Case Number: 1802068/2020
1803135/2021

EMPLOYMENT TRIBUNALS

Claimant: **Mr M Willis**

Respondent 1: **GWB Harthills LLP**
Respondent 2: **Miss Hester Russell**
Respondent:3 **Mrs Elizabeth Lord**

HELD **by CVP** **ON: 19, 22, 23, 24, 25 and 26 November 2021**
Deliberations on 29 November 2021 & 30 March 2022

BEFORE: **Employment Judge Rogerson**
Members: **Mr W Roberts**
Mrs N Arshad-Mather

REPRESENTATION:

Claimant: **Mr T Cordrey (Counsel)**
Respondents: **Mr A Burns of (Queens Counsel)**

RESERVED JUDGMENT

1. The following complaints of discrimination arising from disability (section 15 Equality Act 2010 and victimisation section 27 Equality Act 2010) were **withdrawn** by the claimant and are **dismissed**.

    1.1. Withholding correspondence and documents in connection with the First Respondent's excel assessment and legal aid contracts.

    1.2. Hindering the Claimant's access to the First Respondent's accountants.

    1.3. Excluding the Claimant from the following management decisions:

        1.3.1. For the Second and Third Respondents to assume the title of joint Manging Partners.

        1.3.2. To appoint a HR manager.

        1.3.3. To take out a fixed interest business loan in January 2021

        1.3.4. To take out a Coronavirus Business Interruption Loan in March 2021

2. All the complaints of harassment related to disability (section 26 Equality Act 2010) are also **withdrawn** by the claimant and are **dismissed**.

3. The following remaining complaints of discrimination arising from disability and victimisation made in the Claim 2 are **not well founded** and are also **dismissed**:

    3.1. Failing to reinstate the Claimant to the positions of Managing Partner: Client Care Partner: Compliance COLP: Compliance COFA: Credit Controller and/or Data Protection Manager.

    3.2. Withholding information from the Claimant: minutes of partner's meetings: details of management decisions and supporting documents and correspondence: budgets and finance reports including information about Work in Progress.

    3.3. Excluding the Claimant from partner's and/or management meetings.

    3.4. Excluding the Claimant from the management decisions to appoint new accountants, to terminate the First Respondent's relationship with Peninsula, and to make a financial settlement to a former member of the First Respondent.

    3.5. Continuing to question the Claimant's honesty and integrity in applying for and receiving income protection and accusing him of misleading his insurers.

    3.6. Subjecting the Claimant to a barrage of correspondence and maintaining a hostile and aggressive tone and content in their communications with him.

    3.7. The Second and Third Respondent's, paying themselves interest on capital on or around 10 February 2021 but not paying the Claimant's interest on capital until 1 April 2021.

    3.8. Withholding the Claimant's profit share.

    3.9. The Claimant retiring from the First Respondent on 8 March 2021.

4. The complaints of a failure to make reasonable adjustments (sections 20 and 21 Equality Act 2010) are also **not well founded** and are **dismissed.**

REASONS

Background

1. The Claimant has brought 2 Employment Tribunal claims against the Respondents alleging unlawful disability discrimination and victimisation.

2. Claim 1 was presented on 16 April 2020 bringing complaints of direct disability discrimination, indirect disability discrimination, disability related harassment, failure to make reasonable adjustments and victimisation.

3. On 24 November 2020, the Respondents' solicitors wrote to the Claimant's solicitors making the following admissions on behalf of the Respondents:

    1. The Respondents admit liability to the Claimant under section 45(2) Equality Act 2010 on the following basis:

a. Contrary to s15 Equality Act 2010, they treated the Claimant unfavourably because of something arising in consequence of the Claimant's disability, namely his sickness absence and the funds he has received under his PHI cover by:

   i. Removing him from his roles as a Designated Member and Managing Partner of the First Respondent:

   ii. Taking steps to expel him as a member of the First Respondent:

   iii. Removing and reinstating him as a Person with Significant Control of the First Respondent:

   iv. Removing him from the First Respondent's management and decisions making processes:

   v. Withholding management and accounting information relating to the First Respondent and excluding him from a partners meeting in January 2020.

b. The treatment was not a proportionate means of achieving the legitimate aims of properly managing the First Respondent's business.

c. Contrary to s19 Equality Act 2010 they had a practice of holding partners meetings at the First Respondent's Rotherham Office, instead of the Claimant's home, which put the Claimant at a particular disadvantage and was not a proportionate means of achieving the legitimate aim of properly managing the First Respondent's Business.

d. Contrary to s20 Equality Act 2010 they failed to investigate and make such reasonable adjustments to enable the Claimant to work from home, continue with his management roles and/or return on a phased basis.

e. The Second and Third Respondents are liable for the discrimination as the agents of the First Respondent which is liable as it is treated as having done their acts.

2. The Respondents admit that the Claimant is entitled to a declaration that the Respondents' unlawfully discriminated against him as claimed in paragraph 120.1 of the Particulars of Claim.

3. The Respondents admit that the above admitted acts of discrimination caused the loss claimed in the second paragraph 120.2 and paragraph 120.4 of the Particulars of Claim namely:

   a. Injury to his health and feelings to be assessed.

   b. Financial loss (if any) to be assessed.

   c. Interest (if any)

4. Following those limited admissions of liability, the Claimant's solicitors unsuccessfully attempted to broaden the scope of the admissions to include the disability harassment and victimisation complaints. On 1

December 2020, the Claimant accepted the Respondent's admissions of liability in the terms set out in their solicitor's letter of 24 November 2020. As a result, the Claim 1 liability hearing listed for 8 days in January 2021 was vacated.

5. Judgment was then made by consent by Employment Judge Maidment in the following terms recorded in the judgment issued on 6 January 2021. To that judgment, in square brackets the Tribunal have added the dates of the admitted acts from the record of the preliminary case management hearing of 29 June 2020 and the further and better particulars of the claim provided by the Claimant.

Claim 1 Liability Judgment dated 6 June 2021

"1. On the basis of admissions made by the Respondents in their representatives' letter of 24 November 2020 and by consent it is declared that:

a. The Claimant's complaints of discrimination arising from disability (Section 15 of the Equality Act 2010) are well founded and succeed in respect of:

i. The claimant's removal from the role as designated manager and manging partner of the first respondent. [13.12.19]

ii. The taking of steps to expel him as a member of the first respondent. [28.11.19- 13.12.19]

iii. Removing and reinstating the claimant as a person with significant control of the first respondent [13.12.19]

iv. Removing the claimant from the respondent's decision making and management processes. [13.12.19]

v. Withholding from him management and accounting information relating to the first respondent. [13.12.19]

vi. Excluding the claimant from a partners meeting in January 2020.

b. The Claimant's complaints of indirect disability discrimination (Section 19 of the Equality Act 2010) are well founded and succeed in respect of the practice of holding partnership meetings at the first respondents Rotherham office. [December 2019]

c. The Claimant's complaint of a failure to make reasonable adjustments (Section 20 of the Equality Act 2010) are well founded and succeed in respect of a failure to allow the Claimant to work from home, continue with his management roles and/or return to work on a phased basis. [November-December 2019]

d. The Second and Third respondents are liable for the afore-mentioned acts of unlawful discrimination as agents of the First respondent which is treated as having done their acts.

2. The Claimant's remaining complaints are hereby dismissed upon his withdrawal of them. For avoidance of doubt, no breach of contract claim was brought by the Claimant in these proceedings and the Claimant has stated a wish to reserve his right to bring such a complaint.

3. The matter shall proceed to be listed for a remedy hearing and to hear an application by the Claimant for his costs in bringing these proceedings".

6. The Claim 1 pleadings provided some background to the reasonable adjustments complaint and the admissions made in relation to that complaint. In the further and better particulars of the claim provided by the Claimant on 23 May 2020 (drafted by the counsel), the following provision criterion or practice (PCP) and substantial disadvantage were identified:

> "The First Respondent's policy, criterion or practice, whether as a one off decision or otherwise (from November 2019 onwards) of not permitting a partner from undertaking work (including work ordinarily undertaken as a managing partner remotely) for the First Respondent unless supported by a full medical report, and or otherwise approved by the First Respondent. The substantial disadvantage is that the PCP placed the Claimant at a **substantial disadvantage due to his vulnerability as a disabled person to suffering stress and distress and the heightened negative consequences of the same**. (C1/1page 62 and 63)". (All the highlighted text in these reasons is the Tribunal's emphasis unless otherwise specified)

7. Leave had been granted for the Respondent to provide an amended ET3 response to the claim as clarified but the Respondents were content to rely on particulars of response to the reasonable adjustment complaint already provided in their response of 23 May 2020 (C1/1 page 50) which states:

> "It is not clear whether the Claimant is alleging that the failure to make reasonable adjustments is limited only to his ancillary duties or whether it is being alleged that the First Respondent failed to make reasonable adjustments to facilitate his return to his substantive role as a solicitor. **The Respondents aver that it is self-evident that over a period of approximately 2 years up to the date of these particulars, the Claimant has not been able to carry out any work on a substantive basis and in that context it is not reasonable for a law firm to have key roles such as Managing Partner and those relating to regulatory compliance conducted by a person who has no involvement in the day to day operation of the business and is not able other than briefly to attend its offices**. For those reasons and on the assumption that the Claimant's pleading is only in relation to ancillary and regulatory functions rather than his substantive role, the First Respondent contends that it would not have been

reasonable to allow C to continue with those roles. Moreover, temporary reassignment of those unpaid ancillary and regulatory roles does not amount to a detriment in any event".

8. Unfortunately, the liability judgment does not record any of the agreed facts upon which liability was agreed by the parties in Claim 1 and the '*underlying factual disputes in this case* which were *not straightforward, indeed they are complex*"*'* (see preliminary hearing record of 29 June 2020) were never determined at a liability hearing and remain unresolved when Claim 2 was presented in June 2021.

9. Understandably, Mr Cordrey seeks to rely upon the Claim 1 admissions to persuade the Tribunal to find that liability is established for the alleged discrimination in Claim 2. At paragraphs 2-8 of his written closing submissions he puts his argument in this way:

2. "Plan A had to be **shelved early into January 2020 when C's solicitors intervened**. But Plan B involved marginalising C with the hope that either he would resign or at least would represent no threat to R2 and R3 running the firm as they wanted.
3. R has admitted the **discriminatory components** of Plan B, including stripping C of all of his powers, removing him from management and decision-making processes and withholding management and accounting information (letter of 24 November 2020).
4. They have admitted that they did these things and they did them for discriminatory reasons at some point in Claim 1 period, October 2018 to 16 April 2020.
5. The question for this hearing is whether Plan B was halted on 16 April 2020 or whether it continued on 17 April 2020-the start of the Claim 2 period.
6. It seems highly unlikely that Plan B was halted on 16 April 2020 since R3 confirmed in her oral evidence that she believed that R's actions which comprised Plan B were lawful at that date and continued to hold that view until early November 2020.
7. More bluntly one has to ask what evidence is there of a change of heart on 17 April 2020? What **evidence** is there that R2 and R3 who were hell bent on expelling C during claim 1 period, relented and decided they did not in fact want to side-line and exclude him from the firm?
8. This is where careful attention to R2 and R3's treatment of C during the Claim 1 period is required since it informs the likelihood that R2 and R3 stopped discriminating against C on 16 April 2020"

(all highlighted text in these reasons is the Tribunal's emphasis unless otherwise stated)

10. From the Claim 1 pleadings the Tribunal have identified the dates of the admitted discriminatory acts, the last of which was a planned partnership meeting in January 2020 which did not take place following the Claimant's solicitor's intervention. All the other complaints of discrimination were withdrawn and dismissed. One of the detriment complaints that was

withdrawn and was dismissed is the 'withholding of profit share' which is a complaint that reappears and features prominently in Claim 2.

11. To provide some background to that complaint the Tribunal considered how that withdrawn complaint had been presented in the first claim on 16 April 2020. In the particulars of claim (POC Claim 1) this allegation is pleaded as an act of victimisation relying on the protected act of the Claimant's solicitor's letter dated 6 January 2020:

> "*The claimant has received no profit share **funds** since commencing his sick leave in October 2018 despite the fact he is entitled to these. This has left the claimant unable to properly plan and manage his personal finances" (paragraph 121.7 POC Claim 1)"*.

12. In the Claimant's solicitors letter dated 6 January 2020 the profit costs issue is referred to in the following way:

> ***"Profit Share and Permanent Health Insurance.***
>
> *Our Client has personal Permanent Health Insurance provided by Aviva.*
>
> *During his sickness absence as two of the Designated Members you unlawfully sought to reduce our clients profit share on the basis that he has the benefit of Permanent Health Insurance. However, it then became clear that you had no authority to do so under the LLP agreement.*
>
> *Following the discovery that there was no legal basis or other basis on which you could lawfully deprive our client of his profit share whilst he was off work sick, in an email to our client dated 7 October 2019,Ms Russell sought to persuade our client not to take his full profit share whilst he remained off work sick and asked him to consider whether it was "morally right" to do so. Ms Russell also made the following entirely callous and discriminatory comment in connection with our client's profit share*
>
> *"I know that none of your ill-health is your fault, but it's not ours either".*
>
> *Ms Lord then confirmed her agreement with Miss Russell's discriminatory comments in an email of the same date.*
>
> ***Notwithstanding the above, since our client (completely understandably) would not agree to the profit share reduction <u>it was agreed</u> that he would receive his full entitlement and the March 2019 accounts were subsequently approved and filed with Companies House on that basis".***

13. The Respondents resisted that complaint on the ground that it was 'misconceived' because the alleged act of victimisation was alleged to have occurred before the protected act.

14. The Claimant's solicitors then provided further and better particulars of that claim on 13 July 2020 which put this complaint in a different way making it about the 'distribution' of the profit share funds and not about the 'allocation' of profit share:

*"The claimant pursues this complaint in so far as it relates to profit share **funds which would have been distributed after 6 January 2020** following approval of the accounts on 30 December 2019.The claimant was expecting a payment of his profit share after the accounts were approved on 30 December 2019 and payment became due after the protected act. However, no payment has been made. We believe this can be pursued as a section 15,13(1) and the **missed payment which fell due** after the protected act"*

15. As at 13 July 2020, the detriment complaint had changed and the Claimant agreed that he had been correctly allocated his full profit share into his current account, his concern was whether he had 'missed' any payment on the distribution of unpaid profit share after 6 January 2020. As at July 2020 the Claimant knew, that he had not missed any payment because no payments of unpaid profit share had been made to any of designated members because of the lack of available funds. This allegation of disability discrimination and or victimisation was withdrawn by the Claimant and was dismissed on 6 January 2021. No admissions were made by the Respondents that profit share was withheld from the Claimant due to discrimination in Claim1.

Claim 2

16. Nearly a year later, on 7 June 2021 the Claimant presented Claim 2 in which he alleged the Respondents had committed further acts of disability discrimination (discrimination arising from disability, a failure to make reasonable adjustments) and victimisation in the period 17 April 2020 to 8 March 2021.

17. At a preliminary hearing on 30 July 2021, Employment Judge Eeley consolidated the two claims and directed they should be heard by the same Tribunal. Claim 2 liability issues were to be decided in November 2021, followed by remedy hearing for (Claim 1 and 2) in February 2022. In the record of that hearing, Employment Judge Eeley flagged up the possibility that some remedy issues might be considered at the liability hearing if time permitted recognising the Tribunal's priority was to decide the Claim 2 liability issues. A list of issues for Claim 2 liability and for Claim 1 remedy were identified and confirmed in the form agreed by the parties' representatives.

18. For the Claimant, profit share makes up the bulk of the compensation the Claimant claimed in his schedule of loss for the Claim 1 admitted discrimination. The remedy issues (issue 3 and 4) identify that any loss that flowed from any act of unlawful discrimination was recoverable, otherwise there was no basis upon which the Tribunal could award compensation for profit share under section 124 Equality Act 2010.

"3. Past financial losses (EqA 2010 section 124)

3.1. In accordance with EqA 2010 s124(2)(b),124(6) and Ministry of Defence-v- Cannock(1994) IRLR 509,what compensation is required to put the Claimant into the financial position he would have been in **but for the unlawful discrimination**. In particular:

3.2. **But for the unlawful discrimination**, what profit share would have been paid to the Claimant by the Respondents for the financial years 2018/2019 and 2019/2020:and

3.3. What sums has the Claimant received by way of Permanent Health Insurance during this period and should any or all of these sums be deducted from the loss of profit share when calculating any past financial loss?

4. Future financial losses ((EqA 2010 section 124)

4.1. In accordance with the principles set out at para 3.1 above, what, if any compensation related to the period from the remedy hearing onwards is required to put the Claimant into the financial position he would have been in but for the unlawful discrimination (the Respondent's position is that there is no ongoing loss)".

19. Given all the above, the Tribunal could see why this claim was complex. At the hearing Counsel invited the Tribunal to add further matters of complexity which were not included in the list of liability issues. Mr Cordrey invited the Tribunal to consider 2 'discrete issues related to remedy' which he referred to in his opening skeleton argument (paragraphs 19, 22 and 23):

"*The first additional issue was whether R should be permitted to resile from a concession which it made regarding the award of profit share as part of Claim 1. R (through previous counsel) gave an unequivocal written assurance to C that the remedy that would be awarded to him by a Tribunal for the discriminatory acts it had admitted as part of Claim 1 would include his profit share.*

C will argue that the Tribunal should confirm that as per the concession profit share will be awarded to C with the only dispute being how to correctly calculate the profit share. It should be said that even if R is allowed to withdraw its concession, C will argue that the profit share loss flows naturally and directly from the admitted discrimination and should be awarded to C.

The second additional question relates to a long running dispute between the parties. Whilst off sick C received monthly PHI payments pursuant to a personal policy he had taken out with Aviva. The parties ask the Tribunal to determine whether (as R says) any profit share awarded to C should have deducted from it those PHI payments or whether (as C says) the so called "insurance exception" applies permitting C to keep his PHI payments on top of any profit share ***awarded****"*.

20. Mr Burns does not accept that such a concession has been made by the Respondents. He relies on the principle of 'res judicata' to defend any attempt made by the Claimant to try to go behind the terms upon which liability in Claim 1 was agreed and correctly recorded in the liability judgment, binding on this Tribunal. For the Respondent, it is contended that the true construction of the LLP Agreement and the concerns that it could be viewed as insurance fraud, were the underlying disputes that

caused the parties to fall out so badly. As part of the remedy for Claim 1 and Claim 2, the Claimant claims that he was entitled to be paid profit share and has not been paid due to discrimination which is denied by the Respondent. The respondents dispute that the 'insurance exception' would apply to any award of compensation for discrimination made by the Tribunal which would have to be assessed on the basis of proof of actual financial loss suffered by the Claimant as a result of the admitted discrimination.

