Case No: 2300445/2019
2305653/2019

EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Ms M Bull		**(1) Dr C Namvar** **(2) Dr P Herbert**

Heard at: London South Employment Tribunal **On:** 17, 18, 19, 20, 21, 24, 25, 26 and 27 May 2021

Before: Employment Judge Hyams-Parish
Members: Ms B Leverton and Ms K Omer

Representation:
For the Claimant: Ms A Chute (Counsel)
For the Respondent: Ms N Newbegin (Counsel)

JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:

1. The claims of whistleblowing detriment brought pursuant to s.47B ERA fail and are dismissed.

2. The claim of automatic unfair dismissal brought pursuant to s.103A ERA fails and is dismissed.

3. The claim of unfair dismissal brought pursuant to s.98 ERA fails and is dismissed.

4. The claim of wrongful dismissal fails and is dismissed.

5. The claim of unlawful deduction from wages fails and is dismissed.

REASONS

CLAIMS AND LEGAL ISSUES

1. By two claim forms presented to the Employment Tribunal on 6 February 2019 and 23 December 2019, the Claimant brings the following claims against the Respondents:

   1.1. Whistleblowing detriment (s.47B Employment Rights Act 1996 ("ERA"))

   1.2. Automatic unfair dismissal (s.103A ERA)

   1.3. Ordinary unfair dismissal (s.98 ERA)

   1.4. Wrongful dismissal (Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994)

   1.5. Unlawful deduction from wages (s.13 ERA)

2. At the commencement of the hearing, the Claimant withdrew the second claim but invited the Tribunal not to dismiss it upon withdrawal, as the Claimant indicated that she wished to pursue the claim elsewhere.

3. The Respondents are both GPs at a practice called Hastings and Rother Healthcare. The Respondents contend that the reason they dismissed the Claimant was because she had prescribed Trazodone tablets (an antidepressant) to a patient ("LP") knowing that they were for LP's dog. The Claimant alleges that the real reason for her dismissal, and the reason for the detriments she alleges she suffered, was because she made protected (whistle blowing) disclosures.

4. The following questions were agreed by the parties as those which the Tribunal needed to answer in order to determine the claims[1].

   Status of the Claimant

   4.1. What was the status of the Claimant? Was she a genuine partner, an employee and/or worker for the partnership?

   Whistleblowing detriment (s.47B ERA)

   4.2. Did the Claimant raise the following concerns between February 2017 to September 2018?

[1] This list of issues has been amended to take into account concessions made during the hearing by the Claimant; and to better reflect the legal issues the Tribunal had to determine. The substance is the same as that agreed by Counsel prior to the hearing.

Protected Disclosure 1 to Dr Namvar/Penny Rose

4.3. In/around February 2017, did the Claimant raise her concern with Dr Namvar and Penny Rose that over 1,000 patient letters had been deleted from the DOCMAN system in advance of a CQC visit in February 2017?

Protected Disclosure 2 to Dr Namvar/Penny Rose

4.4. On several occasions between June and August 2017, did the Claimant raise her concern with Dr Namvar and Ms Rose that a nurse practitioner had been required to work alone from 5pm to 6.30pm, covering walk-ins, emergency and telephone queries, working autonomously beyond her competencies?

Protected Disclosure 3 to Dee Kellett

4.5. This disclosure was withdrawn.

Protected Disclosure 4 to Dr Namvar and Penny Rose

4.6. On several occasions in around January to May 2018 (and increasingly in the period mid-April to early May 2018) did the Claimant raise the following concerns with Dr Namvar, Ms Rose and Tracy White, Practice Manager of the Guestling branch surgery:

4.6.1. That the dispensing practice at the Guestling branch surgery was often left without a qualified dispenser, so that unqualified staff were dispensing medications without supervision

4.6.2. That the above practice had been concealed during a CQC inspection when the Respondents had advised that all dispensing staff were fully qualified as at the date of this inspection.

4.6.3. That there were inadequate drug stock control measures in place.

Protected Disclosure 5 to Penny Rose

4.7. Between April and May 2018, did the Claimant raise a concern with Ms Rose about LP who was undergoing chemotherapy and who was continuing to work throughout her treatment?

Protected Disclosure 6 to Dr Namvar/Penny Rose

4.8. On 4 May 2018, did the Claimant raise the following concerns with Ms Rose via email, and with Dr Namvar verbally and by email:

4.8.1. That there was a delay in processing paperwork, including prescriptions and discharge summaries for patients.

4.8.2. That there was a lack of face-to-face appointments for patients.

4.8.3. That there was a delay in reviewing laboratory results.

4.8.4. That there was a lack of reception cover.

4.8.5. That a nurse practitioner felt unsafe in her role and had been required to work autonomously outside her scope of competency.

4.8.6. That non-clinical staff were making clinical decisions regarding travel vaccinations.

Protected Disclosure 7 to Dr Namvar

4.9. On 21 August 2018, did the Claimant raise the following concerns with Dr Namvar:

4.9.1. That he was refusing to address a patient complaint about a paramedic based at Warrior Square, relating to the fact that this paramedic was not attending clinical supervision and was working without supervision.

4.9.2. That patient care and safety continued to be compromised by inadequate and unsafe staffing levels.

4.9.3. That there was a high number of blood results sitting on system (over 600 at any one time).

4.9.4. That unsafe prescribing practices continued (including the lack of medication reviews).

Protected Disclosure 8 to Shani Adams

4.10. This disclosure was withdrawn.

Protected Disclosure 9 to Dr Namvar

4.11. On 4 September 2018, did the Claimant raise the following concerns with Dr Namvar:

4.11.1. That controlled drugs were retained on a repeat prescription basis.

4.11.2. That medication was being regularly prescribed on a 3-monthly basis (instead of a monthly basis).

4.11.3. That medication reviews were not being completed.

4.11.4. That opiates were over prescribed.

4.11.5. That outstanding biochemistry and microbiology results sitting on the system for weeks at a time without being checked by a clinician and the fact that in some cases this had led to a delay in patients receiving treatment.

4.11.6. That patients were placed at risk by the proposed merger because of the ongoing issue of chronic understaffing.

Are the disclosures protected?

4.12. Did the above amount, either individually or cumulatively, to:

4.12.1. A disclosure of information which in the Claimant's reasonable belief:

4.12.1.1. Was in the public interest; and

4.12.1.2. Tended to show that the Respondents had failed, were failing or were likely to fail to comply with legal obligations to which they were subject (s43B(1)(b) ERA) and/or that the health and safety of staff and patients had been, was being or was likely to be endangered (s43B(1)(d) ERA) and / or that information tending to show that any matter in ERA s43B(1)(a) had been, was being or was likely to be deliberately concealed (s43B(f) ERA)?

4.13. Was each disclosure made within the ambit of s 43C and 43G ERA?

Detriments

4.14. Was the Claimant subject to all or any of the following conduct by the Respondents?

4.14.1. Did Dr Namvar tell the Claimant "*Do not rock the boat*" and "*It would not be a good move on your part*" and

"*You are becoming more trouble than you are worth*" on 21 August 2018?

4.14.2. Did Dr Namvar tell the Claimant "*You should pick a fight you have a chance of winning*" on 4 September 2018.

4.14.3. Did the Respondents meet with the Claimant on 7 September 2018 without any advance warning of this meeting, or any opportunity to prepare for this meeting or to bring a companion?

4.14.4. Did the Respondents threaten the Claimant with dismissal on 7 September 2018?

4.14.5. Did the Respondents threaten the Claimant with a referral to the NMC and removal from the register on 7 September 2018?

