of the story. They were asserting, as a fact, that they had done the work. They were asserting that they genuinely believed that the regulators would approve of the fact that payments had been made to the practice, and would be content with the way the money had been spent. They expressed the view that the claimant's doubts about whether they had actually done the work were not justified (and, in support of that, commented that she had not been there at the time to see what work they were actually doing).

323.2 The letter does refer to a proposal to hold a meeting, the following Monday, in absence of the Claimant. However, the context of that is explained, and the letter does not purport to say that the Claimant will be permanently, or without her consent, excluded from the partnership or partnership meetings, and that there should be mediation to find a way forward.

324. We do think that the decision about Covid Admin invoicing was a serious breach of the partnership agreement, and one which potentially entitled the Claimant to treat the breach as repudiatory. She found out about it on 12 January 2021 (not on any earlier date, before or after her return from maternity leave the previous November).

325. The situation with the Covid Admin invoicing was the reason that the Claimant resigned. She resigned promptly (within about 10 days) of discovering the breach. She had not waived the breach, or affirmed the contract, before she resigned. She was entitled to resign without notice. The fact that she decided to resign by giving notice does not change that. Therefore, our decision is that the termination of the Claimant's membership of the partnership was, as mentioned in section 46(6)(b) EQA, "by an act of [the Claimant] (including giving notice) in circumstances such that [the Claimant] [was] entitled, because of the conduct of other partners or members, to terminate the position without notice". Thus, while she was not actually expelled from the partnership by the other partners, section 46(6) deems the situation to be an expulsion. (It was a "constructive expulsion" to use the phrase adopted by the parties' representatives).

326. The Covid decision was not a contravention of EQA, as per our decisions above. Therefore, the "constructive expulsion" does not contravene sections 44(2)(c) or 44(6)(c) (and nor would it contravene section 44(3)).

327. After the resignation, but before the notice expired, the Claimant's name was removed from the website. The list of issues refers to paragraph 30 of the Grounds of Complaint (as does paragraph 33(xiv) of the Grounds of Complaint). Potentially it should say paragraph 31 of the Grounds of Complaint. The allegation is plainly that the removal from the website was discrimination (sex or pregnancy/maternity discrimination) and that that the removal from the website was victimisation, being a detriment because of PA1 or PA2. The reference to "because she had raised issues about how she had been treated during her maternity leave" does not appear in either paragraph 30 or 31 of the Grounds of Complaint (though it does appear in paragraph 33(xiv)). The only alleged protected acts are those in 7.1 of the list of issues, which do not include "allegations of how she had been treated during her maternity leave".

328. In any event, we are satisfied that the Claimant's removal from website was not because of sex and not because of PA1 or PA2 (or because she had raised issues about how she had been treated during her maternity leave). This was a unilateral decision made by Helen Radcliffe (without consulting with the Claimant or any other partner) and was made solely because she thought that it was appropriate to remove the Claimant's name because the Claimant would not be (because of sickness absence that would last until her last day as a partner) seeing any more patients. We are satisfied that that Ms Radcliffe was not motivated, even unconsciously, or even in part, by sex or by any protected act.

329. So, in summary, claims based on 5.1.9 and 5.1.11 of the list of issues are in time, as of right. Claims based on 5.1.8 and 5.1.10 of the list of issues are in time because we extended time. However, they each fail on the merits.

330. We will comment briefly on the other allegations below. However, having taken into account of the overall circumstances, our decision is that none of them form part of a continuing act with anything which is in time. Furthermore, taking into account the significant time which elapsed between the alleged acts/omissions and the presentation of the claim form, and taking into account the departures of Dr Holy (in particular) as well as and Drs Bailey and Bhargava long before the claim was presented, and taking account of the lack of contemporaneous written complaints and the lack of overlap between different alleged incidents, it would not be just and equitable to extend time. There is a significant disadvantage for the Respondent in having to defend itself against allegations (several of which relate to oral conversations) of events so long before the claim was presented. The Claimant is an articulate and intelligent professional who sought advice (eg from BMA) when she thought it appropriate, and who had, as of 2018 (at the latest) knowledge of the existence of the Equality Act and that it included provisions forbidding sex discrimination and pregnancy/maternity discrimination. There was nothing stopping her from bringing the claim sooner had she wished to do so.

331. Thus, for all of the complaints other than those related to paragraphs 5.1.8 to 5.1.11, they are dismissed because they are out of time and we do not extend time.

332. That does not imply that they would have succeeded had they not been out of time. For completeness, our brief comments on the merits are as follows.

333. For item 5.1.1 from the list of issues, we would not have been likely to have upheld this. We have not been satisfied that there was unfavourable treatment or discrimination (and it was before PA1 and PA2). The Claimant was sent the wording of an agreement which reflected a pre-existing agreement for a partnership containing several women, and where the senior partner was female. The Claimant, as was her right, objected to the wording of one of the clauses, and successfully got it amended; however, it does not follow that the unamended clause was discriminatory. Furthermore, as per the findings of fact, in 2020, when the formal agreement for Caswell, Naheed and potentially Bargate was being discussed, the Claimant was content to continue with the wording that had been agreed in 2018. We would not have been likely to decide that sick leave and maternity leave had to be treated the same; rather, the case law is clear that maternity leave is in a category of its own, and a comparison between the way in which a (male) employee treated on sick leave to how an employee is treated on maternity leave is not appropriate, and we would not have been persuaded that the approach should be different for partners. In any event, had the Claimant thought it was discriminatory to fail to treat sick leave and maternity leave identically, then she would have been – on her own argument – discriminating against Caswell, Naheed and potentially Bargate in relation to the terms which she (on behalf of the partnership) circulated for comment. Furthermore, to the extent that a partner who had sick leave was less financially damaged by the absence

than one who took maternity leave, that was because the partnership had decided to utilise insurance coverage for sickness absence up to 18 weeks, and that was not available for maternity leave absences.