21. Mr Burns did agree with Mr Cordrey that the ET should (if possible) determine the correct interpretation of the LLP and the interaction with the PHI policy as an issue at this hearing. In particular, he invited the Tribunal to decide whether the Respondents are correct that:

    a. "*The PHI Policy does not permit C to be in receipt of LLP income while also receiving PHI payments.*

    b. *PHI payments should be taken into account when calculating his entitlement to drawings of profit share under the LLP Agreement when he is not able to work through illness.*

    c. *R's accept the C has not been paid both PHI and profit share drawings. R's contend that this is not a detriment or discrimination but in accordance with the proper construction of the LLP Agreement and the terms of the PHI policy. R's argument is simple. It is the position initially maintained by C until he changed his mind in 2019.*

    d. *The reason that no sums in addition to drawings have been paid to R2 R3 and C is nothing to do with discrimination. Rather it is due to the financial difficulties of the LLP during the Covid Crisis. The LLP does not have excess funds from which the members can take additional drawings of profit share in any event. It is surviving due to borrowing including a government Covid Loan.* ***R's believed that to claim PHI whilst receiving profit share would be dishonest and it was R's fear of being accused of being involved in dishonesty which caused all the events admitted in Claim 1.***

    e. ***Although it is not an issue of discrimination in the list of issues, this issue informs the reason for R's actions and reveals that the non-payment of profit share plus PHI is not a detriment it is the correct contractual entitlement. The parties both invite the ET to resolve this issue and determine the correct construction and interaction between the LLP and PHI Policy".***

    f. *It was also a matter of remedy in Claim 1 and Claim 2. C is claiming in the ET he is entitled to his full earnings, his full income as a member of R1 throughout the period of his sick absence. That is in respect of* ***the same period that he is apparently still telling Aviva, the PHI insurer the opposite-that he was totally incapable of work and had no partnership income. This was the reason R's had concerns about C's integrity and his misleading Aviva-it was nothing to do with his disability or discrimination***

    g. *For the LLP Agreement to make commercial sense the allocation of profit share and drawings under clause 8 and 9 must* ***by necessary implication*** *be read as subject to a deduction of PHI payments*

received by the member pursuant to clause 18.1. It was accepted there is no express term 'stopping profit share income accruing to the members current account while in receipt of PHI' but invited the ET 'if possible' to imply such a term into the LLP Agreement for it to 'make any sense'.

22. Both Counsel agreed that the Tribunal should as a minimum decide liability for the discrimination and victimisation complaints brought by the Claimant as a designated member against the First Respondent as a Limited Liability Partnership (LLP) and against the other designated members Miss Russell (Second Respondent) and Mrs Lord (Third Respondent) as the agents of the First Respondent. Those complaints are brought under section 45 Equality Act 2010, which provides that "an LLP must not discriminate against a member by subjecting that member to a detriment or by victimising the member or by failing to make reasonable adjustments" (If the duty to make reasonable adjustments is in fact engaged).

23. The applicable law was not contentious. Mr Burns has correctly and succinctly identified the questions for the Tribunal which are largely questions of facts. Was the Claimant subjected to the detriments and/or unfavourable treatment he alleges? If so, what was the reason for that treatment? Was it because he complained of disability discrimination in Claim 1? If the reason was related to his cancer or depression can the Respondent show it had justification for what they did? Was C put at a substantial disadvantage by the alleged PCP's and if so, was there a failure to make reasonable adjustments? If any of the acts are discrimination- were they brought in time?

24. The Tribunal proposes in these reasons to deal with those complaints by grouping the alleged detriments/unfavourable treatment together into 4 discrete areas: 'the profit share dispute related detriments' (withholding profit share, delayed payment of interest on capital, and the continued questioning of the Claimant's honesty and integrity in applying for and receiving PHI) the 'work related detriments' (failing to make reasonable adjustments, failing to reinstate as Managing Partner, withholding information and exclusion from decisions and meetings), then the 'barrage of hostile correspondence' and the 'retirement' detriments/ unfavourable treatment.

25. In making its findings of fact, the Tribunal has carefully considered and evaluated the evidence provided by both parties focussing in particular on the contemporaneous documentary evidence because it was alert to the risk that over time, during a contentious and lengthy litigation process, positions might change which do not accurately represent the facts as they occurred. It was important for the Tribunal to find the facts based on the best evidence to decide what had occurred rather than the picture the parties might now want to represent with the benefit of hindsight.

26. In carrying out that evaluative exercise the Tribunal reminded itself of the burden of proof provisions that apply in discrimination and victimisation complaints which Mr Cordrey has helpfully identified in his opening skeleton argument (paragraph 13).

"Section 136 Equality Act 2010 Burden of Proof.

(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".

27. It is therefore agreed that the Claimant must establish a prima facie case of unlawful disability discrimination and victimisation (contraventions of Section 15, 20(3) & 21, 27 Equality Act 2010) before the burden of proof shifts to the Respondents to show it did not contravene those provisions. Mr Cordrey submits that "*in a case where R had admitted certain acts were perpetrated for discriminatory reasons, **that where R continue** to perform the very same acts (as well as some new but connected acts) this in and of itself meets the first stage of the burden of proof and results in the burden of proof reversing. Once the burden of proof reverses it becomes for R to prove that the treatment of C was "in no sense whatsoever' because of something arising in consequence of C's disability or because of the protected acts".*

28. It was important to remember that while past discrimination might be an indicator of future discrimination the Claimant still has the burden of proving, on the balance of probabilities, those matters in Claim 2 which he wishes the Tribunal to find as facts from which the inference could properly be drawn (in the absence of any other explanation) that an unlawful act was committed. That is not the whole picture since, because along with those facts which the Claimant proves the Tribunal must also take account of facts proved by the Respondent which could prevent the necessary inference being drawn. It was also important to remember that **all** the complaints of harassment related to disability in Claim 1 and Claim 2 had been withdrawn and **some** of the complaints of discrimination arising from disability in Claim 2 were withdrawn at the hearing (see paragraph 1 of the Tribunal's Judgment). Leaving the following remaining complaints of unlawful disability discrimination and victimisation for the Tribunal to determine:

Claim 2 Liability Issues

Discrimination arising from disability (section 15 Equality Act 2010)

29. Did the alleged conduct occur? Did it amount to unfavourable treatment? If so, was the reason for the unfavourable treatment something arising in consequence of the Claimant's disability?

30. The Claimant alleges that the Respondents subjected him to the following unfavourable treatment.

30.1. The withholding of the Claimant's profit share.

30.2. Continuing to question the Claimant's honesty and integrity in applying for and receiving income protection (PHI) and accusing him of misleading his insurers.

30.3. The Second and Third Respondents, paying themselves interest on Capital on or around 10 February 2021 but not paying the Claimant's interest on Capital until 1 April 2021.

30.4. Failing to reinstate the Claimant to the positions of managing partner: client care partner: compliance COLP: compliance COFA: credit controller and/or data protection manager.

30.5. Withholding information from the Claimant: minutes of partner's meetings: details of management decisions and supporting documents and correspondence: budgets and finance reports including information about Work in Progress.

30.6. Excluding the Claimant from partner's and/or management meetings.

30.7. Excluding the Claimant from management decisions including the decisions to appoint new accountants, to terminate the First Respondent's relationship with Peninsula, and to make a financial settlement to a former member of the First Respondent.

30.8. Subjecting the Claimant to a barrage of correspondence and maintaining a hostile and aggressive tone and content in their communications with him.

30.9. The Claimant retiring from the First Respondent on 8 March 2021.

31. The 'something' arising in consequence of disability were:

(a) The Claimant's receipt of PHI payments (and/or his assertion that those payments could be retained by him in addition to his profit share entitlement)

(b) The Claimant's inability or perceived inability to discharge his full role at the First Respondent and/or

(c) The Claimant's sickness absence.

32. If the Claimant proved the unfavourable treatment was something arising in consequence of the Claimant's disability the Respondents contend the unfavourable treatment is a proportionate means of achieving a legitimate aim.

<u>Failure to make reasonable adjustments (Section 20(3) and 21 Equality Act 2010)</u>

33. The Claimant complains that the First Respondent failed to make reasonable adjustments. The Claimant relies upon section 20(3) Equality Act 2010 and complains that between 17 April 2020 and 8 March 2021 the First Respondent applied the following provision criteria or practices (PCP's):

33.1. A requirement of being fully fit to return (rather than accepting fitness to perform a therapeutic level of work).

33.2. A requirement of being fit for a full time return to participate in the First Respondent rather than accepting a phased return.

33.3. A requirement on the Claimant to initiate a return/prove his fitness to return.

33.4. Holding partners' meetings at the First Respondent's Rotherham Office rather than at the Claimant's home.

34. If those PCP's were applied by the Respondent did the PCP'(s) either individually or cumulatively place the Claimant at a **substantial disadvantage in comparison with non-disabled persons**? If so, did the Respondent take such steps as were reasonable to avoid the disadvantage to the Claimant?

35. The Claimant claims the following adjustments should have been made:

    16.1 enable him to work from home

    16.2 continue/recommence his management roles

    16.3 return to work on a phased basis

    16.4 hold partners meeting at his house.

Victimisation (section 27 Equality Act 2010)

36. It is accepted the Claimant had done 2 protected acts: (1) the Claimant's solicitors' letter of 6 January 2020 and bringing Claim 1 (Case Number 1802068/2020).

37. The Claimant will rely upon the same 9 alleged acts of unfavourable treatment also as detriments he was subjected to because he had done protected acts.

Jurisdiction

38. It was agreed that the claim was brought in time in relation to the Claimant's retirement on 8 March 2021. All the pre-retirement discrimination allegations are out of time, unless the act is part of a continuing act ending in retirement or time is extended for any unlawful act on just and equitable grounds.

39. The Claimant alleges the Second and Third Respondent continued their discrimination from 17 April 2020 by side-lining and freezing the Claimant out of the First Respondent in the ways alleged to the point where the Claimant's position was untenable, and he was forced to resign in response to their discriminatory behaviour.

Disability

40. Disability is conceded in relation to the Claimant's impairments of cancer, depression and stress. It is conceded that the Claimant was a disabled person by reason of the impairment of cancer in Claim 1. In the Claim 2 period the Respondents concede they had knowledge of the impairments of 'a depressive' disorder' and/or 'stress related problem' as a result of the fit notes provided by the Claimant during the Claim 2 period. The Respondents concede they had knowledge those impairments were disabilities from 27 July 2020 as a result of the GP's report disclosed by the Claimant's solicitors for the purposes of judicial mediation.

The agreed limitations on the Claimant's fitness/ability to return to work

41. During the hearing, the Tribunal requested copies of all the fit notes that the Claimant had provided to the Respondents at the material time. A supplemental bundle (pages 1931- 1945) was produced with all the fit notes issued by the Claimant's GP covering the Claimant's absence from work from 12 July 2018 to his retirement on 8 March 2021. All the fit notes confirm that the Claimant was unfit to perform any work for the whole of that period.

42. From 12 July 2018 up until 22 January 2020 the reason for the Claimant's unfitness to work was '*cancer*'. From 22 January 2020 to 22 June 2020 the reason was '*depressive disorder*'. From 22 June 2020 until 27 August 2020 the reason was '*reactive depression (cancer diagnosis stressful situation at work/stress at work)"*. From August 2020 until the Claimant's retirement on 8 March 2021 the reason was '*stress related problem*'.

43. The Claimant accepted that for the whole of the Claim 2 period, his GP had declared that he was not fit to work and had ruled out any return to work with adjustments. As well as the 'GP limitation' there were 2 other limitations that prevented the Claimant from returning to work for the whole of the Claim 2 period. First the 'therapeutic contact only' limitation imposed by the insurer, Aviva. As a precondition of the PHI benefits paid to the Claimant from October 2018, the Claimant was required to provide ongoing medical assessments confirming he was 'totally' unable to work. Aviva only permitted the Claimant to have 'therapeutic contact' with work limited to the occasional catchup coffee and attending monthly partners meetings. Second, there was the Claimant's 'self-imposed' limitation. From May 2020, the Claimant was unwilling to have any direct contact with Mrs Lord or Miss Russell. From September 2020 until his retirement in March 2021 he was only willing to have contact with them via post.

44. The undisputed facts were that for nearly 3 years the Claimant was absent from work due to ill-health. He had declared to the Respondents and to the Insurer that he was totally unable to perform any work. For the whole of the Claim 2 period, medical opinion had ruled out the possibility of any return to work with or without adjustments and for the last 7 months of the partnership the Claimant was only willing to have contact by post with his partners.

45. In the light of those limitations, Mr Burns invited the Tribunal to find that the Claimant's complaints of unlawful disability discrimination were fundamentally contrary to the evidence and the undisputed facts. He submits the remaining complaints are brought on the basis that the Claimant was fit to return to work, he was able to resume his roles as managing partner client care partner: compliance COLP: compliance COFA: credit controller and/or data protection manager and was able to have greater involvement in the day to day running of the partnership, when he knew that was never the case. While some complaints were abandoned at the hearing and withdrawn others have continued to be pursued, when they were ill-founded for the same reason as the abandoned complaints.

46. The Tribunal considered whether that submission was supported by the findings of fact it made on the remaining allegations of discrimination and victimisation.

<u>Assessment of Credibility</u>

47. The Tribunal saw documents from eight large lever arch files. There were 4 bundles for Claim 1(remedy): C1 (1-4) and 4 bundles for Claim 2 (liability): C2 (1-4) running to just under 4000 pages. Further documents were added with the permission of the Tribunal. In these reasons page numbers and bundles will be identified as C1 or C2 followed by the bundle number (1-4) and then the page number (although some documents appear in both C1 and C2). The Tribunal spent 1.5 days reading the documents from the agreed reading list which comprised the pleadings for Claim 1 and Claim 2

and the parties very lengthy witness statements prepared for Claim 1 and Claim 2. In relation to the relevant contemporaneous documents the parties accepted the reading time did not allow for that evidence to be considered in detail during the hearing and it was accepted that it would have to be considered in more detail during the deliberations. The Tribunal would have been better assisted by the parties/legal representatives at the hearing, if only relevant documents were included in the bundle and if concise witness statements were prepared including only relevant evidence on the complaints and issues.

48. We heard evidence from witnesses in the following order:

    11.1 Claimant,

    11.2 Mrs Elizabeth Lord, the Third Respondent,

    11.3 Miss Hester Russell, the Second Respondent.

49. The Tribunal found that Mrs Lord and Miss Russell gave their answers to questions in a straightforward, direct and open way and those answers were supported by the contemporaneous documents. In contrast, at times, the Claimant gave very unsatisfactory evidence and his answers did not accurately reflect the events or his views at the time. The Tribunal found the Claimant was evasive at times and his evidence was misleading and contradicted by the contemporaneous evidence. In the written closing submissions Mr Burns has identified some of the evidence the Claimant gave on key issues to try to persuade the Tribunal that the Claimant was not a credible witness and reluctantly invited the Tribunal to find that the evidence shows the Claimant had been ‘dishonest’.

50. The Tribunal appreciated that was a seriousness its task of evaluating the quality of the evidence provided, to assess the credibility and truthfulness of the witness evidence. It made that assessment after making all the findings of fact, by stepping back and considering the totality of the findings it had made in the round. At the end of its deliberations the Tribunal could see some force in Mr Burns submission. It was a difficult decision to make given the serious consequences it will no doubt have for the Claimant personally and for his reputation after more than 20 years as a practising solicitor. However, by bringing these allegations to a hearing, the Claimant had decided the complaints he has made should be open to that level of scrutiny and be decided by the Tribunal on the evidence provided by both parties. He also affirmed that the evidence he gave to the Tribunal was the truth.

51. The Tribunal considered whether the unsatisfactory evidence the Claimant gave could be explained as a mistake or misremembering, because this was a particularly difficult time for the Claimant because of his ill-health. The difficulty for the Tribunal was that neither of those explanations can be made to fit with the unsatisfactory evidence. The Claimant has during this difficult time been very proactive in making informed decisions on any disputed matters. His interactions with others(the Respondents, the insurers, the accountants, the HMRC, solicitors) demonstrate his ability to assert his position, to use arguments and select information to persuade, to stand his ground when he disagrees, to provide detailed counterarguments and to deflect blame onto others, all while he was suffering with ill-health.

Unfortunately, and very reluctantly we agreed with Mr Burns, that the Claimant was not a truthful witness and that he has attempted to mislead the Tribunal in some material aspects by the evidence he gave which is referred to in the findings of fact made. For those reasons where there were any material disputes of fact the Tribunal was persuaded that the Respondents witness' evidence was far more credible and reliable than the Claimant's evidence and should be preferred and accepted.

Findings of fact

52. The Claimant is a solicitor and was the Managing Partner and co-founder of Grayson Willis Bennett (GWB) solicitors in 1999 which became a Limited Liability Partnership ('LLP') in 2012. He was absent from work due to ill-health from July 2018 and retired on 8 March 2021.

53. On 1 October 2015, GWB LLP merged with Harthills Solicitors and the merged LLP was renamed "GWB Harthills LLP" ("the First Respondent"). The Second Respondent ("Mrs Lord") and the Third Respondent ("Miss Russell") were both former partners at 'Harthills Solicitors' which was an ordinary partnership not an LLP. The Claimant and Miss Russell specialised in crime. Mrs Lord specialised in care proceedings and family law.

54. After the merger, the Claimant remained the Managing Partner. He was the Legal Aid Agency Contract Manager (LAA), the Compliance Officer for Finance and Administration (COFA), the Compliance Officer for Legal Practice (COLP) and the Data Protection Officer.

55. A limited liability partnership is a body corporate with a separate personality from its members and allows the members a measure of limitation in respect of their own personal liabilities. In return for those measures the LLP is registered with Companies House as a lawful business carried out by the designated members with a view to making profits. The LLP must prepare accounts on a true and fair basis, have these accounts audited (subject to audit thresh holds) and have them filed on public record at Companies House. In broad terms an LLP is tax transparent like any ordinary partnership and the designated members of the LLP are treated as self-employed for tax purposes, taxed on the profits of the LLP in accordance with their profit share entitlements (whether or not those profits are actually distributed to the members).