4.14.6. Did the Respondents attempt to coerce the Claimant into resigning on 7 September 2018?

4.14.7. Did the Respondents suspend the Claimant on 7 September 2018?

4.14.8. Did the Respondents produce an inaccurate note of the meeting on 7 September 2018? If so, was the note misleading and highly prejudicial towards the Claimant?

4.14.9. Did the Respondents dismiss/expel the Claimant from the partnership with immediate effect on 21 September 2018?

4.14.10. Did the Respondents circulate notices to their patients that the Claimant would no longer be working for the Respondents following an investigation into her professional conduct?

4.15. Did any of the above (at paragraph 4.14) amount to a detriment?

4.16. Was the Claimant subject to any of the detriments on the ground that she had made one or more protected disclosures?

Automatic unfair dismissal

4.17. If the Claimant made a protected disclosure, was the sole or principal reason for the Claimant's dismissal that she raised such a disclosure?

Ordinary unfair dismissal

4.18. What was the reason for dismissal and was that reason a potentially fair reason within the meaning of s.98 ERA?

4.19. Did the Respondents genuinely believe the Claimant was guilty of misconduct?

4.20. Was that belief based upon a reasonable investigation?

4.21. Did the Respondents apply a fair procedure when dismissing the Claimant?

4.22. If the Claimant's dismissal was procedurally unfair, would she have been dismissed in any event if the Respondents had applied a fair procedure?

4.23. If the Claimant's dismissal was found to be unfair, to what extent, if any, did the Claimant contribute to her dismissal through her own conduct?

Unlawful deduction from wages

4.24. Were the following sums due to the Claimant on termination of her employment / on her expulsion from the partnership:

4.24.1. Six days' wages for accrued overtime.

4.24.2. Eight days' study leave pay.

4.24.3. Eight days' pay in lieu of accrued annual leave.

Wrongful dismissal

4.25. If the Claimant had a contractual right to notice, was she given that notice or paid in lieu thereof?

HEARING AND EVIDENCE

5. This hearing was conducted remotely by CVP, with the consent of the parties. Aside from the usual minor IT issues, there were no problems encountered during the hearing.

6. The hearing was conducted over nine days. The first day was reserved for Tribunal reading.

7. On the second day of the hearing, the Tribunal dealt with a number of preliminary matters. The first was an application by the Respondents to rely on additional witnesses which they said had become necessary to deal

with matters raised by the Claimant in her witness statement. Whilst unfortunate, this was a symptom of the parties leaving exchange of witness statements to the very last minute. The Tribunal agreed that the evidence from the new witnesses was relevant and allowed them to be called. The Tribunal also allowed the Claimant to provide a supplemental witness statement responding to the new evidence.

8. The other matter dealt with on the second day was an application by the Claimant for a witness order for Ms Adams. The Tribunal agreed to make the order requested.

9. The Tribunal heard evidence from the Claimant and one witness called to give evidence for her, Shani Adams, previously employed as a practice manager for the Respondents. The following witnesses gave evidence for the Respondents, all of whom (apart from LP) worked at Hastings and Rother Healthcare:

   9.1. Dr Craig Namvar – GP and partner

   9.2. Dr Mihnea Chiuia – GP and partner

   9.3. Penelope Rose – Business Manager

   9.4. Steven Boxwell – Senior Finance and Business Manager

   9.5. Dr Karen Skinner – GP and partner

   9.6. Timothy Honeysett – Finance Manager

   9.7. LP - a patient of Dr Chiuia

10. The Respondents also sought to rely on the witness statement of Dr Herbert who could not attend the hearing due to ill-health. As it turned out, her evidence did not really take matters much further and therefore the Tribunal did not need to place any real weight on her evidence.

11. The Tribunal was referred throughout the hearing to documents in a bundle extending to 863 pages.

12. Both Counsel provided detailed written submissions which they supplemented with oral submissions on 26 May 2021. The Tribunal considered these submissions before reaching its decision. Counsel both quoted a number of authorities in support of their submissions which the Tribunal also considered. Where those authorities have not been mentioned below, the Tribunal has nonetheless taken them into account and given them due weight in reaching its conclusions.

13. A decision was provided orally to the parties, with detailed reasons, on the afternoon of the final day of the hearing. These written reasons are

provided at the request of the Claimant.

14. At the conclusion of the hearing, the Respondents said that they wished to make an application for costs. The Respondents was invited to make that application in writing so that the Claimant could consider and respond to it in full.

FINDINGS OF FACT

15. The following findings of fact were reached on the balance of probabilities, having considered all of the evidence given by witnesses during the hearing and documents referred to by them. The Tribunal has only made those findings of fact that are necessary to determine the claims. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.

16. The Respondents are both GPs at a practice called Hastings and Rother Healthcare. They had, until October 2018, both been in practice with the Claimant, who was an Advanced Nurse Practitioner.

17. Dr Namvar qualified as a GP in August 2014 and first practiced in Roebuck House in Hastings. At that time, Roebuck House was occupied by five separate GP practices, all operating independently from each other.

18. In April 2015, Hastings Old Town Surgery was formed when four of the five separate sole practitioner GP surgeries based at Roebuck House merged together. Dr Namvar took over the management of the new, bigger practice.

19. The result of the merger was that from April 2015 onwards there were two practices operating out of Roebuck House. A sole practitioner, Dr Ankur Chopra and his team, and the merged practice managed by Dr Namvar.

20. The Claimant worked with Dr Chopra as an Advanced Nurse Practitioner, which means she is able to substitute for a GP, prescribe medicines and work independently as part of a multi-disciplinary team.

21. Hastings and Rother, where both practices were based, has a particularly demanding population. Dr Namvar said the following, which the Tribunal accepted as fact:

    21.1. They contain the eight most deprived council wards in East Sussex. These experiences of deprivation contribute to higher rates of long-term illness, disabilities, cancer, lung disease and heart problems as compared with the rest of England.

    21.2. Men in the most deprived areas of Hastings are expected to live 11.5 years less than those in other areas of the town - the biggest gap in the Southeast of England.

21.3. Average annual earnings (£20,066) in Hastings are 24% lower than for the Southeast overall.

21.4. 26% of children in Hastings and 17% in Rother live in poverty.

21.5. 62% of the adult population of Hastings is estimated to be overweight or obese.

21.6. One in five Hastings adults are estimated to have a common mental health disorder such as anxiety or depression.

21.7. Almost one in four Hastings adults are smokers.

21.8. Alcohol related admissions to hospital are significantly higher in Hastings compared to England.

21.9. 30% of Hastings residents feel lonely living in their local area.

21.10. Under-18 conception rates in Hastings and Rother are significantly higher than England.

22. On 15th February 2017, the practices of Dr Namvar and Dr Chopra merged to form Hastings and Rother Healthcare. The four partners of the practice were Dr Namvar, Dr Chopra, Dr Pamela Herbert (the Second Respondent) and the Claimant. As with most mergers, bringing the systems of two practices together created many challenges for the newly merged practice.

23. At the time of the merger, Dr Chopra was being investigated by the General Medical Council (GMC), and his practice was in special measures. It was thought that the greater administrative support available in the newly merged practice would bring Dr Chopra's practice out of special measures and improve performance. The Claimant had by this time been working with Dr Chopra since April 2006.

24. Whilst it was unusual for a non-GP to be a partner in a GP practice, the Claimant's skills and experience were thought to be valuable to the practice. She was therefore approached by Dr Namvar and Dr Chopra in December 2016 when they asked her whether she would like to become a partner in the new practice. There had been prior discussions between Dr Namvar, Dr Chopra and Dr Herbert about making this offer to the Claimant. They had agreed that Dr Namvar should instruct a solicitor to draft a partnership agreement.