334. For item 5.1.2, as per the findings of fact, each of the Claimant and R1 expressed their own opinion. Ultimately, the clause was amended (later than 8 May 2018), and the Claimant expressed happiness with the compromise. R1 did not seek the Claimant out to force his opinion on her; she came to him. Even taking into account the burden of proof provisions, we would have been unlikely to have concluded that his comments on 7 May 2018 were because of sex or because of PA1.

335. For item 5.1.3, as per the findings of fact, we are satisfied that the email exchanges on 8 November 2018 occurred after there had been an intervening oral discussion between the emails around 1pm that day, and those between 9.20pm and 10.16pm. Further, in that oral discussion (as well as in the later emails), R1 objected to the tone of the Claimant's email. We would not have been likely to have been satisfied that it was because the Claimant was supporting a female colleague, or because the Claimant is female, or because there was a reference to the pay rates of a male locum. We would not have been likely to had decided that R1 was influenced, even unconsciously, by PA1. On the face of the documents themselves, R1 said that the Claimant's suggestion that he do 4 hours admin work, leaving Dr Merali to be paid the full £640 for 6 hours clinical work was a good one. We would have been likely to decide that it was only the tone of the email (copied to all partners) that he was objecting to, not the fact that the Claimant was expressing an opinion on a matter related to the facts of his secondment or the pay rate to a (female) locum.

336. In relation to 5.1.4, there was agreement almost immediately that the Claimant could change the days on which she did her four clinical sessions. The sticking point was about whether she could convert any of those four clinical sessions to management sessions instead. R5, acting by Dr Holy, did make suggestions in response to the Claimant's reasons for requesting a change. They were not suggestions that the Claimant thought were appropriate, but the respondent did not simply ignore the request. The Claimant was not seeking something that, in general, the male partners were getting and the female partners were not. She was seeking something that one partner only (Dr Holy, a male) was getting. On the facts, he was getting management sessions because the practice manager was absent and he was doing some of that role. We would have been likely to decide that the only reason the respondents did not wish to agree to the Claimant's suggestion is that they did not wish to set a precedent, and wished to maintain the arrangement that partnership shares were based on the number of clinical sessions only and that management was to be shared between the partners and performed as work which was additional to their clinical sessions (with Dr Holy's case being an exceptional set of circumstances). We were not likely to have been persuaded (even taking account of section 136 EQA) that the delay in approving

the new arrangement was because of sex or because of pregnancy, or because of PA1 or PA2. Furthermore, while the Claimant's forthcoming maternity leave, was mentioned in one of Dr Holy's email replies, in context, he was not suggesting that the management session would have been approved had the Claimant not been due to start maternity leave a few months later, but rather he was arguing that one of the Claimant's specific arguments in favour carried less weight in those circumstances.

337. For item 5.1.5, while the allegation refers to a "refusal … to arrange occupational health", that is not accurate. There was no "refusal". The Claimant made a suggestion and Dr Holy did not follow up on it, and nor did the Claimant repeat it. The partnership agreement gave the other partners the right to insist on an OH referral (at the partnership's expense) but did not require them to do so, and did not prevent the absent partner from making proactive arrangements, and seeking agreement about funding. As per the findings of fact, at the time that the Claimant mentioned OH referral, she was not stating that she was fit to work, or that she required OH advice in the immediate future. We received no evidence about how many referrals were done for other partners (by Dr Holy, or at all). We would have been unlikely to have decided that the absence of OH referral was because of sex, pregnancy, maternity leave or PA1 or PA2.

338. In relation to item 5.1.6 from the list of issues, on the facts, we decided that Dr Holy did not say the Claimant had "deliberately" become pregnant. Furthermore, it is not true that the Respondent refused to allow the Claimant to undertake business management. On the contrary, she, like the other partners, was expected to do so. As discussed in more detail above, the requirement was to do management work in addition to (not instead of) clinical sessions and the Claimant expressed a preference to do some management sessions instead of clinical.

339. In relation to item 5.1.7, as per the findings of fact, Dr Holy did not purport to tell the Claimant she had to start her maternity leave then. He mentioned it as an option (one of several) in response to information received from the Claimant. His comment was not because of sex, or protected acts, and was not unfavourable treatment because the Claimant was pregnant.

340. In relation to item 4.1.5, we decided that R1 probably did make the dog with a bone comment. We would have been unlikely to have decided that it was related to sex or because of sex. From the context, he had objected to the Claimant's proposals until being telephoned on the evening of 3 September 2019, and told the Claimant had threatened to resign if the other partners would not agree to her request. While the Claimant had every right to resign if dissatisfied, we would have been likely to decide that there were no facts from which we could conclude (in the absence of explanation from the Respondents) that the treatment was because of sex, or because of pregnancy, or because of upcoming maternity leave, or because of PA1 or PA2.

341. In relation to item 4.1.5, we are satisfied that R1 objected to the Claimant's tone and the fact that she made strong criticism of him in a forum where it could be read by others. We would have been likely to have decided that the facts that the Claimant is female, or that she was pregnant, or was about to go on maternity leave, or had done PA1 and PA2 had nothing whatsoever to do with R1's comments. Furthermore, we would have been likely to have decided that his comments were not "vitriolic abuse" and that he sought to end the discussion.

342. For the reasons stated above, all of the complaints have failed and are dismissed. It is not necessary to resolve the dispute about whether Dr Bargate is an employee of R5, or a partner. Either way, none of the respondents are liable to the Claimant.

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Employment Judge Quill

Date: 28 December 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

3/1/2024

N Gotecha
FOR EMPLOYMENT TRIBUNALS