56. LLP's have become the modern way in which many law firms now operate. The turnover of the business (gross profit) is calculated based on the legal services provided by the LLP to clients recorded as its 'work in progress' irrespective of whether that work in progress is realised in payment for the legal services provided. Tax for a particular year is based on the gross profits at the end of the LLP's year end accounts in the relevant tax year. If the LLP has made profit each designated member is allocated their profit share. At the end of each accounting period, profit share is distributed provided the funds are available in the LLP's bank account. Each partner individually completes a tax return showing his/her share of partnership profits corresponding to the partnership return. The tax is paid by the LLP in 2 instalments at the end of January and July each year and is deducted from the partners individual current accounts at the end of the accounting year.

57. The Claimant was very familiar with the LLP model of partnership having been the Managing Partner of GWB LLP since 2012. The Claimant was registered with Companies House as a 'person of significant control' in the First Respondent. As the Managing Partner he had overall responsibility for managing the business. In particular, responsibility for managing the financial affairs of the LLP including budgets, billing, work in progress, financial forecasts, planning, financial statements, working with the accountants to prepare the final accounts, members individual tax, partnership tax, the calculations for the annual allocation and distribution of profits.

58. It is agreed that from 2017 an unsigned Limited Liability Partnership agreement governed the relationship between the partners and the LLP. The agreement records that "*The Members have agreed to enter this agreement with the LLP to set out the basis on which the LLP is to be organised and the* ***rights and obligations*** *of the Members of the LLP"*. At the material time the Claimant, Miss Russell and Mrs Lord, were the only 'designated members' (equity partners) each entitled to equal profit share of the net profits each year of 33.3%. (All highlighted text is Tribunal's emphasis unless otherwise specified)

59. There was no express term which allowed profit to be stopped for any designated member for any reason including ill-health absence (irrespective of the length of the absence) Clause 8 confirms the level of net profit is determined by the Annual Accounts as prepared by the First Respondent's accountants and signed off by the Members. It provides that:

"The profits of the LLP **shall be divided** between the members in the **Agreed Proportions** and **allocated** to the Members' current accounts with the LLP as soon as the annual accounts for the relevant Accounting Period are approved by the Members"

60. 'Drawings' are monies taken out of the LLP by way of a monthly income on account of profit share with the amount of drawings deducted from the profit share of that member in the final year end accounts. The LLP agreement permits the members to decide how much is paid as drawings on account of the members share of profits subject only to "the LLP retaining an appropriate provision for the relevant member's personal tax liability" (clause 9) .The level of drawings agreed by the designated members was £5000 and additional sums could by drawn by agreement and were required to be accounted for by that member from their current account at the year end.

61. Each designated member had invested £75,000 capital in the LLP recorded in their Capital Account's and was entitled to be paid interest on their Capital investment.

62. At the material time, Mr Mike Jones was the only 'fixed share member' and partner. He was not a designated member or a party to the LLP agreement. Clause 12 of the LLP agreement makes express provision to stop a fixed share member's entitlement to profit share during a period of illness or incapacity and states:

"12. Fixed Share Members

12.1(g) for any period of illness or incapacity exceeding 6 months absence in any year or lesser periods totalling 6 months in any period the Fixed Share Member **shall not be entitled to any profit share**."

63. The 'members' are referred to as the 'partners' in the LLP agreement although equity in the LLP was only held by the designated members. For ease of reference the Tribunal have used the terms 'partners' or 'designated members' and the 'firm' or 'LLP' interchangeably to reflect how the parties referred to themselves at the relevant time in the contemporaneous documents.

64. Profit share is therefore payable in three ways, monthly drawings on account of profit, payments of income tax on profit share to HMRC on behalf of each partner and as additional drawings of profit share as decided by the partners, if there was any excess drawings available in the partners current accounts **and** the firm has the available funds at the year end to pay that surplus out. This is because the gross profit of the firm is based on the 'work in progress' and only when that work in progress is realised into cash funds in the LLP's bank account can any unpaid profit share be distributed to the members from their current accounts. The partnership statements from 2016 to 2021 onwards show that an equal share of profit has always been allocated to each designated member into their current account.

65. Upon the Claimant's retirement from the LLP on 8 March 2021, he was no longer a designated member and became an 'outgoing member' of the LLP. His current and capital account credit balances are transferred to become a debt of the firm. The Claimant is treated as an unsecured creditor of the LLP to be repaid in accordance with the terms agreed in the LLP agreement (by 36 monthly instalments).

66. The relevant clauses of the LLP agreement dealing with Outgoing Members and Interest on Late payments are set out below. Clause 21.3(b)(v) makes it clear that the designated members agree it is for the LLP Accountants, acting as experts not arbitrators to decide the sums to be paid to the Outgoing Member to represent his share at his leaving date.

"21. Entitlements of Outgoing Members.

21.3 After his Leaving Date the LLP shall:

(b) in accordance with clause 21.5 pay the Outgoing Member:

(i) the amount of any capital which he is entitled to be credited by the LLP to his capital account:

(ii) any sums due to him in respect of loans, loan interest and interest on capital in the LLP:

(iii) any **undrawn balance of his profit share in respect of any Accounting Period prior to the Accounting Period in which the Outgoing Members leaving date occurred less any proportion of income tax as the Accountants advise is applicable to any period prior to his Leaving Date**:

(iv) **any undrawn balance of profit share in respect of the Accounting period in which the Outgoing Member's**

leaving date occurred and such sums to which he is entitled to be credited by the LLP to his current account less any proportion of income tax as the Accountants advise is applicable to the period ending on his Leaving Date: and

(v) any sums **as in the opinion of the Accountants (acting as experts and not as arbitrators) are required to be paid to the Outgoing Member to represent the value of his share in the LLP at his Leaving Date**.

21.4 The LLP shall calculate the sums under clause 21.3 **by reference to the annual accounts of the LLP** (apportioned, if relevant in respect of the Accounting Period in which the Outgoing Members Leaving Date occurred) prepared using the same policies and principles as used in the preparation of the annual accounts for the preceding 2 Accounting Period (Termination Accounts). As soon as reasonably practicable after an Outgoing Member's leaving date the Members shall instruct the Accountants to prepare the Termination Accounts.

21.5 Subject to any retention pursuant to clauses 21.6 and 21.7, **the LLP shall pay the sums under clause 21.3, in 36 equal monthly instalments or as otherwise agreed by all the Designated Members** on the first Business Day of each month commencing on the first Business Day of the month immediately following the agreement of the Termination Accounts provided always that the LLP may determine in its absolute discretion to make any or all of such payments at an earlier date.

21.6 The LLP shall be entitled to deduct and retain out of any sums, payable to the Outgoing Member pursuant to clauses 21.2 and 21.4 such sum as the Outgoing Member owes the LLP. In the event, that the Outgoing Member owes an amount to the LLP, that exceeds any sums calculated pursuant to clause 22.2(b)(Outstanding Balance) the Outgoing Member shall pay the Outstanding Balance to the LLP within 45 Business Days of the Accounting Reference Date in respect of the Accounting Period in which the Outgoing Member's Leaving Date occurs.

21.7 The LLP shall be entitled to deduct and retain out of any sums payable to the Outgoing Member pursuant to clauses 21.2 and 21.4 such sum as the LLP shall, acting reasonably, estimate, and in such order or priority as the LLP shall, acting reasonably, determine, to be necessary or sufficient to discharge all or any liability attributable to the conduct of the Outgoing Member amounting to a breach of this agreement but **the LLP shall have an obligation to pursue and resolve any such liability as soon as reasonably practicable and then account to the Outgoing Member promptly for any balance(if any) of any such sum retained after discharging any such liability. Any dispute over the deduction and retention of sums payable under this clause shall be referred to ADR under the provisions of clause 31.**

21.8 The Designated Members shall notify details of any outgoing Member to the registrar of companies in accordance with the Act.

28. Interest on Late Payment

28.1 Where a sum is required to be paid under this agreement, **but is not paid before or on the date the parties agreed**, the party due to pay the sum shall pay interest on that sum at rate of 8% above the base lending rate from time to time of the Bank per annum beginning with the date on which payment was due and ending with the date the sum is paid(an the period shall continue after as before judgment). Interest shall accrue on a daily basis and be compounded quarterly."

Allegation 1: Withholding Profit Share

The Pleadings

67. As at 7 June 2021, when the Claimant presented his second claim the asserted facts relied upon to support that complaint are set out at paragraph 26 and 33-35 of the Particulars of Claim (C2/1pages 35-37) as follows:

"26. The Respondents have continued to deny that the Claimant is entitled to his full profit share and have **continued to withhold his profit share**.

Profit Share

33. Pursuant to the LLP agreement, the Claimant, Second Respondent and Third Respondent were entitled to 33.3% each of the First Respondent's net profit each year. As set out above the first admitted act of discrimination relating to the First Claim was the commencement of attempts to expel the Claimant from the Respondent on 28 November 2019 with a further range of discriminatory steps taken to marginalise and remove the Claimant throughout November and December 2019 and January 2020. **Around January 2020 the respondents made the decision to withhold the Claimant's profit share, ostensibly on the basis that he was not entitled to payment of his profit share and at the same time retain income protection which he had been paid in consequence of his disability. As part of the First Claim the Respondents admitted that the withholding of profit share for 2018/19 and 2019/20 was a loss which flowed from the admitted discrimination.**

34. The Claimant retired from the First Respondent on 8 March 2021. Had he not retired and had he continued as a partner until the age of 65 he would have received further profit share payments for 2020/21,2021/22,2022/23 and for part of the financial year 2023/24. The Claimant has asserted in the First Claim that if it was not for the treatment comprised in the admitted discrimination he would have continued in his role as Managing Partner of the First Respondent until retirement at 65 and as such the loss of those future years of profit share flows naturally and directly from the admitted discrimination in the First Claim.

35. Further or alternatively, the Claimant claims that his decision to retire was significantly influenced by the discriminatory conduct of the Respondents as particularised above(and claims that the retirement itself was an act of discrimination on the Respondent's part).Whether taken cumulatively with the admitted discrimination of the First Claim or taking the conduct particularised above on its own the loss of the future years of profit share flows naturally and directly from the Respondent's discriminatory conduct "

68. The relevant parts of the Respondents' response resisting that part of claim (C2/1page 56/57) are as follows:

37. "With regard to paragraph 26. **It is denied that the Respondents have continued to withhold his profit share due to discriminatory reasons rather profit share was not paid to the Claimant and or the Second and Third Respondents because of their unresolved dispute and the available funds of the First Respondent were not available to do so, not least due to the impact of Covid 19 pandemic.** In **particular the partners meetings minutes of 24 August 2020 stated that the First Respondent "do not have any savings - hand to mouth"** and again in the partners meetings of January 2021, it was minuted that the Second and Third Respondents felt the firm is at "severe risk" if they did not press ahead with a loan. **Therefore, it has been evident to the Claimant that the Respondents' have not withheld the Claimant's profit share for discriminatory reasons**. Further the Claimant is **estopped from bringing a new claim on the same or substantially similar facts especially when the right to do so was not expressly reserved**. In the alternative the limitation period to pursue this claim within the Second Claim may have ended in circumstances where it has been reasonably practicable for him to bring the claim as he has been legally represented throughout it would not be just and equitable to extend the time for presenting the Second Claim.

Profit Share

38. It is agreed that the Claimant retired from the First Respondent on 8 March 2021.It is agreed that had he not retired and had he continued as a partner until the age of 65,he would have received further profit share payments for 2021/22 2022/23 and for part of the financial year 2034/24 subject to any amendments to profit share entitlement arising from any future admission of new partners.

39. It is **denied that if it was not for the treatment comprised in the admitted discrimination arising from disability that the Claimant would have continued in his role as Manging Partner of the First Respondent until retirement at 65** and as such loss of those future years of profit share flow naturally and directly from the admitted discrimination in the First Claim. The Respondents reserve their position pending updated

medical evidence establishing that he would have been able to work as Managing Partner until retirement at age 65.

40. It is **denied that the Claimant's claim that the decision to retire was significantly influenced by the discriminatory conduct of the Respondents as particularised** (and claims that the retirement itself was an act of discrimination on the Respondents' part) whether taken cumulatively with the admitted discrimination of the First Claim or taking the conduct particularised on its own. It is denied that the Claimant's act of retiring without notice is an act of discrimination on the Respondents' part. It is further denied that the loss of future years of profit share flows naturally and directly from the respondent's discriminatory conduct".

The Claimant's witness statement

69. The evidence the Claimant relies upon in relation to the alleged detriment/unfavourable treatment of 'withholding profit share" is set out at paragraphs 36-39 of his witness statement. The Tribunal has set out that evidence in full and the documentary evidence referred to in order to fairly and accurately reflect that evidence to resolve the factual disputes, to assess the credibility of that evidence and the inferences that can properly be drawn from it. (For ease of cross-reference later in these reasons the Tribunal have added subparagraphs 69.1- 69.8 in order to identify the documents the Claimant refers to in his statement which are divided into the correspondence with the Respondents about the payment of his current and capital accounts upon retirement and correspondence with Aviva about the PHI).

Withholding profit share

"36.*The Respondents have continued to* ***withhold my profit share since October 2018*** *and they have repeatedly stated* ***that they will only pay me the profit share due to me if my PHI benefit is deducted*** *(there are many examples of the Respondents stating this in the bundle at pages 742,776-781 and 782-783).* ***This is despite Aviva confirming that my profit share could be paid directly into my pension fund with no impact on my right to receive PHI payments*** *(pages 1376 and pages 1383). I have* ***no doubt that the continuing withholding*** *of* ***my profit share*** *is* ***discriminatory****.*

69.1 C2/2 pages 724-725: Letter dated 26 March 2021 from the Claimant to the Respondents

"Payment of Monies Due.

With regard to the payment of monies due whilst there is no mechanism for the repayment of Capital in full, it is open to the Designated Partners to authorise such a payment.

I find it remarkable that you have refused to pay me any part of my profit share since October 2018 in breach of the LLP

agreement yet you are now seeking to hastily pay me a disputed sum so close to the final Remedy Hearing.

It is **premature for you to make any payments of the monies due from my current account**. The final and retirement accounts have yet to be prepared and the deduction of any Permanent Health Insurance monies is not accepted by me and will be determined by the Employment Tribunal at the Remedy Hearing.

For the avoidance of doubt, **I remain of the firm view that the profit share payments should not be made until the correct sums due to me have been determined by the Employment Tribunal**. However, in the event that you choose to ignore my perfectly reasonable request in respect of profit share payments, please ensure that any profit share payments are clearly identified to enable me to transfer them straight to my pension pot."

69.2 C2/2 pages 741-742: Letter dated 31 March 2021 from Respondents to the Claimant:

"Payments of Monies Due

With regard to the payment of monies due, we agree that there is no mechanism for the repayment of Capital in full, and that it is open to the Designated Partners to authorise such a payment.

It is not remarkable that you have not received any part of your profit share since October 2018 as we have been in serious dispute since that date. The **other Designated Partners are in the exact position that you are in regarding non-payment of profit share**.

We reject the assertion that we are now seeking to hastily pay you a disputed sum so close to the final remedy hearing **rather we are making appropriate financial arrangements as a direct result of your decision to resign with immediate effect on 8 March.**

We have asked the Accountant what is due to you and I have attached their calculation for your information. The monthly figure of £5,689.17 represents what you are owed from both your capital and current account, less PHI payments you have received. It also takes into account the overpayment of tax you have made. It envisages you making your own claim to HMRC for those monies to be reimbursed as this is your individual tax and cannot be claimed back by the LLP. **I confirm that we will revisit what is owed to you following the outcome of the Remedy Hearing.**

We **note your concern regarding it being premature to make any payments from your current account and accordingly the payments in April, May and June 2021 will be made to reduce what is owed in your capital**

account. I confirm that we will also revisit this following the outcome of the Remedy Hearing as we prefer to reduce both your capital and current accounts.

So, to confirm payment will be made over a 36 month period commencing on 1 April 2021 with the final payment due to you on 1 March 2024".

(The calculation from the Accountant provided the Claimant with the following figures:

Current Account Balance (without deduction of PHI) estimated as at 31/3/2021: £336,731.00.

With deduction of PHI of £206,921.00

Leaving a current account balance of £129,810.00.

To that adding a Capital Account Balance of £75,000.

giving a total of the Current and Capital Account of £204,810.00

Payable over 3 years (36 months) in the amount of £5,689.17)

69.3 C2/2 page 782-783: Letter dated 8 September 2021 from Respondents to Claimant.

"I enclose draft accounts for year- end 2021.

As you are aware, we remain concerned that whilst you are in receipt of PHI you are not entitled to your profit share. In an attempt to settle matters **we offered a PHI offset on the basis that AVIVA were content with this**. **We are still unclear as to whether AVIVA are content with this**.

As a result of our concerns and to ensure the employment tribunal have the full picture we have asked the LLP accountant to draw up your current account to (a) illustrate how much you would be left if the PHI were offset and (b) to show how much would be left if you were not entitled to profit share due to being in receipt of PHI. These illustrations are enclosed for your information".

69.4 C2/3 page 1376: Letter dated 24 December 2020 from Mark Munday (Aviva Senior Claims Adviser) to the Claimant

"Dear Mr Willis,

Thank you for your email of 22 December 2020. I am happy to clarify the following:

1. *- (A) Clarify whether you are referring to partnership profit either before or after when Mr Willis' PHI entitlement paid out?*

   - (B) Clarify how receipt of partnership profit into Mr Willis' pension pot whilst he is also receiving PHI affects his claim? and

- (C) Clarify how any receipt of partnership profit by Mr Willis' whilst he is also receiving PHI monies affects his claim?

Any partnership profit paid directly to the pension pot and not declared as earnings on documents to HMRC, would be excluded. This includes any historical partnership profit Mr Willis is entitled to before income protection benefit started as part of his contract. If the partnership profit is declared as earnings to HMRC then it is likely to be regarded as continuing income for the purposes of our calculations and may reduce the amount of benefit payable under income protection benefit.

2. As stated in Clause 4 of the policy "there is no entitlement to Income Protection Benefit in respect of any period during which the Insured engages in a "remunerative occupation". It appears to us that any receipt of profit share by Mr Willis from November 2018 to date is as the result of remunerative occupation which means he has no entitlement to Income Protection Benefit, is that correct?