25. At the meeting in December 2016, the Claimant was presented with a draft of the partnership agreement. The Tribunal preferred the evidence of Dr Namvar in this respect and rejected the suggestion by the Claimant that the first time she saw any version of the agreement was at a meeting in February 2017, when she signed it. The Tribunal finds as fact that the

Claimant had time to look at the agreement between then and the date she signed it. The Tribunal also accepted Dr Namvar's evidence that there were very few changes to the version the Claimant signed, compared to the draft she was given in December 2016.

26. At the December 2016 meeting, the Claimant was asked how much she would like to earn. A figure of £120,000 was agreed, which was increased to approximately £130,000 to take into account the obligation to pay employer and employee national insurance. The signed version of the partnership agreement had this figure inserted.

27. The partnership agreement was signed on 15 February 2017. The Tribunal concluded that the Claimant was excited by the opportunity of becoming a partner and freely entered into the agreement. The Claimant had the opportunity to obtain legal advice on the agreement and had read the clause in the agreement acknowledging that partners had been recommended to seek advice before signing. The Tribunal rejected any suggestion by the Claimant that she was placed under pressure to sign the agreement. She willingly signed the agreement because it brought with it more money, more responsibility and improved status.

28. During the hearing, the Claimant argued that she was a salaried partner – and an employee - throughout the entirety of the relationship since signing the partnership agreement.

29. The Tribunal was taken to the partnership agreement and witnesses were questioned about it. The Tribunal makes the following findings of fact about the partnership agreement and the relationship between the parties:

    29.1. The term "Partner" was defined as each person listed in Schedule 1. The Claimant was included in that Schedule.

    29.2. The agreement stated that it was for "*the purpose of engaging in the practice of General Practitioners and conducting all types of business incidental thereto*".

    29.3. The Claimant had the same voting rights as other partners.

    29.4. If new partners were to be admitted, there needed to be a unanimous vote of all the partners. The Claimant could therefore have vetoed the admission of any new partner to the partnership.

    29.5. As a partner, the Claimant had the right to inspect the books of the accounts at any time and could require rectification of any manifest error.

    29.6. Provision was made for salaried partners to be admitted with the terms of such contained in a separate agreement. Despite the Claimant claiming to be a salaried partner, she never entered into

such a separate agreement and neither did she ask to do so.

29.7. The Claimant and her partners were required to indemnify each other against "all claims, actions, costs liabilities and expenses payable or paid by the Partners for and on behalf of the indemnifying Partner".

29.8. The expulsion of any Partner required the unanimous decision of the remaining partners. As such, the Claimant and Dr Herbert could have voted to expel Dr Namvar from the partnership.

29.9. The Claimant had an equal vote in decision making with a majority required, save where a unanimous vote was required. As such, Dr Herbert and the Claimant could have outvoted Dr Namvar on any issue not requiring a unanimous vote. Again, that is wholly inconsistent with the Claimant being an employee of Dr Namvar.

29.10. The Claimant fully attended and signed the relevant authorisations and the partners' meeting with the accountants on 23 March 2017.

29.11. In the partnership tax return the Claimant was listed as a partner and her profit shares were set out.

29.12. The Claimant submitted tax returns on a self-employed basis. She therefore held herself out to HMRC as self-employed.

29.13. The superannuation (pension) documentation that the Claimant signed, held her out to be self-employed.

29.14. The partnership accounts contained a partnership certificate with all four partners' names on it as well as setting out the respective profit shares.

29.15. The Claimant's profit share was referred to in communications with the Claimant that she did not dispute.

29.16. The Claimant approved the partnership tax return.

29.17. The Claimant held herself out to the CCG as a partner and insisted on asserting her rights "*as a partner*" in her communications with the Respondents.

29.18. The Claimant attended both formal partnership meetings and also the frequent informal partnership meetings held in Ms Rose's office (or in the Claimant's own office) as confirmed by both Ms Rose and Dr Namvar in their oral evidence.

29.19. The partnership agreement gave the Claimant a right to call a formal partnership meeting at any time.

29.20. The Claimant did not report to anyone in the practice. She had no line manager. The Tribunal finds that the partners were accountable to each other.

30. Against that, the Tribunal was directed to references to certain documents in the bundle referring to "salary" (including in the partnership agreement itself). The Tribunal was also referred to a document about the Claimant which stated, "dates of employment". The Respondents had also initially dealt with the conduct matter below by offering a disciplinary hearing.

31. The Tribunal considered such matters to be insignificant. The partnership agreement, which was not a perfectly drafted document, referred to salary in error. The dates of employment referred to by Ms Rose, was simply because the form she was completing did not allow her to refer to partnership. Finally, regarding the offer of a disciplinary hearing, Dr Namvar explained, and the Tribunal accepted, that Ms Rose did not fully appreciate that the conduct matter would be dealt with under the partnership agreement and not as an employee. This was one reason why the offer of a disciplinary hearing was taken away. The Respondents also considered there to be no point in a hearing given the Claimant's admission.

32. In her submissions to the Tribunal, Ms Chute suggested that the partnership agreement did not reflect the reality of the day-to-day relationship, but stopped short of referring to the agreement as a "sham", not least as this was not her pleaded case. In any event, the Tribunal concluded that the agreement was not a sham and that it did in fact reflect the powers, duties and responsibilities of the Claimant and her partners. The Tribunal accepted that the Claimant may not have fully appreciated the extent of her powers under the partnership agreement, but that is not to say that the agreement was a sham.

33. The partnership agreement stipulated that "*all surgery decisions are made by the management committee*" but it is clear that one wasn't established. The Tribunal concluded that the reason for this was because the agreement was a standard, not very well drafted, partnership agreement, that did not fully reflect the fact that there were only three partners. Dr Namvar performed the Managing Partner role which, as one would expect, meant that he managed the practice on a day-to-day basis on behalf of his partners. No one, including the Claimant, appeared to object to this.

34. At some point, it appears that Dr Chopra was subject to investigations into misconduct and restrictions were placed on his ability to practice. The Tribunal did not hear any evidence as to the nature of the allegations but as a result of such allegations and restrictions Dr Chopra resigned from the practice and ceased to be a partner with effect from 1 October 2017.

35. LP was a cleaner for the Respondents and had cleaned the practices at

Roebuck for about 20 years. When the mergers took place, she carried on being the cleaner and remains in her role to this day. She also cleaned for Dr Chopra personally, at his home. LP was registered at the time as a patient of Dr Chiuia. Because she was the cleaner for the surgery and worked in the evenings, and because Dr Chiuia generally used to work until late, it meant that quite often they were the only two people in the building. They would often chat and sometimes there would be an unplanned consultation; it was easier for her if she just saw Dr Chiuia during an evening rather than making an appointment during the daytime. At the time they were having frequent medical discussions because she was undergoing treatment for cancer.

36. On 3 September 2018, LP and Dr Chiuia had one such informal consultation. He asked in a general manner how she was doing. She said she was alright but that she was not sleeping so well. Dr Chiuia had her notes on his computer screen, and he noticed that a few days previously she had been prescribed Trazodone. The Tribunal accepted that Trazodone is an old-fashioned sedating anti-depressant, not often used. Dr Chiuia asked LP about the prescription and whether she was still unable to sleep well despite taking it. She laughed and said "*No, that's not for me, it's for my dog!*"

37. The patient record showed that the Claimant had issued a prescription for Trazodone. The problem recorded was depression, and the record stated "*Telephone encounter: requesting Trazadone as problems sleeping and worrying. Has had years ago and found effective. Advised re driving regs*". LP proceeded to tell Dr Chiuia that her dog (who had recently undergone a surgical intervention) had been prescribed Trazodone by the vet, and that she had looked it up on the internet and found that the drug was also used for humans. Therefore, a few days before, whilst cleaning for Dr Chopra, she had asked him whether he could help her get it for her dog in order to save the prescription money. LP told Dr Chiuia that initially Dr Chopra had said that he couldn't help, but a couple of days later he called her to say that the drug she needed was waiting for her to collect from her usual pharmacist. Dr Chiuia asked LP whether it was the Claimant who spoke to her, but she said that it wasn't, it was Dr Chopra. Dr Chiuia established LP did not take Trazodone herself. She was emphatic with Dr Chiuia that it was not for her and that it was for her dog.

38. Dr Chiuia telephoned Dr Namvar on the evening of 3 September 2018 and informed him what he had been told by LP. Dr Chiuia had previously contacted Dr Namvar by WhatsApp to inform him that he wanted to discuss some concerns about the Claimant. The Tribunal accepted that both Dr Chiuia and Dr Namvar were shocked by what they had heard and considered the matter to be very serious.

39. Dr Namvar spoke to Ms Rose and informed her of the situation on 4 September 2018. Her view was that it needed to be reported to the Clinical Commissioning Group. Dr Namvar also sought some advice from Mary

Rose Shears, Regional Dean for GP Trainees. In addition, as he was on a course during this time, he spoke to peers on a no-names basis for their views and opinions, and everyone was of the same mind: it was a very serious matter.

40. On 6 September 2018, Ms Rose and Dr Chiuia met with LP and took a statement from her in which she confirmed her account of the Trazadone prescription incident which she had told Dr Chiuia previously.

41. On 7 September 2018, the Claimant was invited to a meeting with Dr Chiuia, Dr Namvar and Ms Rose to discuss the prescription of Trazadone for LP. The Claimant was not given any warning of the subject matter of the meeting.

42. The meeting was chaired by Ms Rose, who also took notes. The meeting lasted between 45 minutes and 1 hour. Ms Rose accepted that the notes taken by her were not verbatim and did not record everything said at the meeting. In her note, Ms Rose wrote [sic]:

> ***Maria explained that Lynn had spoken with Dr. Ankur Chopra requesting help with the medication Trazadone which she needed for her dog. Dr. Chopra then contacted Maria and informed her that Lynn had asked him to help with the medication for the dog. Following this contact, Maria confirmed that she had created the entry and generated the prescription for Trazodone.***
>
> ***When questioned further about how and when Dr. Chopra knew to contact Lynn again, Maria stated that she had spoken with Dr. Chopra to inform him that she had generated the prescription for Lynn and told him that as far as she was concerned that the prescription was for Lynn. Penny advised Maria whether she was aware of the serious nature of her actions. She had confirmed to them that she had entered a false consultation into Lynn's clinical notes and fraudulently generated a prescription knowing it was for Lynn's dog. This was acknowledged by Maria, who said it was a mistake and she was only trying to help Lynn because she knew of her situation. It was explained to Maria that there were a number of other options that had been available to both herself and Dr Chopra including paying for the medication on her behalf and the actions that took place did not need to happen.***

43. On the Claimant's own evidence, she received a copy of the note of the meeting on 14 September 2018 but said she was told by her RCN representative not to communicate with the Respondents. In her witness statement she gave the following account of what had occurred [sic]:

> ***On 30 August 2018 I received a phone call from Dr Chopra who requested a prescription of trazodone (an anti-depressant), for patient LP. LP had been a patient of his until 2017, and was his cleaner. LP continued to be a patient with the Respondents' practice and she was also employed as a cleaner by the Respondents. Dr Chopra explained that LP had advised him that she was having trouble sleeping and was feeling exhausted, and she had asked him to request this prescription***

as in the past she had found it beneficial. Dr Chopra also said that LP had advised him that she had already discussed her fatigue and lack of sleep with me and that I had said she could contact me if she required any further assistance. I recalled this discussion with LP in July 2018 as described above. I agreed to review LP's patient records. I advised that if I did prescribe this medication for LP, Dr Chopra would need to caution LP against driving because it could cause drowsiness.

When I consulted LP's patient records later that day I noted that she had already been coded as having depression and she had previously been prescribed trazodone. It was within my usual practice to both initiate and restart medications for mental health conditions. As an autonomous practitioner and independent prescriber I was able to prescribe any medications in the British National Formulary ("BNF") that I assessed as being necessary and appropriate. Based on my knowledge of LP, LP's medical history, my previous discussion with LP, the reasons for her request for this medication and the fact that LP had previously been prescribed this medication I completed a prescription for trazadone. I made the following entry onto the system in relation to this prescription on 30 August 2018:

"Problem: Depressed (review) Telephone encounter requesting trazodone as problems sleeping and worrying. Has had years ago and finds effective. Advised re driving regs."

On the following evening, 31 August 2018, I received a further phone call from Dr Chopra in relation to another matter. I was at home at the time as this was after work. He appeared to be in a relaxed and cheerful mood and sounded as though he may have had a drink. We had both a professional and friendly relationship and he would often joke about work related matters. Before ending the conversation, I asked Dr Chopra to let LP know that her prescription was at the pharmacy, if she had not already collected it. I also asked him to tell her to let me know if there was anything else I could do for her. At this point Dr Chopra made an off-hand comment about how he hoped LP did not give the medication to her dog as she had given medication to her dog on past occasions, and he referred to anti-inflammatories. Given the jovial nature of our conversation, I naturally presumed he was joking and said in response "really? as if!" In any event, I had no prior knowledge of this possible use of medication by LP and did not take the remark seriously. He made no further comment regarding this and the conversation changed to another matter.

Whilst I had dismissed Dr Chopra's comment about LP potentially giving some of her medication to her dog, as being a flippant, jocular remark, after the conversation I did consider my position if Dr Chopra's comment turned out subsequently to have some merit. I had prescribed the medication in good faith, being at the time personally familiar with LP's historic and present medical situation. I had conversed with her about the same in the recent past. The request had been made by a qualified practising medical practitioner. I had consulted LP's medical records and noted she had been prescribed the drug previously. I made a note of my actions on the record at that time. Post prescribing the medication I had no authority as to what LP did with the drug. It is my understanding that I have no jurisdiction over what a patient does with medication once it is in their possession. I did not therefore consider I had the legal power nor any other authority by which to confront and accuse LP regarding this information.

> ***Furthermore, the details were purely hearsay, and I had no other corroborating evidence.***

44. The Clamant gave the following account of the meeting [sic]:

> ***Penny Rose stated that they were there to discuss LP. They first asked me if and why I had prescribed trazodone for LP and if I had spoken to her. I said that yes I had issued a prescription as Dr Chopra had contacted me on LP's behalf, but I had not been able to speak to her directly at the time. In response to this Dr Chiua agreed that he too often had difficulty when trying to contact LP by telephone. I said that I had then documented the information I had been given, intending to try and contact LP later that evening, but did not get an opportunity before leaving the surgery. I said that I had been planning to discuss LP's case with Dr Chiua and update him about the fact she had been unwell. They then asked if I had been aware that LP wanted the medication for her dog. It was at this moment that the sudden realisation that the conversation of the 31 August may have had some relevance. I said, "I am now", and then explained that Dr Chopra had mentioned in a telephone call, after I had issued the prescription, that there was a possibility LP may have intended to give some of the medication to the dog.***
>
> ***My comment was no way an admission to any knowledge of concerns regarding LP's use of prescribed medication prior to my issuing of the prescription.***

45. Having considered both accounts carefully, the Tribunal preferred the account of Ms Rose for the following reasons:

    45.1. Three witnesses gave evidence separately about the same meeting and were credible, clear, and consistent. Neither Dr Chiuia nor Ms Rose were current employees of the Respondents and were not obliged to attend the hearing to give evidence. The Tribunal did not believe they would attend the hearing in those circumstances and give false evidence.