No, we would not class Mr Willis as engaged in remunerative occupation as a result of receiving profit share. In this context clause 4 is referring to someone actively working in a remunerative occupation.

3. Is Mr Willis obliged to account for any profit share received from the LLP as clause 18a of the PHI Policy Conditions appear to impose a limitation on the amount of benefit payable? In particular,

a) When Mr Willis receives his outstanding profit share, would this meet the requirements of continuing income?

b) It appears to us that his Continuing Income plus the Income Protection Benefit payable will be reduced to nil subject to the value of his profit share. Is our interpretation correct?

If the profit share is declared to HMRC as earnings and assessed for income tax purposes, then we would include them as continuing income. Without figures I can't determine the affect any potential continuing income may have on Mr Willis' income protection benefit.

I hope this is helpful but please come back to me if you require any further information.

Yours sincerely,

Mark Munday (Senior Claims Adviser)"

69.5 C2/3 Page 1383 Letter dated 11 January 2020 from Mark Munday to the Claimant

Dear Mr Willis

Thank you for your email of 29 December 2020 and update. I'm happy to clarify the following:

*Question 5: "**As a self- employed person, I will be entitled to a Profit Share from the LLP - albeit that no profit share has ever been paid to me since the commencement of the PHI and the amount is the subject of a dispute**. All monies after taxation that become due will be paid in full into my pension scheme and will not be drawn as income. I provided you with the Partnership Tax Return on 14 February 2019 and on 22 March 2019, you confirmed **based upon that information that my benefit was ongoing**. On 21 February 2020, I supplied you with my Personal Tax Computation as drawn up by the accountant for the year to 5 April 2019 detailing any taxation due through to 31/7/20. **Based upon this information you assessed my claim** as ongoing **in the knowledge that any profit share due would go directly into my pension scheme** which you confirmed on 1st April 2019 and 21 October 2019 and this would not affect my PHI claim. Can you please reconfirm that the above is correct"?*

Answer: In the event, that any partnership profit is paid directly to your pension pot, and **not** therefore declared as earnings to HMRC, this would be excluded as continuing income. This includes any historical partnership profit you may be entitled to before the income protection benefit was paid or that you became entitled to after income protection started as part his contract. (Text in this paragraph is as highlighted by Mr Munday)

However, if you elect to take an income from the pension pot then this could affect the benefit.

Additionally, in the event that the event that the partnership profit is declared as earnings to HMRC then it is <u>likely</u> to be regarded as continuing income for the purposes of our calculations and may reduce the amount of benefit payable under income protection benefit.

I hope this is helpful but please come back to me if you require any further information.

Yours sincerely

Mark Munday (Senior Claims Adviser)"

37. My PHI with Aviva is under a policy which is personal to me and which is not for the benefit of the First Respondent. This has repeatedly been confirmed to the Respondents. Aviva has confirmed that the First Respondent has no rights under the policy and the benefit is not dependent on me remaining a Member of the First Respondent in order to benefit from the policy (page 1369).

69.6 C2/3 Page 1369: Letter from Mark Munday to the Claimant dated 10 December 2020

Question 6: What is your understanding of the Claimant's ill-health during the period he has been claiming under the PHI policy.

Mr Willis has been **totally unable to work since July 2018** as a result of bowel cancer, complications from his illness and from treatment/surgery and more recently mental health difficulties as a result of his diagnosis, the complications and treatment.

Question 7: Please could you tell me in your own words what type of PHI cover the Claimant is benefitting from including whether it is a personal benefit or a group benefit?

Mr Willis is in receipt of income protection benefit under a personally held income protection policy. The claim is assessed on Mr Willis ability to perform the generic duties of his occupation. His employer has no rights under the policy and whether Mr Willis remains with GWB Harthills LLP whilst a claim is in payment does not have an effect on the payment of benefit.

Question 8: Please could you explain how the payments for the premiums work? Are you able to confirm how many payments have been paid by GWB Harthills and how many were paid by Grayson Wills Bennett/Grayson Wills Bennett LLP?

Our records show that premiums of £37,122.44 in total were paid by from 1 September 2003 up to 1 October 2018 from a bank account in the name of Grayson Willis and Bennett. Since 1 November 2018 no premiums have been paid directly as they are waived whilst a claim is in progress. No premiums have been paid from any other accounts.

Question 9: In your own words, please can you explain what profit share arrangements (including payment into a pension pot) are permitted under the Claimant's PHI policy? For example, is he permitted to retain his full profit share during the period he has been claiming PHI benefits or is he required to forfeit any part of the profit share under his current PHI policy?

Benefit is paid on the basis of Mr Willis's **taxable earned income** in the year before his date of first absence and we take into account any **ongoing taxable earned income as continuing income** in our calculations. It is not within my remit to comment on any profit share arrangements.

Question 10: Please can you confirm whether there is anything in the Claimant's current PHI policy which

would prevent him claiming motoring expenses from the LLP?

Mr Willis advised me in February 2020 that the partnership had been reimbursing his motoring expenses up to September 2019 for periods when he had visited the Office on therapeutic visits/catch up. I confirmed at the time that these would not affect the benefit under his individual policy.

Question 11: As far as you are aware did Hester Russell Elizabeth Lord or any other person acting on behalf of the LLP contact you or your colleagues in connection with the Claimant's profit share entitlement or his motoring expenses?

We have no record of any contact from Hester Russell Elizabeth Lord or any other person acting on behalf of the LLP in connection with Mr Willis' profit share arrangement or motoring expenses.

38. The First and Second Respondents will directly benefit from their discriminatory actions if they deduct my PHI benefits from my profit share, since the monies they deduct will increase their respective personal profit shares and will be distributed between them to my detriment. This seems grossly unfair in circumstances where since January 2020 I have remained on PHI as a direct result of the Respondent's discriminatory actions and the significant harm, they have caused my mental health. I would have returned to the First Respondent in January 2020 and I would have continued to receive my full profit share but for the Respondent's discriminatory actions.

39. As a result of **misleading questions** the Respondents have recently asked Aviva my PHI benefit has now ceased and I currently have no source of income.

Tax on Profit Share

40. I received drawings from the First Respondent until October 2018. I ceased to receive drawings from the First Respondent when my PHI benefit commenced **but it was always agreed and understood that I would continue to receive my share of the firms profit as set out in the LLP agreement by way of an annual payment**.

41. My personal tax liability was calculated by the First Respondent on the basis that I had received a full profit share for the 2018/2019 and 2019/2020 accounting years and the First Respondent paid this tax directly by taking out loans and **more recently deducting £45,002.43 of tax from the capital sum I paid into the First Respondent (page 926 -928).** To date I have been **taxed the sum of £252,283.53 on profit share** that has been deliberately withheld from me by the Respondents. **I now understand that tax should not have been paid on a profit share that had been deliberately withheld from me**.

69.7 C2/2 pages 741-742: Letter dated 27 July 2021 from the Claimant to the Respondents:

"I confirm receipt of your letter today **confirming the payment of my income tax on my full profit share**
As you are aware, I stated that any payments made to me are by way of capital repayment only-as set out in my email of 4/2/21. This had been agreed by Elizabeth in her letter of 31 March 2021.The only change has been the remedy hearing has been delayed until November, therefore **this arrangement will continue until then**. There has been no consultation to change the arrangement nor to reduce the payment which is unacceptable. Please confirm the monthly Capital repayment continues as agreed with the next payment being stated by you as 1/8/21. The amount of my Capital Account paid to 1/7/21 by agreement is £22,756.68 leaving a balance due of £52,243.32.

I ***reaffirm that payment of my Current Account balance is not appropriate until decided by the Employment Tribunal***. There remains substantial areas of disagreement and the Accounts for 2020/21 are not completed and therefore there is no basis for accurately deciding profit shares".

69.8 C2/2 pages 741-742: Letter dated 27 July 2021 from the Respondents to the Claimant:

"Re; Repayment of Capital

We write in response to your email dated 27 July 2021.
We understand that you are requesting we pay to you only your capital account. Your capital account upon your retirement stood at £75,000.

Since your retirement we have made the following payments:

(a) £5,689.17 for the months of April May June and July 2021.

(b) A Tax payment on your behalf of £45,002.73

(c) £4,282.83 for the month of August

This leaves an amount outstanding of £2,957.76.

As a result, your next monthly payment will be for the outstanding balance on your capital account of £2,957.76.

In ***accordance with your requests we shall not commence payments of your current account at this stage.***

We must draw your attention to the fact that ***should the tribunal determine that you have suffered no financial loss due to being in receipt of PHI payments then your***

> ***current account is significantly overdrawn due to the amount of tax that has been paid on your behalf*** so it is perhaps sensible at this stage for us to respect your wishes and not to make any further payments in case you have a large sum to pay back to the LLP at the end of the litigation.
>
> For ease of reference we enclose your capital only repayment schedule".

44. During recovery from my operation in October 2018, the Respondents attempted to expel me and the 2018/2019 accounts were prepared and filed. At the time I was recovering from a life-threatening illness and the attempted expulsion had left me absolutely distraught. Therefore, the question of whether or not I should have paid tax on the profit share that I had not received was **not something I gave any thought** to as I assumed it would be dealt with properly by the First Respondent's accountant.

45. At no stage have the First Respondent's accountants ever provided advice that indicated that it was inappropriate that I be taxed in the sum of £252,283.53 on monies that I have not received.

Claimant's evidence on tax position in October 2021

46. On 18 October 2021 since the Respondents were insisting, I had **'continuing'** or '**earned income'** (this text is as highlighted by the Claimant) because I had paid tax on my profit share. I decided to check the position directly with a HMRC adviser via Gov UK Income Tax Enquiry Line. I provided the tax adviser with my UTR Number and National Insurance details to allow access my online account which included copies of my partnership tax returns and my individual tax returns for the financial years 2018/2019,2019/20 and 2020/21.**During this call I explained that payments from the First Respondent ceased in October 2018 and that I have received nothing thereafter**. I also explained the ongoing and admitted discrimination issues.

47. The tax adviser was unable to answer my query about **"earned income"** (this text is as highlighted by the Claimant) and she said that she would pass the enquiry on to the HMRC Technical Office who would call me back within 3 working days.

48. On 19 October 2021, I again called HMRC and I spoke to a Tax Adviser, but no Technical Tax Adviser was available.

49. On 20 October 2021, I received a telephone call from Mr Eban, a Tax Inspector assigned to my query. I again explained the situation to him, and he accessed the partnership tax returns for the First Respondent and my personal tax returns. The 2019/20 partnership and personal tax returns showed a profit share of £372,404.00 upon which I have been taxed. I then explained no monies had been paid to me by First Respondent since October 2018.

50. I asked Mr Eban whether I should have declared and paid tax on an income that had not actually been received. Mr Eban

indicated that he was not sure of the answer and would look into the issue. Mr Eban said that, strictly speaking, **all partnership income must be declared**. However, he was not sure where I stood in these particular unusual circumstances. I asked Mr Eban to email the advice, when it was available, but he indicated that he could not provide advice by email outside the department. However, he assured me that he would call back once he had looked into my queries.

51.Two hours after our initial call, Mr Eban called back and explained that he had looked at the Income Tax Guidance but there was no answer to what he described as a "unique situation". However, after running my specific situation by a colleague, he confirmed that **I should not have paid tax on the profit share that was being deliberately withheld from me by the Respondents on the basis that they had disputed my entitlement to it**.

52. Mr Eban provided me with a number of options, but he said he was unable to advise me on which option I should take. He also suggested that I submitted amended tax returns showing my income as "nil". Mr Eban again confirmed this was a unique situation where no monies had been paid and where there was a finding of disability discrimination and an ongoing case.

53. Mr Eban **asked me why I had paid monies I had not received in the first place and I explained that the tax was paid by the First Respondent.** I explained the history of cancer. PHI and mental illness as well as the ongoing litigation. I also stated that the accountants had never raised the issue of paying Income Tax on monies that had not been paid. Mr Eban confirmed he understood why the tax had been paid based on my explanations.

54. Based on the advice from HMRC (my contemporaneous notes of the conversation are at pages 1923-1924) on 1 November 2021 my accountant submitted amended tax returns on my behalf (pages 1798-1828) showing that I had earned 'nil' income and referring to the conversation with Mr Eban. However, whilst I have amended my tax returns, I have decided not to apply for a tax refund at present in view of the current dispute with the Respondents

58. It should be noted that had my profit share been paid directly into my pension pot, Aviva confirmed that it would not have constituted 'earned income' or 'continuing income' (page 1383) and the tax position would have been completely different. **It is stating the obvious that the fact that the First Respondent wrongly paid income tax on profit share payments which were never paid to me does not mean that I received income and therefore that I should not have received PHI payments. I have received no income from the First Respondent since October 2018 and the payment of notional income tax does not change that fact.** The tax went directly to HMRC and I have received nothing. Even if I had been paid my profit share it would have gone directly into my pension and not been available to me or used by me as income,

and therefore would not have prevented me from receiving PHI payments under the terms of my policy.

59. The Respondents have also benefitted from me paying tax on my unpaid profit share since October 2018 because it has reduced their own tax liabilities."

Who paid the PHI premiums?

70. During the merger, Mrs Lord realised she did not have a Permanent Health Insurance (PHI) policy in place to cover her for any lost income in the event she was unwell and unable to work. Miss Russell did have a PHI policy she paid for personally until August 2016. Miss Russell queried her personal payments with the Claimant because she believed they should be paid by firm as a business expense. The Claimant agreed and the payments were transferred to the firm which was already paying the PHI premiums for the Claimant and for Mr Jones who both had the same PHI policy with Aviva. The premiums appear as "members life and health insurance" in the expenditure column of the firm's "Trading Profit and Loss Accounts".

71. Clause 18 of the LLP agreement deals with **Insurance** and provides:

"18.1 The LLP **shall at its own expense maintain insurance policies** (**for the benefit of the Members or the LLP as appropriate**) in such amounts as the Members determine in respect of:

(a) property of the LLP:

(b) private health insurance for Members and Employees:

(c) life assurance for the Members and Employee:

(d) employer's liability:

(e) public liability:

(f) professional negligence:

(g) loss of profits arising out of sickness and accident:

(h) loss of profits arising out of destruction or damage to the premises used for the Business: and

(i) permanent health.

18.2 The Members shall cooperate with the LLP in obtaining the insurance policies in Clause 18.1 and undergo any medical examination regarded as reasonably necessary for the procurement of any such insurance policy".

72. Mrs Lord then obtained her own PHI policy at a premium of £60 a month which would entitle her to a benefit of 75% of her drawings (£3000 a month) if she was unable to work due to sickness. She personally paid the premiums until March 2018 when the issue of PHI came up again at a partners meeting. As the Managing Partner, the Claimant confirmed that the payments should be made by the firm as a business expense and not individually by the members. As a result, the Claimant authorised a reimbursement payment to Mrs Lord of the PHI premiums she had personally paid for in error for more than 2 years.

73. At that time, Mrs Lord expressed her concerns about the apparent inequality between the partners in terms of the cost of premiums and benefits provided

when all the premiums were paid for by the firm as a business expense. The Claimant's monthly premium of £279.35 entitled him to payments of £6,000 to £7000 per month from his policy if he was unable to work due to ill health while Mrs Lord's premium of £60 would only entitle her to claim £3,000 per month benefit if she was unable to work due to ill-heath. The Claimant and Mr Jones had put in place better policies with higher monthly premiums. All PHI premiums were paid for by the LLP as an expense of the firm before any net profits were allocated to the partners. This business expense was listed with other business expenses like the office insurance, the lease of office equipment etc. When this was raised as an issue in the partners meeting in 2018 the Claimant agreed it was a business expense of the LLP and not a personal expense of the designated members. Mrs Lord's clear and unchallenged evidence was supported by the contemporaneous documents (minutes of partners meeting, emails communications, evidence of reimbursement, the Profit and Loss accounts).

74. The Claimant's evidence was surprisingly unclear about this given his detailed knowledge of the LLP finances and his involvement in the issue as the Managing Partner in 2018. He suggested that he indirectly paid for the PHI payments, made "through the LLP" rather than "by the LLP" for "administrative convenience". At paragraph 102 of the Claimant's first witness statement he states:

> "The PHI premiums are paid **personally** by me, the Second and Third Respondent (being the 3 Designated Members of the First Respondent) **with the premiums taken from our profit share**. As a matter of **administrative convenience** rather than each receiving our profit share and contributing separately to our premiums, the premiums are paid out from the First Respondent's account and *deducted from the profit share* which we subsequently each receive".

75. To support his position the Claimant had created a document (C2/1 page 151) dated 9 November 2020 identified in the index to the bundle as the 'Claimant's PHI Payments Schedule' to show that from 2003 he had paid for the premiums through his partnership share. On 4 November 2020, the Claimant had emailed Mark Munday to urgently request a list of the PHI contributions made from 2003 for his 'discrimination' claim (C2/3 page1354). On the same day, Mr Munday provided that information in a document headed "**M Willis- premiums paid under policy**" which provided the dates the payments were made, the monthly amount paid and the total amount paid up until 1/11/18 when the premiums were waived by Aviva under the claim.

76. The Claimant's Schedule has a column headed "**MDW Proportion based on Partnership Share**" and a second column headed "**HJR/LL Individual Proportion Paid**". The Claimant has then divided the monthly premium paid in the proportion of the partnership profit share to show that he contributed 1/3 of the cost of the PHI premiums and Miss Russell and Mrs Lord contributed 1/3 each as their individual proportion of the premium paid. The Claimant did not refer to PHI being paid indirectly by the partners in those individual proportions when the issue of PHI payments arose in 2018. The partnership minutes of the PHI discussion do not record this was the Claimant's understanding of the PHI payments at the time when Mrs Lord raised the issue before the dispute.

77. The Claimant made further enquiries with Mr Munday on 10 December 2020 and asked him to explain how the payments for PHI premiums worked. The Tribunal found this was an odd question to ask if for more than 20 years the Claimant genuinely believed he personally paid a proportion of the premiums through his partnership share (see CWS paragraph 37).

    Question 8: Please could you explain how the payments for the premiums work? Are you able to confirm how many payments have been paid by GWB Harthills and how many were paid by Grayson Wills Bennett/Grayson Wills Bennett LLP?

    Answer: Our records show that premiums of £37,122.44 in total were paid by from 1 September 2003 up to 1 October 2018 from a bank account in the name of **Grayson Willis and Bennett**. Since 1 November 2018 no premiums have been paid directly as they are waived whilst a claim is in progress. No premiums have been paid from any other accounts.