    45.2. There is only one contemporaneous note of the meeting which all three witnesses to the meeting confirm is an accurate record.

    45.3. The Tribunal did not accept as credible the Claimant's evidence, faced with a note of a meeting that was so incorrect on a crucial point, that she was told not to communicate, even in writing, with the Respondents. Had she taken the view that the note was as inaccurate as she now states, the Tribunal believes she would have taken issue with the note at the time.

    45.4. The Tribunal did not accept the Claimant's evidence that Dr Namvar was sat behind a computer throughout the meeting, something denied by others at the meeting, and thought it strange that she should deny that Dr Namvar became emotional when that is what she had said in an email to her RCN representative giving her

account of what had happened.

45.5. More generally the Tribunal did not find persuasive the Claimant's evidence as to why LP would have been prescribed Trazodone herself, given that she had not been prescribed it for so many years, and it was not the first-choice drug to offer someone. Indeed, when cross-examined by Ms Newbegin about the dosage and the wisdom of taking medication which aids sleep, when someone is about to start work, the Tribunal found the Claimant's evidence unconvincing. The Tribunal also found the number of Trazodone tablets prescribed in excess of what would usually have been prescribed for a patient.

46. At the conclusion of the meeting, Ms Rose stated that she had been advised to suspend the Claimant and to report her to the Nursing and Midwifery Council (NMC). Before Dr Chiuia left the room, the Claimant asked him for a quiet word. She asked him if they couldn't just "*leave it at that and not report her to the NMC"*.

47. The Tribunal concluded that having gone into the meeting, said what she did, and then importantly realized the gravity of what she had said, she later attempted to row back from that position during a telephone call to Ms Rose that same evening.

48. The Tribunal accepted that it was a difficult meeting for Dr Chiuia, Dr Namvar and Ms Rose due to them having to raise such serious allegations against a fellow partner. The Tribunal further accepted that, faced with such a serious admission and the potential consequences having been brought home to Dr Namvar, that he became emotional and left the meeting for a brief period.

49. The Claimant was sent home following this meeting but then reported in sick.

50. The Claimant was initially invited to a disciplinary hearing which she could not attend because she was unwell. The Respondents later concluded that they were not required to hold a disciplinary hearing in light of the Claimant's partnership status.

51. The Claimant was then informed by letter dated 21 September 2018 that she was being expelled from the partnership having breached the following provisions of the partnership agreement:

> ***13.1.1 - To use their best endeavours towards the successful operating of the partnership and at all times shall conduct themselves in a fair and proper manner in any transactions of any nature affecting the partnership.***
>
> ***13.1.12 - All partners shall disclose to other partners any matter that may prejudice the business prospect of the partnership.***

LEGAL AND FACTUAL ANALYSIS, CONCLUSIONS AND ASSOCIATED FINDINGS OF FACT

(A) Was the Claimant an employee?

52. It was common ground that the Claimant needed employee status to bring the claims at paragraphs 1.2, 1.3 and 1.4 above; and *either* an employee *or* a worker to bring claims at paragraphs 1.1 and 1.5 above. The Tribunal therefore had to determine the Claimant's status at the material time.

53. Section 230(1) ERA defines an "employee" as "*an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment*".

54. "Contract of employment" is defined in s230(2) ERA as "*a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing*".

55. Employer is defined in section 230(4) ERA as, in relation to an employee or worker, "*the person by whom the employee or worker is (or, where the employment has ceased, was) employed*".

56. Section 1(1) of the Partnership Act 1890 ("PA 1890") defines partnership as "*…the relation which subsists between persons carrying on a business in common with a view of profit*."

57. In ***Cowell v Quilter Goodison Co Ltd [1989] IRLR 392***, the CA held that the relationship between partners is that of people who are carrying on a business in common with a view to profit and that this is wholly different from an employment relationship. At §7 Lord Donaldson MR said:

> ***It has been customary in recent years – since the 1960s at least – to eschew the old term 'master and servant', and quite right too. Now we talk about employers and employees, and we talk about employment relationship. But it is the terminology, not the relationship, which has altered, and it is quite impossible to say, in my judgment, that Mr Cowell was the servant of anybody when he was an equity partner, or that he was the employee of anyone, or that he had any employment relationship with any of the other partners, or perhaps with all the partners, including himself. The firm was not a corporate entity. It had no separate identity. His relationship with the other partners was governed by the concept to which the Partnership Act applies, namely of people who are carrying on business in common with a view to profit, a very well-known and well understood relationship in law, and one which is wholly different from the employment relationship.***

58. In so holding Lord Donaldson MR (at §5) rejected arguments that, because Mr Cowell attended work each day, worked exclusively for the partnership, provided personal services that he could not delegate, held a job

specification, was subject to the control of the organisation and had to report to the managing partnership, he was an employee.

59. At §10 Glidewell LJ said the following:

> ***The definition of 'employee' in regulation 2 of the Transfer Regulations specifically excludes from the definition 'anyone who provides services under a contract for services'. That, in my view, is precisely the position of a normal equity partner. His partnership agreement normally requires him or her to provide his services for the benefit of the partnership. In my view not merely because Mr Cowell was not working for another person, but because the definition itself specifically excludes him, it is clear that he was not an employee of Quilter Goodison. I too would therefore dismiss the appeal.***

60. That someone might be referred to as a "fixed share" or "salaried" partner does not govern their employment status. In ***Stekel v Ellice [1973] 1 WLR 191*** it was held that, on the facts, the plaintiff's salaried partnership was a partnership within section 27 Partnership Act 1890. At §198D-F Megarry J said:

> ***Certain aspects of a salaried partnership were not disputed. The term "salaried partner" is not a term of art, and to some extent it may be said to be a contradiction in terms. However, it is a convenient expression which is widely used to denote a person who is held out to the world as being a partner, with his name appearing as partner on the notepaper of the firm and so on. At the same time, he receives a salary as remuneration, rather than a share of the profits, though he may, in addition to his salary, receive some bonus or other sum of money dependent upon the profits. Quoad the outside world it often will matter little whether a man is a full partner or a salaried partner; for a salaried partner is held out as being a partner, and the partners will be liable for his acts accordingly. But within the partnership it may be important to know whether a salaried partner is truly to be classified as a mere employee, or as a partner.***

61. At §199G Megarry J continued:

> ***I have found it impossible to deduce any real rule from the authorities before me, and I think that, while paying due regard to those authorities, I must look at the matter on principle. It seems to me impossible to say that as a matter of law a salaried partner is or is not necessarily a partner in the true sense. He may or may not be a partner, depending on the facts. What must be done, I think, is to look at the substance of the relationship between the parties; and there is ample authority for saying that the question whether or not there is a partnership depends on what the true relationship is, and not on any mere label attached to that relationship. A relationship that is plainly not a partnership is no more made into a partnership by calling it one than a relationship which is plainly a partnership is prevented from being one by a clause negativing partnership: see, for example, Lindley on Partnership, 13th ed. (1971), p. 66.***
>
> ***If, then, there is a plain contract of master and servant, and the only***

> ***qualification of that relationship is that the servant is being held out as being a partner, the name "salaried partner" seems perfectly apt for him; and yet he will be no partner in relation to the members of the firm. At the other extreme, there may be a full partnership deed under which all the partners save one take a share of the profits, with that one being paid a fixed salary not dependent on profits. Again, "salaried partner" seems to me an apt description of that one: yet I do not see why he should not be a true partner, at all events if he is entitled to share in the profits on a winding up, thereby satisfying the point made on section 39 by Lindley at p. 13. However, I do not think it could be said it would be impossible to exclude or vary section 39 by the terms of the partnership agreement, or even by subsequent variation (see section 19), and so I think that there could well be cases in which a salaried partner will be a true partner even though he would not benefit from section 39. It may be that most salaried partners are persons whose only title to partnership is that they are held out as being partners; but even if "salaried partners" who are true partners, though at a salary, are in a minority, that does not mean that they are non-existent."***

62. Applying that test, Megarry J held that the plaintiff was a partner, despite receiving neither share of the profits or losses, nor having ownership of the capital in the business (§201A-D).

63. In ***M Young Legal Associates v Zahid [2006] 1 WLR 2563, CA*** it was again held that provision for a share in the profits is not necessary in order to be a partner (Wilson LJ at §32):

> ***I agree with the decision in Stekel's case [1973] 1 WLR 191 and with the propositions in the books on Partnership by Lindley and Banks and by Mr Blackett-Ord himself to the effect that an agreement for a person to be paid a specified sum for work to be done by him on behalf of a firm does not preclude his thereby becoming a partner of it. No authority for the contrary proposition can be derived from the 1890 Act even though it would have been simple to provide for it either in the core definition in section 1(1) or, in particular, in section 2(3) in which the significance of receipt of a share of profits in determining whether a partnership exists is expressly addressed. On the contrary, the words of the core definition are wide enough to render the recipient of payments in a fixed sum a partner provided that there is a business, that it is carried on with a view to profit and, crucially for present purposes, that he is carrying it on in common with another or others. …***

64. In the case ***Tiffin v Lester Aldridge [2012] ICR 647, CA*** Mr Tiffin was admitted to the partnership as a fixed share partner. He received monthly drawings calculated on the basis of an annual fixed share of profits. When the firm converted to being an LLP both full equity and fixed share partners signed a members' agreement that described the signatories as "equity partners". Following a provisional notice of dismissal, Mr Tiffin was required to resign from the partnership. He claimed unfair dismissal and a preliminary issue was whether he was an employee within s230(1) ERA. The Employment Tribunal held that he was not, and that decision was upheld by the EAT, and then subsequently by the CA.

65. Rimer LJ held at §59:

> **The problem which this presents for Mr Tiffin is that a reading of the members agreement shows it to be tolerably obvious that it was *intending to set up a relationship between the various signatories and adherents to it of a nature that, if analysed through the prism of the law relating to partnership under the Partnership Act 1890, could fairly be regarded as a partnership relationship between the full equity partners and the fixed share partners*.**

66. An attempt to rely upon the case of ***Autoclenz v Belcher [2011] ICR 1157*** was dismissed, not least given that Mr Tiffin was a willing signatory of the members agreement, which reflected the true intentions of the parties to it, including Mr Tiffin (§62).

67. Rimer LJ also commented at §31 that it is not possible to be an employee of oneself and as such partners cannot be employees of the partnership:

> ***The drafting of section 4(4) raises problems. Whilst I suspect that the average conscientious self-employed professional or business person commonly regards himself as his hardest master, such perception is inaccurate as a matter of legal principle. That is because in law an individual cannot be an employee of himself. Nor can a partner in a partnership be an employee of the partnership, because it is equally not possible for an individual to be an employee of himself and his co-partners: see Cowell v Quilter Goodison Co Ltd [1989] IRLR 392. Unfortunately, the authors of section 4(4) were apparently unaware of this. The subsection is directed to ascertaining whether a particular member (call him 'A') of a limited liability partnership is or is not for any purpose an employee of it. The statutory hypothesis which the subsection requires in order to answer that question is that A and the other members of the limited liability partnership "were partners in a partnership". That hypothesis, if it is to be read and applied literally, must in every case produce the same answer, namely that A cannot be an employee of the limited liability partnership for any purpose. If that had been Parliament's intention when enacting section 4(4) , it might just as well have ended the subsection immediately before the word "unless". That, however, was plainly not its intention. The subsequent words must be contemplating a practical inquiry that, in particular factual circumstances, will yield a yes or no answer to the question whether a particular member of a limited liability partnership is an employee of it. The subsection must, therefore, be interpreted in a way that avoids the absurdity inherent in a literal application of its chosen language so that it can be applied in a practical manner that will achieve the result that I consider it obviously intended. The presumption is that Parliament does not intend to enact legislation whose application results in absurdities, and section 4(4) must therefore be interpreted with that in mind.***
>
> ***In my judgment the way section 4(4) is intended to work is as follows. Subject to the qualification which I mention below, it requires an assumption that the business of the limited liability partnership has been carried on in partnership by two or more of its members as partners; and, upon that assumption, an inquiry as to whether or not***

> ***the person whose status is in question would have been one of such partners. If the answer to that inquiry is that he would have been a partner, then he could not have been an employee and so he will not be, nor have been, an employee of the limited liability partnership. If the answer is that he would not have been a partner, there must then be a further inquiry as to whether his relationship with the notional partnership would have been that of an employee. If it would have been, then he will be, or would have been, an employee of the limited liability partnership. I consider that it is implicit that the primary source material for the purpose of answering these questions will be the members' agreement although this will not necessarily represent the totality of what may be looked at. The inquiry thus requires a consideration of the circumstances in which a person may become a partner in a partnership under the Partnership Act 1890 , which is why I have summarised such circumstances. The qualification that I have referred to is that, in what are probably likely to be more unusual cases, the relevant issue may perhaps arise in circumstances in which at the material times there were just two members in the limited liability partnership, with the issue being whether one of them was an employee of the limited liability partnership. The approach that I have suggested does not work in such a case and would need to be adapted for it. For present purposes, however, there is no need to consider such cases further.***

68. Langstaff P in ***Williamson and v Briars UKEAT/0611/10/DM*** considered the position of a solicitor who – it was not disputed – had remained an employee when accepting the title salaried partner. New arrangements were then agreed between Mr Briars and the firm that he would receive a guaranteed profit share instead. Mr Briars had not signed – or been invited to sign – the partnership agreement that the five equity partners of the firm had signed. When considering Mr Briars' employment status, Langstaff P gave a useful analysis of the legal position and what needs to be considered by Tribunals when dealing with this type of factual scenario (§25):

> ***The question to be determined for the purposes of jurisdiction is not whether a given individual is a partner; it is not whether he is self-employed. It is whether he comes within the definition of employee. The rights which he claimed were rights which could only be accessed by an employee, so defined by section 230 of the Act. Section 230 may have an element of circularity about it in that a contract of employment is defined as a contract of service, and 'employee' defined in relation to contract of employment: but it is clear that, whatever the circularity may be, a contract is essential. Therefore the question is: what is the nature of the agreement? As to this, there are too many cases here to review, but it is worth reminding oneself of the requirements concisely stated as to a contract of employment by Stable J, using one sentence in Chadwick v Pioneer Private Telephone Co Ltd [1941] 1 All ER 522 at 523D: "A contract of service implies an obligation to serve, and it comprises some degree of control by the master." That was expanded by McKenna J in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497 at 515:***
>
> > ***A contract of service exists if these three conditions are fulfilled:***

> ***(1). The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.***
>
> ***(2) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.***
>
> ***(3) The other provisions of the contract are consistent with its being a contract of service.***
>
> ***The third of those requirements operates not so much by identifying those provisions which are consistent, but is in its practical application directed towards those provisions of the contract which are inconsistent and would therefore negate there being a contract of employment. Thus, for instance, a contract which required the contracting party to provide his services personally would be consistent with there being a contract of employment, but one that gave him full liberty to use substitute employees would in general negate the contract being one of service. So too, as it seems to me, would it negate there being a contract of service if the contract, properly construed, provided that the individual was a partner who was operating together with others in common with a view of profit, so as to come within the Partnership Act 1890.***

69. Applying the findings of fact set out at paragraphs 25-33 above, and the above legal position, everything pointed to the Claimant being a genuine partner within the meaning of s.1 PA 1890 and not an employee. As is clear from the above authorities, they are mutually exclusive concepts and the Claimant had to be one or the other. It is entirely appropriate in this case to use the partnership agreement as a starting point to determine the status of the Claimant. When the Tribunal considered all of the points referred to at paragraph 30 above, it concluded that it was entirely inconsistent with the Claimant being an employee.