78. Mr Cordrey submitted that the fact that payments for the insurance were made from the First Respondent's bank account rather than each Designated Member individually arranging the payment from their own personal account, was 'entirely irrelevant'. As C described in his statement this was simply a matter of 'administrative convenience'. In his written closing submissions (paragraphs 84-86) Mr Cordrey suggests the Tribunal should find that "*In September 2003, C took out, personally, an income protection policy with Aviva **[B1-451]**.Over the years, C personally **forewent** thousands of pounds which he could have taken in his pocket as profit share, but which instead **he spent on the PHI premiums**. Other partners may have preferred to gamble and take the higher annual profit share, C preferred to be prudent and have the insurance in place"*.

79. The Tribunal found the Claimant's 'PHI Payments Schedule' was misleading and self-serving. It was created to present an artificial argument to support the case presented at this hearing that the Claimant personally paid the premiums which was untrue. The PHI premiums were not a personal expense of the partners 'deducted from their profit share'. They were a business expense of the LLP and have always been treated in that way. That was clear from the premium payment history, the LLP agreement and the LLP Accounts from October 2015 onwards as approved by the partners to reflect the true financial position. The Claimant as the Managing Partner knew that was the true position which he confirmed was the case to the other partners when he authorised the repayment to Mrs Lord before the dispute arose.

80. While the Tribunal agreed the Claimant had been 'prudent' putting in place such a good insurance policy, it did not agree with or was persuaded by the self-serving artificial suggestion made on the Claimant's behalf that he was making a greater personal sacrifice to have better benefits, or that Miss Russell and Mrs Lord had '*preferred to gamble*' taking a higher profit share, instead of having a better policy. It was clear from the evidence that in 2018 Mrs Lord believed it was unfair and wanted to have the same benefits as the Claimant because she knew the LLP was paying for all the partners PHI policies as a normal business expense.

81. Unfortunately, the LLP agreement does not provide any more detail about the PHI than what is set out at Clause 18 which lists a variety of policies the

LLP may pay for either for the benefit of the member or the LLP (as appropriate). It does not say which type of policy falls into which category or how a member should account to the LLP for any PHI payments received by a member under a policy paid for by the LLP. The only clause in the LLP agreement that relates to a members' accounting to the LLP for any personal benefit is in relation to any personal benefit derived from the business. Clause 15 under the heading "Members Duties and Restrictions" at 15.2(j) provides that:

> "A Member shall at all times "account to the LLP for any profit derived from a business, office or appointment accepted by him in breach of this agreement, or <u>any personal benefit derived by him from the business</u>, the use of the Name or Trading Name, or property of the LLP in breach of this agreement".

82. The Tribunal has not been invited to and does not make any findings of fact about this clause or whether it would apply in respect of the Claimant's PHI payments.

83. The Tribunal does however make the findings of fact that Mr Burns invites the Tribunal to make on this issue which are supported by the evidence. The premiums are a normal expense of the business. The LLP is a separate legal personality from the members, the very point of limited liability. The PHI premium is not paid by members but by the LLP. That is why Mrs Lord was repaid two year of premiums because it was not her expense. It was the obligation of the LLP to pay the premiums, which the Claimant had accepted at the time. The Claimant had created a misleading schedule suggesting that he had been paying for the premiums for 20 years. The Claimant had not. The payment of premiums only affects the profit of all the members in the same way that any other business expense does. Mr Burns gave the example of the LLP renting a photocopier, the members do not indirectly pay the rental payments. If the LLP makes a profit it is distributed to members. If it keeps costs down (and income up) they will all earn profit.

<u>What were the terms of the Aviva PHI Policy (formerly the "Friends Provident Income Protection Plan")</u>

84. In June 2018, the Claimant was diagnosed with cancer. His cancer is now thankfully in remission and the Tribunal recognises that this must have been a very worrying time for the Claimant and his family. The Claimant contacted the PHI provider Aviva on 18 September 2018 and submitted a claim. Mark Munday was the Senior Claims Adviser for Aviva who has dealt with the claim throughout. In making the claim the Claimant had declared he was totally unable to work and had not worked since 5 July 2018 because of his cancer and then because of other illness. Under the terms of the policy the Claimant has an ongoing duty to inform the insurer of any change in material circumstances during the claim.

85. Under the terms of the PHI policy the Claimant understood that he was paid on the basis he was **totally unable to work since July 2018.** Mr Munday permitted the Claimant to have unpaid therapeutic contact with work. The Claimant confirmed this was limited to his attendance at monthly partner meetings and the occasional coffee catch up. The Claimant agreed he would have been a breach of the PHI policy terms if he did any work beyond the permitted 'therapeutic' remit.

86. The definitions section of the Aviva PHI policy (C2/3page 1324) provides that:

> "Pre-incapacity earnings" - includes earnings from all the Insured remunerative occupation and **for the self-employed** this means:
>
> > The Insureds share of pre-tax profit from their trade profession or vocation in the 52 weeks immediately prior to the Period of Incapacity for the purposes of Schedule D Case 1 and II of the Income and Corporation Taxes Act 1988(i.e. their share of pre-tax profit after deduction of trading expenses) **as assessed for Income Tax and agreed by the Inland Revenue in respect of earnings** in the United Kingdom.
>
> "Continuing income" means **income <u>received</u> by the Insured <u>or</u> to <u>which the insured becomes entitled</u>.**
>
> > Continuing Income received by the Insured is the amount received **<u>net of income tax</u>**. Where the actual Income Tax liability cannot yet be established, Friends Provident at its discretion will make an **approximation of the net figure by reference to the current tax regime**. Adjustments will then be made as appropriate **when the actual when the actual tax liability is known** or waiver of a regular payment due from the Insured during a period of Incapacity. It Includes other income derived by the Insured from all remunerative occupations".

87. The Claimant's pre-incapacity earnings were assessed by Aviva based on the financial information he provided in September 2018 (see 69.5 which records the historical financial information the Claimant provided to Aviva to support the initial assessment of his claim).

88. On 26 September 2018, (C1/2 page 506) Mr Munday wrote to the Claimant to inform him that payments would be paid into the LLP account which was the account from which the premiums had been paid. The Claimant then arranged for a change of account to his personal bank account so that the payments could be made to him directly. In that email Mr Munday informed the Claimant of his obligations to provide ongoing financial information to support the claim:

> "Benefit is payable from **4 October 2018** and as we pay monthly in arrears the first payment will be made on 3 November 2018 to the account premiums are deducted from. My calculation shows I am able to pay £1,432.22 per week (£6,223.34 per month). This isn't the full sum insured under your policy and I have attached a break-down of my calculation. The figures are based on the partnership accounts for the year ending 31 March 2018. I'll need a copy of the relevant tax return the figures appear in to complete my calculation. **I'll also need future partnership accounts and your tax returns to ensure there is no continuing income. If we overpay benefit, then this will need to be reclaimed from you:** if the tax return shows I can increase

> your pre-incapacity income then I'll pay you an underpayment benefit. While were paying benefit we'll also pay the premiums. This means that we'll pay your premiums for this policy from 1 November 2018"
>
> The financial information sheet provided to the Claimant (C1/2 page 474) explained the purpose of the benefit payment.
>
> "Q. If you agree my claim will you pay me the Income Protection Benefit amount shown in the policy schedule.
>
> A. For most customers, yes, we will. We look to **replace a proportion of the earnings you've lost**. We consider what you earned before you became ill or injured and **what you receive from various sources while your unable to work** because of your illness or injury".

89. The Claimant was required to and did provide "*evidence of his pre-incapacity earnings*". He was also required to provide evidence of "***continuing income' defined under the policy* as income <u>received</u> by the Insured <u>or</u> to <u>which the insured becomes entitled</u>** which would include any profit costs which were allocated to him after October 2018. The Claimant was also required to provide "*immediate written notice of the Insured's medical adviser's declaration of the termination of a period of incapacity*" (clauses 17 (a) (g) and (i) (C2/1 page 461). This ongoing disclosure conditions relating to 'medical incapacity' and 'income' were required because the Income Protection benefit was paid to the Claimant to **replace** a proportion of the income the Claimant had lost because he was unable to work due to illness. Any material changes to either of those 2 qualifying conditions would impact the amount of PHI benefit paid. From 25 September 2018 the Claimant would have known that he had an obligation to provide ongoing financial information and that if that evidence disclosed any continuing income it would affect his PHI benefit payments because that was income the Claimant was continuing to receive while he was unable to work because of his illness.

90. The ongoing duty of disclosure of the Insured to the Insurer under the Policy is confirmed in Clause 17(a) which provides that:

> "if in connection with the happening or purported happening of any event insured by this policy the Insured makes an untrue statement or omits to disclose a material fact the Policy will immediately become void and no benefit whatsoever will be payable".

91. Clause 18 explains how any continuing income would affect the amount of benefit paid and provides that:

> <u>Income Protection Benefit.</u>
>
> If at the end of the deferred period the Insured **continuing income plus the Income Protection Benefit** specified in the Policy schedule exceeds the Maximum Insurable Benefit, then any income Protection Benefit payable under this Policy **will be reduced** by the amount of the excess.

The calculation set out in the preceding paragraph of this Condition **will be repeated whenever there is a change in the Insured's continuing income** or in any event at least every 3 years…

Rights of other parties.

Friends Provident and the Policy Holder are the parties to the contract. It is not intended to benefit any other person, neither is it intended that any other person has any direct or indirect contractual rights other than the parties to the contract".

92. It is accepted that the First Respondent was not a party to the insurance contract and had no rights under that contract. From October 2018, the Respondents were completely dependent on the Claimant to voluntarily share information about the policy and his communications with Aviva in so far as any decisions of the LLP might be affected by that insurance contract. The Claimant did not provide a copy of policy to the Respondents until July 2020 in response to a disclosure order. The Respondents only made their own enquiries of Aviva in August 2021 after which PHI benefit payments were suspended by Aviva on 4 November 2021.

93. It is accepted that during the period between October 2018 and 20 January 2020 the Claimant had been declared unfit to work and was receiving PHI benefit because of his cancer diagnosis and treatment. From 22 January 2020 until his benefit was suspended in 2021 the Claimant was receiving PHI benefit because of his mental health diagnosis and treatment. If the Claimant had been declared fit by his medical advisers at any stage during that absence and was no longer considered unfit to work, his PHI benefit payment would have stopped.

94. The issue of transparency was relevant to the alleged detriment/unfavourable treatment of the Respondents continuing to question the Claimant's honesty and integrity in applying for and receiving income protection benefit, the allegation of withholding profit costs and to the delayed payment of interest on Capital. The Claimant views the continuing questioning by the Respondents as 'extremely serious allegations' which were in his view completely unjustified because he was being 'completely transparent' with Aviva and with the Respondents and had "provided all documentation Aviva have required" to assess his claim (paragraph 108 CWS1). The Respondents do not accept that the Claimant had been completely transparent either with them or with the Insurer. They believed the Claimant was selective about the information he disclosed to them and deliberately supressed material facts/information from the Insurer which they believed could have implicated them in potential dishonesty/ insurance fraud and was the reason why they sought the appropriate assurances from the Claimant that what he was requesting them to do was acceptable to Aviva.

When did the PHI/Profit Share dispute between the parties first arise?

95. On 27 September 2018, (C1/2 page 530) the Claimant sent an email to the other partners (copied to the firm's then accountant, Sarah Fields). In that email the Claimant confirmed his understanding of the LLP agreement and PHI.

> ***"Under the terms of the insurance I cannot be paid by the firm after 4 October 2018****. I would be grateful if I could draw an additional £4000 this week which will then be offset at the year end. Thank you for your consideration"*

96. As at this date there was a common understanding between the partners about the interrelationship between PHI payments and profit costs that the Claimant which put simply was that the Claimant could not have both. For that reason, the Claimant requested his partners agreement to pay an extra £4000 drawings before the PHI payments started so as not to breach the terms of his insurance contract. The Claimant was not expecting to take any drawings from 4 October 2018, because he knew it would have been treated as 'continuing income' which would have reduced his monthly income protection benefit payment. Despite that being the Claimant's clear understanding of the reason why he was not paid any profit share as monthly drawings from October 2018, the Claimant has continued to allege the Respondents have 'continued to discriminate' by withholding his profit share since October 2018 **(paragraph 36 CWS)**

97. At the time the Respondents did not know that Mr Munday had already written to the Claimant on 26 September 2018, (C1/2 page 506) informing him that:

> "Benefit is payable from **4 October 2018** and as we pay monthly in arrears the first payment will be made on 3 November 2018 to the account premiums are deducted from. My calculation shows I am able to pay £1,432.22 per week (£6,223.34 per month). This isn't the full sum insured under your policy and I have attached a break-down of my calculation. The figures are based on the partnership accounts for the year ending 31 March 2018. I'll need a copy of the relevant tax return the figures appear in to complete my calculation. **I'll also need future partnership accounts and your tax returns to ensure there is no continuing income. If we overpay benefit, then this will need to be reclaimed from you:** if the tax return shows I can increase your pre-incapacity income then I'll pay you an underpayment benefit".
>
> The financial information sheet provided to the Claimant by Aviva (C1/2 page 474) explained the payment.
>
> Q. If you agree my claim will you pay me the Income Protection Benefit amount shown in the policy schedule.
>
> A. For most customers, yes, we will. We look to **replace a proportion of the earnings you've lost**. We consider what you earned before you became ill or injured and what you receive from various sources while your unable to work because of your illness or injury.

98. Mrs Lord's evidence (paragraph 36-38 WS) was that although Aviva correspondence was only revealed on disclosure, it accords with her assumption that Aviva would only pay if the Claimant was not getting any income and if he was getting profit share it would affect his benefit. Her understanding of the LLP agreement was that "*a Member who is off sick who therefore cannot devote his whole time would be in breach of the LLP*

Agreement and liable for his drawings of Profit Share. So, the LLP Agreement puts in place Permanent Health Insurance (PHI) to protect Members from this loss when they are unable to work as required. As a result, it is obvious that members do not receive both their full profit share and their insurance payments to cover the profit share whilst absent from work through long term illness" (paragraph 16 WS). She refers to clause 18.1 which provides that "*the LLP shall at its own expense maintain insurance policies (for the benefit of the Members or the LLP as appropriate) in such amounts as the Members determine in respect of b) private health insurance for Members and Employees and (l) permanent health*" She was content to waive the terms of the LLP Agreement until the PHI payments started.

99. To clarify the Claimant's understanding of PHI payments Mr Burns put 3 propositions to the Claimant which were agreed. Firstly, that the purpose of insurance is to provide cover for something you are not otherwise getting. Secondly during illness if you were paid by the LLP there would be no point in having an insurance policy. Thirdly that if the LLP paid out normally, then insurance would not pay out.

100. Consistent with that understanding on 17 April 2019, the Claimant confirmed to his partners at a partner's meeting that the firm's accountant (who was also his personal accountant) had confirmed that he 'could not have both' (profit costs and PHI).

101. From 27 September 2018 until 16 October 2019 all the partners were singing from the same hymn sheet. That position only changed when the Claimant changed his mind and decided that he could have both which was first communicated to his partners at a partners meeting on 16 October 2019.

102. Mrs Lord's evidence about the partners meeting that day was very clear. The Claimant informed the partners that he had taken independent financial advice and had been advised that provided he put his profit share directly into his pension then he was permitted to receive it without deduction of his PHI. Mrs Lord recalls that she was stunned into silence. She describes this as a 'bombshell' and how it seemed completely wrong to her at the time. The Claimant did not provide any more information but simply expected his partners to agree.

103. Miss Russell was so concerned that immediately after the meeting she sent an email to the Claimant (C2/3 pages 541-542) which we set out in full.

"*Dear all*

Following our meeting this evening (Sarah I'm copying you in as your advice is of relevance) I confirm that I agreed that Mike W could (from my point of view) take his profit share from the business. Mike and Elizabeth L were silent on the point. I confirmed my view having been assured that Mike's financial adviser who I do not know and Sarah Fields who I trust implicitly said that this was acceptable. I'm really keen that Mike W (and his family) feel looked after and supported – as I said, money is not important. Having thought things over though, ***alarm bells are ringing and I'm really, really, worried****. Please all take legal advice – especially you Mike W. The dictionary definition of insurance is "an arrangement by*

which a company or the state undertakes to provide a guarantee of compensation for a specified loss, damage, illness or death in return for payment of a specified premium." ***If the monthly payment you receive is to compensate you for your illness, Mike then you are clear. If, however, it is to <u>compensate you for the loss of income</u> then you cannot possibly claim insurance whilst at the same time taking your profit share from the firm****. On reflection, it's not sufficient to have an assurance from our accountant and from your financial adviser, they are not lawyers, we are.* ***Mike, please contact your insurers and ask them to confirm in writing that they are happy for you to keep the monies that you've received from them in addition to profit share. On reflection I have very very grave concerns*** *(not only about this year but also about the monies that you placed into your pension last year. I feel personally and professionally compromised by this. I agreed to you placing monies into your pension last year on the understanding that this was acceptable to them. Tonight, you commented that your financial advisor said that it would be alright if money went into your pension. This is not the same as your insurer agreeing to this.*

I want to make it very clear that my agreement to you taking monies from the firm in addition to insurance payments was strictly on the basis that this was acceptable to your insurers. If it is not, then you must not take money from the firm whilst claiming upon your insurance. *Please look at the Fraud Act 2006 section 2. I hope that this is a storm in a tea- cup and that you have got direct confirmation from your insurers – if so then my apologies for the stress. I do not want anyone to think that I was trying to legitimise this without making the appropriate enquiries of your insurers". (highlighted text is Tribunal's emphasis)*

104. This email very clearly and unequivocally confirms Miss Russell's concerns at the time which never changed. If the payment from the insurer was made to compensate the Claimant for his illness, she had no problem. However, if the payment was to compensate the Claimant for loss of income (profit share) then her position was very clear. The Claimant "*cannot possibly claim insurance whilst at the same time taking your profit share from the firm*'. She felt she was being personally and professionally compromised by the Claimant's request. She wanted confirmation from the Insurer that it was acceptable to them because she believed it was potential insurance fraud and did not want anyone to think she was trying to legitimise it by turning a blind eye to it. She did not agree that by paying it into the Claimant's pension it was no longer treated as income from the firm. The Claimant accepted Miss Russell was genuinely worried about the consequences not only for herself but also for the Claimant and for the firm and was expecting him to make the appropriate enquiries of the insurer. The Tribunal find that Miss Russell and Mrs Lord genuinely believed the Claimant's proposed actions were wrong and potential insurance fraud which could have serious implications for them individually and for the LLP. This was the reason why they could not 'comply' with the Claimant's request or leave this request unchallenged and the reason why they insisted the Claimant obtained and provided them with the appropriate assurances from the Insurer that this was acceptable.