70. It is notable that even when the Tribunal commented at the end of the hearing that if the Claimant believed she was an employee, it was not entirely clear who she believed she was employed by, the Tribunal did not get a clear answer to that question. The power that the Claimant had under the partnership agreement, which included the ability to expel Dr Namvar, subject to the agreement of Dr Herbert, was again entirely inconsistent with being an employee. When one looks at the irreducible minimum to a contract of employment, it is clear that there was no master or servant relationship, because the Claimant was the master; there was no personal service because the service being provided was to herself and the other partners. Again, the Claimant's partnership status was completely inconsistent with her status being that of an employee.

71. The Tribunal therefore concluded that the Claimant was not an employee. For this reason, the Claimant was not entitled to bring unfair dismissal claims under s.98 and s.103A ERA, as well as the wrongful dismissal claim. That being the case, the Tribunal did not go on to determine those

claims.

(B) Was the Claimant a worker?

72. Section 230(3) ERA 1996 defines workers as follows:

> ***(3) In this Act 'worker' (except in the phrases 'shop worker' and 'betting worker') means an individual who has entered into or works under (or, where the employment has ceased, worked under)—***
>
> ***(a) a contract of employment, or***
>
> ***(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;***

73. A worker as defined by 230(3)(b) is often referred to as a "limb B" worker. There is no direct authority which has looked at whether a genuine partner, within the meaning of s.1(1) PA 1980, can also be a worker. This was a point made by Elias LJ in the Court of Appeal in the case of ***Clyde & Co LLP & another v Bates van Winkelhof [2013] ICR 884*** who said that there was no case which has in terms considered the question whether a partner can be a limb (b) worker under the ERA. Having reviewed the relevant authorities in the area, Elias LJ went on to hold:

> ***The Ellis and Cowell cases are clear authority for the proposition that a partner in an 1890 Act partnership cannot be a worker. The reasoning in these cases provides no rational basis for distinguishing between employees and limb (b) workers.***
>
> ***There are, in my view, two interrelated reasons identified in the judgments why partners cannot have that status. The first is legal: since the partnership is not a separate legal entity, the parties are in a relationship with each other and accordingly each partner has to be employed, inter alia, by himself. He would be both workman and employer which is a legal impossibility.***

74. At §69, when considering s.230 ERA, Elias LJ noted the difference between Limited Liability Partnerships ("LLPs") and 1890 Act partnerships, namely that an LLP is incorporated and so "*overcomes the technical problem which faced an 1890 Act partner, namely that he could not be both worker and employer acting on both sides of the contract*" and that "*There is now a direct contractual relationship between the member and the LLP*".

75. The decision of the CA was overturned on appeal by the Supreme Court in ***Bates van Winkelhof v Clyde & Co LLP [2014] ICR 730, SC***. The Supreme Court held that Ms van Winkelhof was indeed a worker for the purposes of s230(3) ERA 1996. By that stage in proceedings it was common ground that Ms van Winkelhof worked "under a contract personally to perform any work or services" and that she provided those services "for" the

LLP (§16). The Supreme Court dealt specifically with "members" of a LLP and did not determine the point as regards traditional partners in the PA 1890 sense.

76. Having looked at the circumstances of this case, as against s.230 ERA and the case law referred to by Counsel, all of which the Tribunal has considered very carefully, the Tribunal concluded that the Claimant was **not** a worker. In the Tribunal's view, an important factor was that there was no other "party" for whom the Claimant provided her services, and unlike the ***Bates*** case, she did not have the benefit of an LLP as a separate party to whom she could provide her services. As she was not a worker, she cannot therefore bring whistleblowing detriment claims or claims of unlawful deduction from wages. Despite this finding, the Tribunal did consider further those claims which required worker status below.

(C) Whistleblowing detriment and dismissal claims

(i) Did the Claimant make protected disclosures?

77. The term "*protected disclosure*" is defined in section 43 of the ERA as follows:

> ***43A. Meaning of "protected disclosure"***
>
> ***In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.***
>
> ***43B. Disclosures qualifying for protection***
>
> ***(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—***
>
> ***(a) that a criminal offence has been committed, is being committed or is likely to be committed,***
>
> ***(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,***
>
> ***(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,***
>
> ***(d) that the health or safety of any individual has been, is being or is likely to be endangered,***
>
> ***(e) that the environment has been, is being or is likely to be damaged, or***
>
> ***(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.***
>
> ***43C.— Disclosure to employer or other responsible person.***

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure […]

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility, to that other person.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

43K.— Extension of meaning of "worker" etc. for Part IVA.

(1) For the purposes of this Part "worker" includes an individual who is not a worker as defined by section 230(3) but who—

(a) works or worked for a person in circumstances in which—

(i) he is or was introduced or supplied to do that work by a third person, and

(ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them,

78. A disclosure of information must be one that conveys facts rather than simply makes an "*allegation*" or "*mere assertion*". That said, it is important not to draw a rigid distinction between them as they are not mutually exclusive concepts. Importantly, the disclosure of information has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in s.43(B)(1) ERA.

79. Section 43(B)(1) ERA requires that the disclosure of information must "*in the reasonable belief of the worker……tend to show*" one of those matters at s.43(B)(1)(a)-(f). The worker is not required to show that the information disclosed led him or her to believe that the relevant failure was established, and that the belief was reasonable — rather, the worker must establish only reasonable belief that the information tended to show the relevant failure. It is a subtle but important distinction.

80. A worker does not therefore have to prove that the facts or allegations disclosed are true, or that they are capable in law of amounting to one of the categories of wrongdoing listed in the legislation. The wording of S.43B(1) ERA indicates that some account is to be taken of the worker's individual circumstances when deciding whether his or her belief was reasonable. Thus, the focus is on what the worker in question believed rather than on what a hypothetical reasonable worker might have believed

in the same circumstances. This introduces a requirement that there should be some objective basis for the worker's belief. As long as the worker subjectively believes that the relevant failure has occurred or is likely to occur and their belief is, in the Tribunal's view, objectively reasonable, it does not matter that the belief subsequently turns out to be wrong, or that the facts alleged would not amount in law to the relevant failure.

81. In determining public interest, a tribunal has to determine (a) whether the worker subjectively believed at the time that the disclosure was in the public interest and (b) if so, whether that belief was objectively reasonable. There might be more than one reasonable view as to whether a particular disclosure was in the public interest, and the Tribunal should not substitute its own view. The reasons why a worker believes disclosure is in the public interest are not of the essence, although the lack of any credible reason might cast doubt on whether the belief was genuine. However, since reasonableness is judged objectively, it is open to a Tribunal to find that a worker's belief was reasonable on grounds which the worker did not have in mind at the time.