105. In his witness statement (paragraph 8 CW2) the Claimant says that "*if the Respondent's had* ***complied with this request*** *such* ***payments would not have been considered 'earned income' and they would have been excluded as continuing income****. The letters from Aviva dated 24 December 2020 and 12 January 2021 confirm this. I have never suggested that I would take my profit share* ***as drawings during the period I was in receipt of the PHI benefit***".

106. The Claimant has confirmed again that he was not expecting to take any profit share as drawings because the drawings would be treated 'earned income' which would affect his PHI benefit and that continued to be his position from October 2018 until his retirement on 8 March 2021. The Claimant also knew that his full profit share (including the amount his partners had taken as monthly drawings) was being allocated in full into his partnership current account at the end of each accounting year. He knew that because he could see that from the LLP accounts which he and his partners approved at the end of December 2018, December 2019 and December 2020 which were filed with Companies House. The Tribunal found the Claimant's position on the pleaded detriment of 'withholding profit share' was and has been fundamentally contradictory to his own evidence and the undisputed facts.

107. As an equity partner for over 20 years the Claimant knew that the partners paid income tax on the income as it was earned by the firm rather than when it was received into the firm's bank account. He also knew the reason why the Respondents wanted his insurers to confirm that what he was proposing they agreed to do, was all above board so they could not be implicated in any wrongdoing. As practising solicitors and joint owners of the LLP it was reasonable for Miss Russell and Mrs Lord as part of their own due diligence and good faith obligations to seek the appropriate assurances from the Claimant and his insurer rather than just comply with his request. The LLP agreement expressly provides that "each member shall show the utmost good faith to the LLP and to the other members" (clause 15.2).

108. It was clear that the Claimant needed his partners agreement to treat his profit share in a different way so that it was not considered 'earned income' and would not affect his PHI payments. We agreed with Mr Burns submission that "w*hilst it might be true for an employee whose employer 'directly' and without paying it to the insured employee paid monies into an occupational pension, the Claimant (an experienced solicitor and partner) must have known that a self -employed person with a private pension scheme cannot have any money paid 'directly' into the scheme by any-one else but him. And that money will be taxable earnings***"**.

109. On 19 October 2019, Miss Russell emailed the Claimant questioning his sudden change of position reminding him that he had previously accepted that 'he could not have both' having taken advice from the firm's accountant.

> "*My clear recollection is that, after this email and some discussions you agreed Mike. You had clearly run that past Sarah Fields as your response was that it would mean Liz and I paying more tax.*
>
> *I maintain the position that I (very gently) made clear in this email. I hope this assists you in recalling the discussions we had in April. You cannot U turn at this juncture"*

110. On 21 October 2019, the Claimant sent an email to the partners enclosing an email from Aviva (which was the only correspondence the Claimant voluntarily disclosed to the Respondents) in which he states:

"***My profit share will go into my pension pot and as such my insurance payments are totally separate and unaffected****. There has been no* ***U turn*** *from me as the problem was that the original advice provided by Sarah Fields was based upon a misunderstanding.*

It was only in the last few weeks that she and BHP have looked at the situation and their advice has been confirmed by Aviva. There will still be benefit to the **firm's overall tax bill of reducing my tax bill** *which will assist us all.*

I hope this is now clear and finally ***lays to rest any fears that may have been held over me acting fraudulently or in bad faith***". Those suggestions were totally unjustified and only served to catastrophes the situation in a way that was totally unjustified.

111. The attached email was from Mr Munday dated 21 October 2019 and very briefly states:

"*further to our call last week and earlier today,* ***if your share of the partnership profit is paid directly into your pension pot the claim would be unaffected****".*

112. In cross examination, the Claimant was asked how Mr Munday had got the impression that partnership profit would be paid directly from the firm into his pension pot which suggests that it would not involve the Claimant first receiving that profit in his hands as taxable income. In answer the Claimant said it was it was not a '*wrong-headed assumption*' to make and reflected his understanding of the situation at the time.

113. This email was the only information from Aviva the Claimant voluntarily disclosed to the Respondents, even though he had in his possession policy documents and email communications that supported the Respondent's concerns. He had in his possession Mr Munday's email of 26 September 2019 which **confirmed he had an ongoing** obligation to disclose the partnership accounts and his personal tax returns to prove that he was not receiving any continuing income whilst claiming income protection benefit to avoid the overpayment of benefit. This would have supported the 'can't have both' common understanding shared by the partners from September 2018 to 19 December 2019 before the Claimant changed his mind.

114. On 30 December 2019 (C1/2 page 559) the partnership accounts for 2018/2019 were finalised and agreed by the partners allocating the Claimant's full profit share into his current account. The email communications exchanged between the Respondents to the accountant confirm that **'Mike has not given us the information needed regarding his permanent health insurance we have no choice but to move forward on that basis and look again in due course**". The respondents were clearly still waiting for the Claimant to provide information from Aviva.

115. In January 2020, the Trading and Profit Loss Account for the year ended 31 March 2019, and the partners current account schedules (page C1/2 page 812) show each equity partner was allocated an equal share of the profit of £167,819. Drawings in respect of tax paid by the LLP on behalf of the

partner were deducted as well as any other drawings made in that year. The Claimant's drawings in respect of his payment of tax were £88,274. He/his accountant completed a self-assessment form and his tax for the tax year 2018-2019 was paid on 31 January 2019 and 31 July 2019.

116. At this time the Respondents did not know the Claimant had not provided the partnership accounts and his tax return to Aviva. The Claimant was being deliberately selective about the information he disclosed to the Respondent to attempt to secure their 'compliance' to his request to pay his profit share into his pension pot. He was also being selective about the information he disclosed to Aviva about his payment of tax. As at January 2020 the Claimant was not being completely transparent with Aviva or with the Respondent.

Allegation 1: the withholding of the Claimant's profit share in January 2020.

117. The Claimant had accepted the Respondents had not withheld his profit share as at July 2020 (see paragraph 14) and had withdrawn that complaint in January 2021. His concern was whether he had missed a payment due but knew that he had not in fact missed any payments in January 2020 or subsequently in the Claim 2 period. The Claimant accepted the reason why unpaid profit share was not distributed throughout the Claim 2 period was because the firm was significantly impacted by the Covid-19 pandemic and there was no cashflow to pay out unpaid profit share.

118. The Tribunal asked the Claimant some questions to try to clarify his understanding of the circumstances in which an annual distribution of profit would be made to the partners and how the firm's cashflow was affected during the pandemic from January 2020 to March 2021. The Claimant confirmed that profit share was only distributed (paid) to the partners if the firm had the cashflow i.e. available funds in the LLP's bank account to make payment. Distribution of profit share was dependent on cash flow. He confirmed cash flow was 'seriously affected' for the firm by court closures during the pandemic which meant cases could not be completed and payments were delayed. He confirmed that in January 2020 and January 2021 when payments due would normally be made there was a lack of cash flow which prevented payment of profit share and that remained the situation up until his retirement. Those answers were clarified and confirmed in re-examination and fit in with the other undisputed evidence about the firm's lack of cash flow which was the reason the firm had to obtain a Government (Coronavirus Business Interruption Loan) 'CBIL' loan for it to remain financially viable.

119. On 29 October 2020, (page 583 C1/2) the Claimant wrote to the firm's new accountant, Rebecca Birkett (SMH Haywood & Co) to introduce himself and to provide some background of "*his knowledge and experience as Managing and Senior partner for over 20 years"*. In that letter he states:

"I will not need your services for my own personnel tax (I have appointed accountants) but we will obviously need to work together when completing and submitting the Members Income Tax at the appropriate time and the Annual Accounts and Reports.

The LLP is responsible for the payment of the Individual Members income tax (which we usually fund by '6' month loan arrangements.)

I am aware that ***my income tax payment due on 31 July 2020 was deferred without my knowledge and contrary to my express instructions.*** *The LLP was advised by Hodgson & Oldfield to set aside a monthly provision for that tax although I am not aware of the extent that the advice was followed. I had requested my outstanding tax to be paid in July 2020 but that was not done, and* ***I would require my tax be paid as soon as possible from any provision set aside****.*

The LLP is governed by an LLP agreement from 1 October 2015(albeit unsigned) that all members agree applies-it sets out the Profit Share ratios Capital levels and the usual areas of agreement. ***On the 31st December 2019 the Annual Accounts (for 2018/2019) were signed off as accurate by all Members. My colleagues confirmed my entitlement to a full profit share.***

I ***ceased taking any drawings from the LLP in October 2018 when a personal PHI scheme commenced- this does not affect my entitlement to a full profit share****, and this was expressly confirmed by my colleagues in December 2019 when communicating with our previous Accountants. The PHI payments are tax free and therefore do not form part of any tax calculation. The only stipulation from Aviva PHI is that my profit share is paid into my pension scheme which is entirely appropriate as I move towards retirement.*

I felt it only appropriate to set this information out and please do not hesitate to contact me if you require any further clarification or information. I have a detailed knowledge of the Law Fushion Management Accounts system should you need help accessing financial information."

120. The letter the Claimant sent to the accountant demonstrates his ability to recall and convey detailed factual information to the accountant to persuade her that he understood and had access to detailed financial information, that he knew what he was doing and should continue to be involved. He confirms his intention to proactively be involved in the completion and submission of the members income tax, the payments of tax, the preparation of annual accounts and the financial reports. He confirms his familiarity with, and ability to, remotely access the management account systems and offers to assist the new accountants to access that information. He also made it clear that his own personal accountant would be calculating his tax liability and insisted his tax payments due to HMRC on his continuing income were to be paid on time and not deferred and wanted adequate provision made by the LLP for his tax to be paid on time.

121. During the pandemic, businesses were able to defer tax payments to assist them financially during this difficult time. The firm wanted to utilise this option instead of taking out a loan to pay the tax liabilities which did not have to be paid at that time to help the firm. The Claimant was very proactive in making decisions about the payment of his tax, how it was calculated and when it was paid. Unsurprisingly, the LLP accountant did not advise the Claimant that he was not required to pay any tax on his profit share which is how the Claimant now puts his case to explain why he paid his tax liability. The Claimant was being advised about his tax liabilities by his own accountant who it appears was the accountant assisting him with completing his personal tax self-assessment, at this time.

122. On 3 December 2020 (page 597 C1/2) the Respondents' identified some questions they wanted the Claimant to ask the insurer about the interaction between PHI and profit costs having had sight of the Aviva Policy in July 2020. Mrs Lord sought the Claimant's written consent to jointly write to Aviva which she thought was the swiftest way to find a solution without '*yet more legal costs being spent*'.

123. The Claimant did not consent and without his agreement Aviva would not disclose any information to the Respondents.

124. In cross examination the Claimant was shown the written advice he had been given by Mr M. Munday (Senior Claims Adviser) on the two occasions he refers to, in his witness statement, the emails of 24 December 2020 and 12 January 2021 which were not disclosed to the Respondents. In providing that written advice on two occasions Mr Munday emphasises in bold the fact that the Claimant could only take profit share if it was **not** declared as earnings to HMRC. The emails states:

    "*Any partnership profit paid directly to the pension pot and **not** declared as earnings on documents to HMRC would be excluded….*

    If the partnership profit is declared as earnings to HMRC then it is likely to be regarded as continuing income for the purposes of our calculations and may reduce the amount of benefit payable under income protection benefit"

125. The Claimant accepts that at this time his share of partnership profit had been allocated and had been declared as earnings to HMRC and that the tax due on those earnings had at his insistence been paid and not deferred. During cross examination the Claimant was asked twice why he did not tell Mr Munday that his profit share was declared to HMRC during the period he had received PHI benefits. The Claimant tried to avoid answering the question until he was pressed to do so by the Tribunal. He said he could not explain his failure to share information which would have impacted his PHI benefit. His answer was; "*I have no answer to give and was not deliberately misleading them. I have provided them with all the information"*. The Claimant had not provided Aviva with 'all the information', because he had not informed Mr Munday that tax had been paid and had not provided Aviva with a copy of his tax returns or the partnership accounts. If he had they would have revealed the true position that income had been declared to HMRC, which would be treated as continuing income which would have affected the PHI benefit paid. The inference the Tribunal draws from this evidence is that the Claimant was deliberately supressing this information from the Insurer.

126. Although the Claimant knew the Respondents were seeking further information from Aviva, he did not make those enquiries on their behalf or disclose the information he already had which would have made the position clear. At paragraph 37 of the Claimant's witness statement he refers (see paragraph 69.6) to a letter sent by Mr Munday on 10 December 2020 which was not disclosed to the Respondents but might have helped resolve the dispute. The relevant part of that letter is:

    Question 9: In your own words, please can you explain what profit share arrangements (<u>including payment into a pension pot</u>) are permitted under the Claimant's PHI policy? <u>For example, is he permitted to retain his full</u>

profit share during the period he has been claiming PHI benefits or is he required to forfeit any part of the profit share under his current PHI policy?

Benefit is paid on the basis of Mr Willis's **taxable earned income** in the year before his date of first absence and we take into account any **ongoing taxable earned income as continuing income in our calculations**. It is not within my remit to comment on any profit share arrangements.

127. The answer confirms that the key issue for the insurer was whether there was any ongoing taxable earned income because that would affect the amount of benefit paid. Mr Munday does not comment on the profit share arrangement (including payment into a pension pot) and does not indicate that there are any exceptions to the general rule.

128. The answer provided by Mr Munday was unhelpful to the Claimant's position and was not disclosed to the Respondents at the time and would have supported their concerns about the appropriateness of the action proposed. The inference drawn was that the Claimant was deliberately supressing information from the Respondents. When these 3 letters (10/12/20,24/12/20 and 24/1/21) were disclosed, the Respondents' solicitors wrote to the Claimant's solicitors on 10 February 2021 with some questions which were answered by the Claimant's solicitors the next day on 11 February 2021 (C2/1 page 243-244).

"Aviva Letter Dated 24/1/21

Question 1: Does your client accept that his unpaid profit share has been declared as earning to HMRC upon which tax has been paid on his behalf by the LLP in January 2021? If not, why not?

Answer: **Our client has provided Aviva with all relevant financial information and accounts in respect of profit share and tax so that Aviva could calculate his entitlement accordingly.**

Aviva has also confirmed that it is content that our clients profit share due to date can be paid into his pension pot without affecting his benefit since it will not be taken as income.

Question 2: We refer you to Aviva's letter of 10 December 2020 whereby it confirms that benefit is paid on your clients taxable earned income in the year before his date of first absence. Mark Munday confirmed that Aviva would take into account any ongoing taxable income as continuing income in their calculations. We also refer you to paragraph 5 of Aviva's letter dated 12 January 2021 which confirms that any partnership profit not declared as earnings to HMRC would be excluded as continuing income. Does your client accept that taxed unpaid profit share cannot be excluded as continuing income? If not why not?

Answer: Please see the response to 1 above.

Our client has provided Aviva with details of his personal tax return for the previous financial year and this has been accepted by Aviva. He also supplied Aviva with a full set of Accounts when Aviva initially assessed his claim. In this

respect please refer to the email exchanges between our client and Aviva dated 14 February 2019,12 March 2019 and 22 March 2019.

Friends Provident IPP.

Our client has been **completely transparent with Aviva about the unpaid profit share and the tax paid**.

Both **we and our client** are extremely concerned about the contents of your letter and the fact that you appear to now be alleging that he has misled or been untruthful in respect of his PHI claim".

129. This then takes us to the Claimant's second 'change of mind' in October 2021 regarding his tax liability. On 22 October 2021, (C2/3page 1410) the Claimant wrote to Mr Munday as follows:

> "*I wish to clarify an important issue that has been raised with Aviva by the Respondent's in my disability discrimination case.*
>
> *As I have explained at the outset, I have not received any income from the LLP since the commencement of my PHI payments in October 2018. My profit share, payable under the LLP agreement has never been* ***distributed*** *by the LLP to me* ***although I have paid the tax to the HMRC****. My position has never changed, and Aviva have accepted that position.*
>
> *I have had the opportunity of having detailed conversations with an Income Tax Inspector at the HMRC on 19th and 20th October 2021(after my question was referred from an HMRC Tax Adviser to an Inspector). The issue I raised with the HMRC was whether I should have paid income tax for the years 2018/2019 (post October 2018),2019/2020 and 2020/2021 when I have not received any income.*
>
> ***The advice given to me by the HMRC is that as the monies have never been paid to me, they are not 'earned income' for the purposes of Income Tax.*** *The amended tax returns will confirm that I have had no earnings during the period of my PHI claim and that tax should not have been paid at this time.*
>
> *The HMRC stated that for 2018/2019 year I can seek Overpayment Relief and for the subsequent years my Personal Income Tax Return can be amended to show nil income paid in those years.* ***These amendments accurately reflect my situation*** *and I have authorised my accountant to make appropriate applications and amendments in line with HMRC advice.*
>
> *Tax will be payable when the distributed monies are paid to me and the tax paid thus far will be held on account against future taxation(I will not be seeking a refund).All of these monies when paid will be placed in my pension pot as we agreed from the outset and declared on further tax forms. I will not be drawing down any income from that pension before I am 65.*
>
> ***HMRC expressed surprise that the income tax had been declared when I had not received any income****.* ***Unfortunately, this was done during my serious illness and at no stage was I***

> ***made aware of the situation by the accountants.*** *I have acted immediately I became aware of the issue.*
>
> *I will forward to you the amended tax returns for the periods 2018 to 2021 and the Overpayment Relief Claim once I have received that information."*

130. The statement the Claimant makes that he was "at no stage" made aware by the accountants of the basis upon which income tax was declared, contradicts the position he set out to the accountants about his tax on 29 October 2020. The Claimant knew income tax had been declared and paid on his profit share allocation.

131. On 3 November 2021, the Claimant's solicitors sent the Respondents' Solicitors the Claimant's amended tax returns for the 2019/2020 tax year and 2020/2021 tax year to show a nil income for each of those years.

132. On 12 November 2021, the Respondents' Solicitors challenged the appropriateness of the 'nil sum tax return' suggesting that it was misleading and should be withdrawn. In that letter under the heading "*Does your client receive a taxable profit share only when money is received*?" the Respondents' Solicitors made the position clear supported by references to the Taxes Management Act 1970.

> " *When members of an LLP file their personal tax returns, they are* ***required*** *to include as a* ***taxable profit from the LLP*** *whatever sum has been* ***allocated*** *to them in the partnership statement contained within the LLP's partnership return: section 8(1B)-(1)(C) of the Taxes Management Act 1970('TMA')****The legislation does not permit a member of an LLP to avoid paying tax on a profit share which has been allocated to him, which has not been paid to him****"*
>
> *"As a long-standing LLP member, your client is* ***familiar*** *with the taxation of profit share. Once the LLP agreement allocates a profit share to a member of the firm then that sum is their taxable profit share.* ***There is no provision in the legislation which makes 'receipt' the taxable even rather than 'allocation'.*** *It would be very surprising for a HMRC adviser to have advised that receipt was the taxable event and so there* ***must have been a miscommunication*** *between your client and the HMRC adviser. (highlighted text is our emphasis)*

133. The applicable law set out in that letter was not in dispute. ***The legislation does not permit a member of an LLP to avoid paying tax on a profit share which has been allocated to him, which has not been paid to him***. Mrs Lord addresses the sudden change of position in her supplemental witness statement. At paragraph 8 she states *"I do not understand why Mike has filed nil tax returns with HMRC.As members of an LLP we know income tax is payable upon the allocation of profit share. Mike will be taxed on his share of profits as they arise whether they are paid out to him or not, as the LLP is tax transparent".*

134. In the Claimant's witness statement (set out in full at paragraph 69 sub-paragraphs 46-59) he explains his change of mind in this way:

> 46. "On 18 October 2021 since the Respondents were insisting, I had **'continuing'** or '**earned income' (this text is highlighted by**

the Claimant) because I had paid tax on my profit share. I decided to check the position directly with a HMRC adviser via Gov UK Income Tax Enquiry Line. I provided the tax adviser with my UTR Number and National Insurance details to allow access my online account which included copies of my partnership tax returns and my individual tax returns for the financial years 2018/2019,2019/20 and 2020/21.**During this call I explained that payments from the First Respondent ceased in October 2018 and that I have received nothing thereafter**. I also explained the ongoing and admitted discrimination issues.

50. I asked Mr Eban whether I should have declared and paid tax on an income that had not actually been received. Mr Eban indicated that he was not sure of the answer and would look into the issue. Mr Eban said that, strictly speaking, **all partnership income must be declared**. However, he was not sure where I stood in these particular unusual circumstances. I asked Mr Eban to email the advice, when it was available, but he indicated that he could not provide advice by email outside the department. However, he assured me that he would call back once he had looked into my queries.

52.Mr Eban provided me with a number of options, but he said he was unable to advise me on which option I should take. He also suggested that I submitted amended tax returns showing my income as "nil". Mr Eban again confirmed this was a unique situation where no monies had been paid and where there was a finding of disability discrimination and an ongoing case.

53. Mr Eban ***asked me why I had paid monies I had not received in the first place and I explained that the tax was paid by the First Respondent.*** *I explained the history of cancer. PHI and mental illness as well as the ongoing litigation. I also stated that the accountants had never raised the issue of paying Income Tax on monies that had not been paid. Mr Eban confirmed he understood why the tax had been paid based on my explanations.*

54. Based on the advice from HMRC … on 1 November 2021 my accountant submitted amended tax returns on my behalf (pages 1798-1828) showing that I had earned 'nil' income and referring to the conversation with Mr Eban.

58. it is stating the obvious that the fact that the ***First Respondent wrongly paid income tax*** *on profit share payments which were never paid to me* ***does not mean that I received income*** *and therefore that I should not have received PHI payments. I have r****eceived no income*** *from the First Respondent since October 2018 and the payment of* ***notional income tax*** *does not change that fact. The* ***tax went directly to HMRC*** *and I have received nothing. Even* ***if I had been paid my profit share it would have gone directly into my pension and not been available to me or used by me as income****, and* ***therefore would not have prevented me from receiving PHI payments under the terms of the policy***"

135. The Claimant suggests that he only made the tax enquiry on 18 October 2021 because the Respondents were insisting that he had 'continuing' or 'earned income' because he paid tax on my profit share. The Respondents position on tax was accurate and consistent with the legislation and the Claimants position on tax for more than 20 years. The Claimant had the opportunity of explaining his change of position as a 'miscommunication' issue and could have withdrawn the nil tax return. The accuracy of any advice given by the HMRC in response to a tax enquiry is dependent upon the accuracy of information provided by the individual making the enquiry. When the Claimant was asked why he had paid tax, he did not disclose his own proactive role in the payment and calculation of his tax or his communications with the firm's accountant about the calculation and payment of his tax. The Claimant has given the Tribunal a misleading impression in his evidence suggesting the enquiry was only made in October 2021 because the Respondents were insisting profit share was 'continuing income' as though that had come as a surprise to him, when he had known that had been their position for the previous 3 years. The Claimant also says he explained to the HMRC Inspector: *"the history of cancer. PHI and mental illness as well as the ongoing litigation. I also stated that the accountants had never raised the issue of paying Income Tax on monies that had not been paid".* The Claimant was not being completely transparent with the HMRC about his dealings with the LLP accountant, his detailed understanding of partnership income and tax and individual members tax liabilities on partnership income. The Claimant an experienced LLP member and Managing Partner was very familiar with the legislation and knew that it did not permit a member of an LLP to avoid paying tax on a profit share which has been allocated but has not been paid.

136. The Tribunal found the timing of the enquiry and the selective reporting of information to HMRC was extremely suspicious and self-serving. The Claimant has continued to unfairly blame the First Respondent and/or the First Respondent's accountant for 'wrongly' paying his tax on profit share when he knew it was paid correctly and on time with his knowledge and approval. His contradictory evidence to the Tribunal at this hearing suggesting otherwise was untruthful and misleading.

137. As at October 2021 the Claimant also knew (see paragraph 65.1 and 65.2) that he had instructed the Respondents that it was 'premature to make **any** payments of the monies due from my current account'**.** He was adamant he should not be paid **"**For the avoidance of doubt, **I *remain of the firm view that the profit share payments should not be made until the correct sums due to me have been determined by the Employment Tribunal***. The Respondents agreed to that request and to "**revisit this following the outcome of the Remedy Hearing as we prefer to reduce both your capital and current accounts".** Both parties agreed to leave it to the Remedy Hearing to decide the issue. The fact that it was the Claimant who had instructed the Respondent that profit share payments should not be paid until the outcome of the remedy hearing is not information that the Claimant (on his account) appears to have shared with the HMRC. Instead he informed them that "**that payments from the First Respondent ceased in October 2018 and that I have received nothing thereafter"** which was misleading because it did not disclose the full facts but implied that the

Respondents were unlawfully withholding the Claimant's profit share from October 2018 which was also untrue.

Allegation 2: the delayed payment of interest on Capital

138. On 9 February 2021, Mrs Lord authorised the payment of interest on Capital to all members but wanted to check with the Claimant that he was able to receive this payment from the LLP under the terms of his PHI policy. On 10 February 2021 the members were paid interest on their Capital.

139. On 19 February 2021, Mrs Lord wrote to the Claimant requesting that he provide written confirmation that the payment of the interest on Capital under the terms of the LLP, would not affect his eligibility to PHI payments under the terms of his insurance policy to protect the First Respondent's position.

140. On 23 February 2021, the Claimant sent an email to Mrs Lord insisting payment was made 'without any caveat' confirming he was unwilling to provide the assurances sought. Mrs Lord responded confirming he would be paid immediately upon receipt of those assurances. The Respondent's solicitors then sought those assurances from the Claimant's solicitors and the payment was made on 1 April 2021 with interest calculated to the date of payment, at the rate of 5% in accordance with the terms of the LLP agreement. The Claimant did not lose out financially by the delay and understood why the assurances were being sought because the Respondents were genuinely concerned that they could be implicated in insurance fraud/wrongdoing.

141. The Claimant says the request was an unnecessary 'obstacle' to him receiving monies that were properly due. The Tribunal do not agree. It was reasonable for the Respondents to request those assurances from him to protect their position so that they could not be implicated in any wrongdoing. If the Claimant was being completely transparent with the Insurers and the Respondents, it does not explain why he was so unwilling to provide the assurances requested.

142. The evidence given by Mrs Lord about the delay and her reason for seeking those assurances from the Claimant was not challenged in cross-examination.

143. That brings us full circle in this long running ongoing partnership dispute between the parties which began in October 2019 about profit share and PHI which as at the date of this hearing remains unresolved but provides context to the next allegation.

Allegation 3: continuing to question the Claimant's honesty and integrity in relation in applying for and receiving income protection and accusing him of misleading his insurers

144. At paragraphs 142 -160 of the Claimant's witness statement he deals with the alleged detriment/unfavourable treatment of the Respondents continuing to question his honesty and integrity in relation to applying for and receiving income protection and accusing him of misleading his insurers. At paragraph 142 he states:

"In June 2018 my PHI Provider requested a number of documents from me to assess my potential claim. At all times I have been **completely transparent**

and open with my PHI provider about my health my finances and the work I carried out during my sickness absence. If I was (1) **made aware of**: or (2) unsure of any matters which may affect my continuing PHI entitlement I have shared or queried such matters with Mark Munday, the Senior Claims Assessor at Aviva, who has been dealing with my PHI claim throughout my sickness absence" (paragraph 142).

145. The Claimant then refers to a request made in December 2020 for his consent to send a joint letter of enquiry to Aviva which he refused to give. He states (paragraph 143) that he did not wish for the Respondents to contact Aviva directly in circumstances where they had "*already been indiscreet, accused me of fraudulent behaviour shared sensitive data without my permission and made a number of disparaging (and untrue) statements*". It was not apparent to the Tribunal why a joint letter containing the joint questions for Aviva to answer would create any problems for the Claimant, if he had been completely transparent with Aviva about his health and finances. The Claimant complains (paragraph 153) that the Respondent's and their lawyers "have continued to question my honesty and integrity through *aggressive correspondence and questions which suggest that I have misled Aviva*. I find the Respondent's *persistence in trying to find evidence* that I have misled my insurers extremely stressful and distressing as well as time consuming and costly for me to respond to (often with the assistance of my solicitors)".

146. The Respondents were in some difficulty obtaining information from the Insurer because they were not a party to the contract. They had asked some questions of the Claimant's solicitors in January 2021 but were not satisfied by the response and without the Claimant's consent, Aviva would not disclose any information to them. The Claimant complains that the tone and nature of the questions were aggressive and misleading because they suggest:

    - his PHI insurance was "invalid because profit share was earned income",
    - he had "received his full profit share into his current account" and that "his profit share had not been paid into his pension fund" (paragraph 160 CW2).

    The 6 questions the Respondent's solicitors requested the Claimant's solicitors to ask Aviva in their letter dated 19 October 2021 (C2/1page 402) are as follows:

    1. "*Mr Willis is asserting in his employment tribunal claims that provided his current and future profit share is paid directly into his pension pot, he is able to receive both PHI and net profit share. Please can you explain why receipt of taxed partnership profit into a policy holder's pension pot whilst receiving PHI entitlement would not affect the PHI Benefit and/or PHI claim.*
    2. *We are instructed that the pension contribution limit is currently 100% of income with a cap of £40,000 for tax relief purposes. Mr Willis' profit share for year ending 18/19,19/20 and 20/21 is approximately £615,350.Therefore we understand that whilst Mr Willis would be able to put all of this income into his pension pot,*

the bulk of it will be taxed and all of it declared to HMRC. Mr Willis' profit share for year-end 18/19,19/20 and 20/21 has not gone directly into his pension pot, rather he has received it into his current account and the First Respondent has paid his personal tax liability to HMRC on the partnership pot in January 2021 on his behalf. Are you aware of this?

3. *Please confirm whether you have received from Mr Willis his annual self-assessment tax returns and/or invoice for the tax payments from HMRC? How would Aviva take the policy holder's profit share (i.e. taxable income) into account when calculating PHI benefit? How would this affect the PHI benefit?*
4. *Please confirm what Aviva's approach is where a policy holder has received income by way of profit share which has been declared as taxable earnings to HMRC? How would Aviva take the policy holder's profit share (i.e. taxable income) for the same period he has been claiming his PHI benefit? How would this affect the PHI benefit?*
5. *Please confirm the effect on Mr Willis' PHI policy if he were to be paid his full profit share (i.e. taxable income) for the same period he has been claiming his PHI benefit? Please confirm how his PHI benefit will be affected and/or reduced in the future?*
6. *Clause 17(a) of the Friends Provident Income Protection Plan provides: "if in connection with the happening or purported happening of any event insured by this policy the Insured makes an untrue statement or omits to disclose a material fact the Policy will immediately become void and no benefit whatsoever will be payable". Are the payment of a) Mr Willis's non-therapeutic motoring expenses and b) the payment on his behalf of tax to HMRC on his undistributed profit share material facts?"*

147. The claimant complains that as a direct result of those 'misleading' questions from 4 November 2021 his PHI payments were suspended pending further investigation. No written evidence has been provided to the Tribunal about the reason why the PHI payments were suspended. The Tribunal do not agree that the questions were misleading. The asserted facts in the questions reflect the Respondents understanding of the position and their interpretation of the policy. They were entitled to make their own reasonable enquiries of Aviva on the effect any continuing income would have on the payment of PHI benefit given their concerns that the LLP and the designated members of the LLP may be implicated in potential insurance fraud.

148. By then on 15 September 2021 (C2/3page 1402) Mr Munday had written to the Claimant in the following terms:

"You may remember from my email dated 26 September 2019 that I needed to see future partnership accounts and your tax returns to verify that you've had **no continuing income**. Following a **recent internal review,** it's been noted that I've not followed up on these. I apologise for my oversight but to ensure our records are updated please can you send a copy of the partnership accounts and your tax returns including tax schedules from the

tax year ending 2017 to date and a copy of the LLP partnership agreement" .

149. It was not known what had prompted that review, but it was reasonable to infer it might have been prompted by the Respondents' solicitors questions. In his letter, Mr Munday has referred to his earlier letter of 26 September 2019 sent before any PHI payments had been made to the Claimant, to remind him of his continuing obligations to provide ongoing financial information and warning the Claimant of the consequences any continuing income would have on his PHI benefit payments and on the risk of recovery by way of overpayment (see paragraph 97).

150. On 22 September 2021, the Claimant sent an email to Mr Munday confirming the information he had provided in response to that request which was:

    1. Accounts to 31/3/2017/2018/2019/2020.
    2. Partnership Tax Returns -6/4/2017-2018/2018- 2019/2019-2020.
    3. Tax Calculations 5/4/19 and 5/4/2020.
    4. LLP Agreement.

    He then states as follows:

    "*The Annual Accounts for the year to 31/3/21 have not been agreed and will form part of the ongoing litigation. To assist I can confirm as background that I was a Member of the LLP until 8 March 2021 when I left due to ongoing disability discrimination and ill health(which forms the second claim-the first claim having been admitted by the Respondents).The second disability discrimination case is the subject of a weeklong hearing in November 2021.*

    Since the commencement of the PHI Insurance in October 2018 I have not received any <u>continuing-payments</u> *from the LLP nor do I have any alternative income (other than the pre-existing pension which has been disclosed to you). I remain medically unable to work.*

    *My entitlement to profit share is the subject of the disability discrimination case and will be resolved at the Remedy Hearing to be held by the Employment Tribunal between the 7th and 15 February 2022(for claim 1 and 2).**I have not received any profit share that is contained within the attached documents <u>albeit I have been taxed</u>.** The LLP have withheld monies as part of the Discrimination.*

    As agreed with you previously any profit share that is released to me after the remedy hearing would be paid directly into my pension scheme and will not be taken as income.

    I have a Capital Account of £75,000 which was invested in the LLP. I have been repaid £35,000 but the LLP has suddenly ceased to pay me and again this is an issue of continuing discrimination. This is my Capital Contribution in the LLP and is not taxable income. All monies have been used towards my legal expenses."

151. It was clear from those facts that the Claimant had not provided any of the financial information he was required to provide on an ongoing basis from September 2019 until September 2021. He was also being very careful about how he explained his position in the light of the financial information

he had disclosed. The Claimant refers to not having had any 'continuing payments' from October 2018 because the tax returns would reveal 'continuing income' which had been declared to HMRC. The Claimant seeks to blame the Respondent's solicitors for continuing to question his honesty and integrity in relation to applying for and receiving PHI inferring and suggest their questions are unjustified because he had been "**completely transparent with Aviva about the unpaid profit share and the tax paid"**(see paragraph 128) when the evidence shows that was not the case.

152. When the Respondents made enquiries directly with Aviva in October 2021, they did not know that the Claimant had not disclosed relevant financial information to Aviva until September 2021, but the Claimant did know he had not disclosed that information. The Respondents' solicitors only made their own direct enquiries after failing to obtain information in cooperation with the Claimant and his solicitors because he refused to agree to any joint letter of enquiry. The reason why the Respondents were continuing to make those enquiries was because they were not satisfied with the Claimant's response and had still not received the appropriate assurances from the Claimant or the Insurer. They were still genuinely concerned they could be implicated in insurance fraud. The fact that the Claimant does not agree/like the way the second question was phrased, does not mean it was 'misleading'.

153. Aviva could easily objectively verify the answer they gave by reference to the financial information provided in September 2021 Aviva were free to answer/refuse to answer any questions in any way they chose to. Aviva decided to suspend the Claimant's PHI payments. The Claimant asserts that the reason why his benefit was suspended was because of the 'misleading' questions asked by the Respondent but has not disclosed those answers to the Respondents or to the Tribunal to show how the questions influenced the answers that resulted in the suspension of benefit made to support the allegation made. Aviva were best placed to interpret and apply the PHI policy based on the financial information disclosed by the Claimant in September 2021 which was historical and not open to manipulation by either party. Joint questions would have been the quickest and easiest way to resolve the issue and address any concerns about potential insurance fraud.