Protected disclosure 1

82. The first disclosure was made in or around February 2017 to Dr Namvar and Ms Rose that over 1,000 patient letters had been deleted from the DOCMAN system in advance of a CQC visit in February 2017. The Claimant alleged that the letters were being stored in the loft to get them off the system and to give the impression to the CQC that they had been dealt with or actioned. It was a serious allegation to make about the practice which the Tribunal rejected.

83. The Tribunal accepted Dr Namvar's evidence that the merger with Dr Chopra's practice had identified a colossal amount of correspondence that had not been dealt with and were stored on local computers rather than on a central system. The letters therefore had to be printed off, checked manually, and rescanned back on to the system. This meant that the Respondents could action the letters regardless of which computer someone was sat at. Dr Namvar said that no records were or could be deleted and there is an audit trail on the system.

84. The Tribunal accepted Dr Namvar's evidence that the Claimant spoke to him at one point about patient records but did not make a disclosure in the terms she invited the Tribunal to believe in this hearing. The Tribunal concluded that there was no disclosure of information made by the Claimant which in her reasonable belief tended to show one of those matters at s.43B(1) ERA. Neither did the disclosure satisfy s.43C ERA as Dr Namvar was not her employer and any legal responsibility would have sat with the partnership, which included the Claimant. It was therefore not a protected disclosure.

Protected disclosure 2

85. The second disclosure was that on several occasions between June and August 2017, the Claimant raised her concern with Dr Namvar and Ms Rose that a Nurse Practitioner ("DP") had been required to work alone from 5pm to 6.30pm, covering walk-ins, emergency, and telephone queries, working autonomously beyond her competencies.

86. The Tribunal noted that DP wasn't even employed during the period suggested by the Claimant when she says that she made the disclosure. Whilst the Tribunal was shown an email to Ms Rose (dated 4 May 2018) in which the Claimant raised this concern, there is no suggestion that the concern had been raised a number of times before, as is suggested. Indeed, she stated at the beginning of the email "*I just wanted to raise a few concerns before I go on holiday as I haven't had an opportunity to speak to you in person. I have spoken to Craig today outlining them to him, but wanted to keep you in the loop*".

87. The Tribunal accepted that DP had access to a GP at all times and that the Claimant's concerns were actually misplaced. Her role was later changed in any event.

88. Whilst the Tribunal concluded that the email to Ms Rose could be a disclosure of information tending to show one of the matters in s.43B(1) ERA, the disclosure did not satisfy the requirements of s.43C ERA as it was made to someone more junior to her who did not have legal responsibility. In fact, it was the partnership, of which the Claimant was a partner, that had legal responsibility. It was therefore not a protected disclosure.

Protected disclosure 3

89. This protected disclosure was withdrawn.

Protected disclosure 4

90. The fourth disclosure was allegedly made to Dr Namvar, Ms Rose and Tracy White and is set out at paragraph 4.6 above.

91. The Tribunal was not satisfied that such disclosures were made. There was no evidence, other than what the Claimant said, that she raised any such concerns. The Tribunal preferred Dr Namvar's evidence that he was never told about such concerns and there was nothing put down in writing.

Protected disclosure 5

92. The fifth disclosure was allegedly made to Ms Rose between April and May 2018, raising a concern that LP was continuing to work throughout her treatment?

93. The Tribunal did not accept that this protected disclosure was made. Even if it had been made, a disclosure to Ms Rose would not satisfy the requirements of s.43C ERA. This was not a protected disclosure.

Protected disclosure 6

94. The sixth disclosure was allegedly made to Ms Rose via email dated 4 May 2018, and with Dr Namvar verbally and by email. The details of the disclosure are set out at paragraph 4.8 above.

95. The Tribunal carefully considered the above email to Ms Rose, but it concluded that this did not satisfy the requirements of s.43B ERA. It raised the above topics but not more than that. Furthermore, as it was an email to Ms Rose, it did not satisfy s.43C ERA.

96. The Tribunal was not satisfied that the same matters were raised with Dr Namvar at all. There was certainly no email evidence of this.

97. For the above reasons this was not a protected disclosure.

Protected disclosure 7

98. The seventh disclosure was allegedly made to Dr Namvar on 21 August 2018 when the Claimant raised the concerns set out at paragraph 4.9 above.

99. Dr Namvar denied that these concerns were raised. There is no documentary evidence of them apart from what the Claimant told the Tribunal in her oral evidence. The Tribunal accepted that in the course of running a busy practice, there would be conversations about many different matters. The practice was going through a very challenging and busy time. Dr Namvar said, in terms, that if anything of significance or something serious needed to be raised with him, he preferred for it to be sent to him in an email so that there would be a formal record of it and he could deal with it. The Tribunal saw insufficient evidence of what was actually said at the time to Dr Namvar, if at all, for it to determine what was said and whether such matters fell within the definition of a protected disclosure. The Tribunal was not satisfied that this protected disclosure was made. Moreover, the Tribunal concluded that the disclosure did not satisfy the conditions of s.43C ERA as Dr Namvar was not her employer and any legal responsibility would have sat with the partnership, which included the Claimant. It was therefore not a protected disclosure for that reason either.

Protected disclosure 8

100. The eighth disclosure was made to Shani Adams and was withdrawn.

Protected disclosure 9

101. The ninth disclosure was allegedly made to Dr Namvar and Ms Rose on 4 September 2018 raising the concerns set out at paragraph 4.11 above.

102. Dr Namvar denied that these concerns were raised as alleged, or at all. There was no documentary evidence of them; only what the Claimant said in her oral evidence. The Tribunal was shown insufficient evidence of what was actually said at the time to Dr Namvar, if at all, for it to determine whether such matters fell within the definition of a protected disclosure. The Tribunal noted that there was a partnership meeting on 5 September 2018 and these concerns, if they were real concerns, were not raised then – not even as AOBs. If the Claimant had genuine concerns at the time, which she considered to be protected disclosures, she could have called a partnership meeting or sent a formal email to her partners. She failed to do so. The only email the Tribunal saw was the one to Ms Rose on 4 May 2018. The Claimant sent an email to the CCG but that was after the meeting on 7 September 2018 when the dog prescribing incident was discussed.

103. The Tribunal was not satisfied that this protected disclosure was made. Further, the Tribunal concluded that the disclosure did not satisfy the conditions of s.43C ERA as Dr Namvar was not her employer and any legal responsibility would have sat with the partnership, which included the Claimant. It was therefore not a protected disclosure for that reason either.

104. There being no protected disclosures, any detriment claim must fail at that point. It would be an artificial exercise to go on to determine the detriment claims in the alternative, and therefore the Tribunal did not do so. However the Tribunal was satisfied that the reason for the Claimant's expulsion from the practice was due to the prescribing incident and nothing else.

(D) Unlawful deductions from wages

105. This claim related to unpaid overtime, holiday and study leave pay. However, as the Claimant was not a worker or employee, she is not able to bring a claim of unlawful deduction from wages.

106. Even if she were able to bring these claims, the Tribunal concluded that the evidence lacked the essential detail to enable it to determine that these sums were due to the Claimant. The Tribunal was certainly not satisfied that there was any agreement between the Claimant and Dr Namvar that the Claimant could carry forward holiday entitlement and the partnership agreement was silent on the point. Further, certainly the overtime and study leave claims related to a period before August 2018. As such they were presented out of time and there was no evidence that it was not reasonably practicable for the Claimant to have presented them within the applicable time limit.

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Employment Judge Hyams-Parish
28 July 2021

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