154. Despite those undisputed facts the Claimant continues at this hearing to blame the Respondent for the suspension of his PHI stating " if my PHI provider considers that I am not entitled to the benefit paid to me since October 2018 **this is not because I have misled them it is because the Respondents have it appears deliberately misled** them by stating I have received my full profit share into my current account. Indeed, if I had received my full profit share (which I have not) the profit share due to me would have been paid directly into my pension account as permitted by Aviva" (paragraph 159 CW2). The Claimant is ignoring the impact of the financial information he disclosed to Aviva showing the taxable income declared to HMRC after October 2018 and tax of £252,283.53 which had been paid on that income. The Claimant's allegation that the Respondents have deliberately misled Aviva is untrue and is completely unfounded.

The Claim 1 Admissions

155. Before dealing with the alleged failure to make reasonable adjustments complaint and allegation 4,5,6 and 7, the 4 'return to work' detriments, some of the background of the admitted discrimination in Claim 1 is set out using (in part) Mr Cordrey's summary of those events.

156. On 28 November 2019, the Claimant was served with a letter giving notice of a partners' meeting which would consider whether he was "physically and/or mentally unfit" to continue to hold his responsibilities as a member of the firm. The letter page C1/2 page 690 refers to Clause 20.1(j) of the LLP agreement which provides that;

"Clause 20 Expulsion.

20.1 The LLP may by written notice to the Member concerned with effect from the date of the notice expel that person from membership of the LLP where the Member concerned:

(j) becomes, in the reasonable opinion of the Members, physically or mentally unfit (whether or not certified as such by a medical practitioner) to carry on his duties and obligations as a Member under this agreement".

157. In the Claimant's absence at a partners meeting on 13 December 2019 the Claimant was declared physically and or mentally unfit and stripped of his responsibilities. No medical evidence had been sought before the declaration was made.

158. On 17 December 2019, Miss Russell and Mrs Lord filed form LLPSCO1 with Companies House to remove the Claimant as a person with significant control of the First Respondent. After their unlawful actions were pointed out by the Claimant's solicitors the Claimant was reinstated as a person with significant control.

159. On 19 December 2019, the Claimant was served with a letter notifying him of a meeting that would be held on 31 December 2019 with a vote to expel him from the First Respondent. As a result of intervention by the Claimant's solicitors that meeting did not take place.

160. By admissions made on 24 November 2020, the Respondents admitted they treated the Claimant unfavourably because of something arising in consequence of the Claimant's disability, namely his sickness absence and the funds he has received under his PHI cover, and that that treatment was not a proportionate means of achieving the Respondent's legitimate aims of properly managing the First Respondent's business.

161. The admitted unfavourable treatment was removing the Claimant from his roles as Managing Partner of the First Respondent, taking steps to expel him as a member of the First Respondent on 28 November 2019 , removing him as a Person with Significant Control of the First Respondent on 19 December 2019, removing him from the First Respondent's management and decisions making processes on 19 December 2022, withholding management and accounting information relating to the First Respondent and excluding him from a partners meeting arranged for 7 January 2020.

162. The Respondents also admitted indirect disability discrimination by applying a practice of holding partners meetings at the First Respondent's Rotherham Office, instead of the Claimant's home, on 6 December 2019 postponed to 13 December 2019 which put the Claimant at a particular

disadvantage and was not a proportionate means of achieving the legitimate aim of properly managing the First Respondent's Business.

163. The Respondents also admitted it had failed to investigate and make such reasonable adjustments to enable the Claimant to work from home, continue with his management roles and/or return on a phased basis.

164. The Claimant's Solicitors had written to the Respondents on 6 January 2020 ("the protected act") alleging that the proposed expulsion and removal of the Claimant's roles was discriminatory. The Respondents did not take any further steps to expel the Claimant. They agreed to try to obtain medical evidence relating to the Claimant's likely fitness to return to work. The Claimant was reinstated as a person of significant control in January 2020. Mrs Lord and Miss Russell had jointly assumed the role and responsibilities of the Managing Partner because those roles needed to be performed on a day to day basis and it was not tenable for those roles to be undertaken by the Claimant while he was absent from work due to illness. As at 22 January 2021 the Claimant's absence was expected to last until 22 March 2021.

165. Up until 22 January 2020 the reason for the Claimant's unfitness to work was '*cancer*'. From 22 March 2020 to 22 June 2020 the reason was '*depressive disorder*'. From 22 June 2020 until 27 August 2020 the reason was '*reactive depression (cancer diagnosis stressful situation at work/stress at work)"*. From August 2020 until the Claimant's retirement on 8 March 2021 the reason was '*stress related problem*'. The medical advice on the fit notes had ruled out any return to work with or without adjustments.

Allegation of a failure to make reasonable adjustments

166. On 19 February 2020, the Respondent's solicitors wrote to the Claimant requesting any suggestions for any reasonable adjustment that could be made to assist with a return to work. On 24 February 2020 they wrote requesting the Claimant's consent and cooperation for the First Respondent to obtain a medical report about his prognosis, fitness to return to work, a timescale for a return , whether he could return part time/phased return or whether any other adjustments could be made. In response the Claimant's solicitors confirmed the Claimant's prognosis was that he had been signed off work on 22 March 2020 for 3 months for depressive disorder and that he was unfit to return to work.

167. Mrs Lord confirmed that the Respondents wanted to be guided by the medical advice and by the Claimant/his solicitors and no reasonable adjustments had been suggested that they could then put in place. In cross examination, Mr Cordrey suggested that a return to work on a phased basis would have been a reasonable adjustment for the Claimant accepting that suggestion was never communicated to the Respondents at the time. Mrs Lord confirmed that if it had been suggested it would have agreed provided it was supported by the Claimant and by medical advice.

168. The 4 PCP's the First Respondent is said to have applied to the Claimant from 17 April 2020 to 8 March 2021 are:

    168.1. A requirement of being fully fit to return (rather than accepting fitness to perform a therapeutic level of work).

168.2. A requirement of being fit for a full time return to participate in the First Respondent rather than accepting a phased return.

168.3. A requirement on the Claimant to initiate a return/prove his fitness to return.

168.4. Holding partners' meetings at the First Respondent's Rotherham Office rather than at the Claimant's home.

169. Although the issue of substantial disadvantage is identified at paragraph 31 of the list of issues. The Claimant has failed to assert any facts identifying the substantial disadvantage of the PCP's he relies upon for comparison with non-disabled persons. The purpose of the comparison with people who are not disabled is to establish whether it is because of disability, that the PCP applied by the First Respondent disadvantages the disabled person. Only if there is in fact a substantial disadvantage and the respondents know (or ought to have known) that the Claimant was substantially disadvantaged in the way alleged, is the duty to make reasonable adjustments engaged.

170. Not only has the Claimant failed to identify the substantial disadvantage but 3 of the PCP's involve a requirement involving some form of return to work which was inconsistent with the Claimant receipt of PHI benefit during this period based on his declaration that he was 'totally unable to work' and his GP's medically assessment of his fitness to work. The therapeutic exemption by the Insurer only permitted the Claimant to attend monthly partners meetings, not a phased return or involvement in any other work activity. Those were the requirements imposed by the Insurer and not the Respondent which prevented the Claimant from returning to work while he was in receipt of PHI. Although the Claimant suggests a reasonable adjustment of holding partners meetings in his house, the reality was that was not something the Claimant would have ever agreed to or wanted. He confirmed it was 'impossible' for him to have any face to face meeting with Mrs Lord or Miss Russell and that was the reason why he did not attend any partners meeting in person or remotely.

Allegation 4: Failing to reinstate the Claimant to the positions of managing partner: client care partner: compliance COLP: compliance COFA: credit controller and/or data protection manager.

171. It is accepted the Claimant was not reinstated into the role of Managing Partner because the Claimant was assessed as medically unfit for work, he was in receipt of PHI benefit on the basis he was totally unfit to work and any return to work had been ruled out on the fit notes throughout the Claim 2 period.

172. It is the Respondent's case that if it had required the Claimant to fulfil these important and demanding roles of responsibility in a firm with 60 plus staff in a Covid-19 pandemic, at a time when the Claimant was clearly too unwell to manage work, it could have been held liable for disability discrimination. The role and responsibilities of managing partner: client care partner: compliance COLP: compliance COFA: credit controller and/or data protection manager had been taken over by Mrs Lord and Miss Russell because those roles needed to be performed fully and daily to meet the firms responsibilities to its employees, the Solicitors Regulatory Authority and the Legal Aid Authority.

173. It was put to Mrs Lord that she had blocked and side-lined the Claimant from returning to his role as part of the Respondents' 'Plan B' a continuation of the Plan A discrimination, a strategy to force the Claimant to leave the partnership. Mrs Lord denied such a 'strategy' existed or that the Claimant was blocked or side-lined. She explained the reason the Claimant could not and did not resume the role of Managing Partner was because he had been declared unfit to work and that remained the position for the whole of Claim 2. Her answer was supported by the fit notes and the Claimant's concession that medical opinion had completely ruled out any return to work. He and his solicitors had not identified any reasonable adjustments that could have been made. If he was no longer declared unfit to work by his GP, his PHI payments would have stopped.

174. Miss Lord and Miss Russell had assumed the role of Joint Managing Partners and shared the responsibilities of the role during the Claimant's absence. Mrs Lord did not agree with the suggestion made by Mr Cordrey that as a 'gesture of good will' she should have restored the Claimant's Managing Partner 'title' without requiring him to perform any of the responsibilities of the role. She said it would be misleading and inappropriate for the firm to misrepresent the position in that way. In his closing submissions Mr Burns reminded the Tribunal that this reframed detriment was not the pleaded detriment. The Tribunal agreed that was not the pleaded detriment and agreed that it would be unreasonable and inappropriate for the Respondents to run the firm in the misleading way suggested.

175. From May 2020 the Claimant decided he could not have any direct contact with Miss Lord and Miss Russell. The Claimant confirmed it was 'impossible' for him to have any face to face contact with Mrs Lord or Miss Russell and that was the reason why he did not attend any partners meeting in person or remotely. Given the limitations put in place by the insurer, the GP and the Claimant it was difficult to see how the Claimant makes his case that he should have been reinstated and more involved in the day to day management of the firm during his ill-heath absence. This was another aspect of the Claimant's case which the Tribunal found was fundamentally contrary to the evidence.

Allegation 5: Withholding information from the Claimant: minutes of partner's meetings: details of management decisions and supporting documents and correspondence: budgets and finance reports including information about Work in Progress

176. The partners meeting minutes were available to all the partners in the management folder on the desktop of the Claimant's work laptop. The management folder also contained details of management decisions and finance documents.

177. The Claimant agreed that he had access to those documents in the Claim 2 period and that his access had never been blocked. He was familiar with the system and the folders, having been involved in setting them up and having used them for much longer than Mrs Lord and Miss Russell and having confirmed that position to the LLP accountant in October 2020.

178. Mrs Lords evidence was clear. The Claimant had access to everything on the desktop and as far as she was aware no information had been withheld.

She was also aware the Claimant did not want any direct contact and he was unwell. She limited the contact she had with the Claimant in the way he permitted for those reasons. The Respondents did not withhold information from the Claimant.

179. It was also difficult to see why the Claimant would need to have access to the level of detailed information referred to in this allegation when he was unfit to perform any work. The Tribunal questioned why the Claimant would need to see 'supporting documents and correspondence for management decisions' when the Joint Managing Partners had assumed those responsibilities and he was totally unable to work. It was not reasonable for the Claimant to expect to see any more information than that which he already had access to on the system and was provided by post when requested by the Claimant or was required and provided for the partnership meetings.

Allegation 6: Excluding the Claimant from partner's and/or management meetings.

180. The 'therapeutic' limitation did not permit the Claimant to attend management meetings about the day to day management of the firm. The Claimant did not expect to attend those meetings and the Respondents did not require him to attend while he was unfit to work. The Claimant confirmed it was 'impossible' for him to have any face to face with Mrs Lord or Miss Russell and that was the reason why he did not attend any partners meeting in person or remotely so in reality the Claimant was not excluded he would not have attended management meetings.

181. From September 2020, the Claimant had only agreed to having contact by post with the Respondents. As a result, during the pandemic Mrs Lord would attend the office to make sure she photocopied all the paperwork for partnership meetings in good time before the meetings to enable the Claimant to contribute to those meeting. She made those adjustments because the Claimant would not accept any email contact and was only willing to be contacted by post.

182. Mrs Lord complied with all the agreed adjustments by sending an agenda for the partners meeting out by post on the first Friday of each month. On the second Friday of each month the Claimant would confirm what further information he required or whether he wished to make additions to the agenda. On the third Friday of each month any necessary alterations to the agenda were made and the Claimant would be provided with the documents requested. On the fourth Friday of every month a partners meeting would be held. As a result of the pandemic all partners meetings were conducted virtually by Microsoft Teams and the Claimant never indicated that he wanted those meetings to take place at his house which is his pleaded case unsupported by his own evidence.

Allegation 7:Excluding the Claimant from management decisions of (1) appointing new accountants, (2) terminating the First Respondent's relationship with Peninsula, and (3) making a financial settlement to a former member of the First Respondent

183. Out of the 8 specific complaints brought under the overarching allegation of exclusion from management decisions, only 3 were pursued at the hearing

(the withdrawn allegations were the decision for Mrs Lord and Miss Russell to assume the title of Joint Manging Partners: the decision to appoint a HR manager, the decision to take out a fixed interest business loan in January 2020 to pay the tax, and the decision to take out a Coronavirus Business Interruption Loan(CBIL) loan in March 2021)

184. By withdrawing those complaints of unlawful discrimination, the Claimant appears to be accepting that most of the management decisions made by Mrs Lord and Miss Russell during his ill-heath absence were lawful and only 3 were unlawful discrimination or victimisation without explaining how that distinction was made. It must also be remembered that Miss Russell and Mrs Lord had lawfully assumed the role of Joint Managing Partners and that they were limited in the contact they could have with the Claimant because of his unwillingness to have any direct contact with them and because of his continued ill heath absence.

185. The first management decision the Claimant complains was unlawful detriment/unfavourable treatment was made in August 2020 when the firm's accountant Sarah Fields suddenly resigned because she decided there was a conflict of interest to act for the firm and the Claimant. As a result of that resignation, there was an urgent need to find a replacement accountant because the firm needed to submit SRA accounts by the end of September 2020.The Claimant provided his input through Mr Jones that one of the proposed accountancy practices should not be appointed. Mrs Lord and Miss Russell accepted his view and the partners agreed to appoint a different accountancy practice. On 29 October 2020, the Claimant wrote to the new accountants accepting their appointment. The Claimant was not excluded from that management decision.

186. The second management decision the Claimant complains is unlawful discrimination is the decision made in July 2020 to terminate the firms contract with Peninsula. During the pandemic, the HR manager had reported difficulties with Peninsula who were not answering queries or provide advice in a timely manner. As a result, the HR manager was having to find the answers elsewhere which was time consuming and meant that Peninsula were being paid for a service they were not in fact providing. The Claimant could not comment on those circumstances but accepted that if true continuing with that situation would have left the firm in a 'vulnerable' position at a difficult time. Mrs Lord and Miss Russell confirmed those were the circumstances the HR manager conveyed to them at the time. On that basis as the Managing Partners they made a reasonable management decision to end the contract with Peninsula and find a provider that could better meet the firm's needs.

187. The third management decision was the settlement payment made to a former partner JB. The Claimant agreed that when he saw JB's claim to the Employment Tribunal on 6 May 2020 it came as a surprise. The Claimant was included in all the emails and was provided with a copy the legal advice obtained by the firm which advised a settlement. On 20 May 2020, the Claimant directed that all direct contact should cease. The Respondent's complied with that instruction and stopped sending the Claimant emails. A settlement was concluded based on the legal advice obtained by the firm. It was reasonable for the First Respondent to make that decision based on the legal advice obtained. In closing submissions, it was conceded that the

Claimant had been 'partially involved' in that decision and had not been excluded. Despite making that concession the complaint was not withdrawn.

Allegation 8: Subjecting the Claimant to a barrage of correspondence and maintaining a hostile and aggressive tone and content in their communications with him.

188. This alleged detriment is not referred to at all in Mr Cordrey's closing submission but is still pursued and was dealt with by Mr Burns at paragraph 70-71 of his closing submissions.

189. We agreed with the short and valid point Mr Burns makes that of the 4 examples the Claimant has referred to in his witness statement, 3 of the letters were sent between the solicitors litigating in Claim 1 and were not sent directly to the Claimant. Parties in litigation adopt a combative tone at times. The Claimant as an experienced solicitor is familiar with how that litigation process works.

190. The first letter the Respondents sent directly to the Claimant is the letter dated 6 January 2021 about the proposed office move. Mrs Lord was making the Claimant aware that his refusal to vote on or agree to the office move meant the firm would have to deal with the dilapidation works for the unsafe premises which she believed was not in the best interests of the firm. The Claimant complains this letter was intended to place 'undue pressure' on him. Further details of that correspondence are provided later in these reasons.

191. In the Claimant's evidence he refers specifically to a second letter dated 1st March 2021 which was sent by Mrs Lord in circumstances where the Claimant was not agreeing to the CBIL loan. The Claimant complains that Mrs Lord was accusing him of not acting properly or in the best interests of the firm and he has identified the following comments which he found "deeply upsetting" (paragraph 136 CWS).

> " *It strikes me that you were prepared to allow us to take this loan out to the tune of 1.7 million pounds when It resulted in you benefitting from it yet when it is now clear that it is in fact the firm who need to benefit from it you seek to prevent it."*

192. In making those comments Mrs Lord was referring to the fact that the Claimant had agreed to the firm taking out a loan to pay the Claimant's tax liabilities which could have been deferred to a later date while at the same time refusing to agree to the CBIL loan which was being offered on favourable terms and was desperately needed for the firm to remain financially viable. It was clear from the tone of those letters that Mrs Lord was becoming increasingly frustrated with the Claimant. She perceived he was being unreasonable and uncooperative in his approach to the office move and the CBIL loan.

193. It was reasonable for Mrs Lord as the Joint Managing Partner to be able to communicate her feelings in a clear and frank way to a fellow partner and joint owner of that business at a time of crisis. She was communicating her genuinely held view that the Claimant was behaving unreasonably by refusing to agree to a loan she believed was (and has proved to be) in the best interests of the firm. The Claimant accepted it was sent at a time when

the firm was in 'absolute crisis' and that Mrs Lord and Miss Russell appeared to be worried about the firm. Objectively viewed it was not reasonable for the Claimant to treat any of the letters sent by Mrs Lord or the letters exchanged between the parties' solicitors during litigation as a detriment or unfavourable treatment.

Allegation 9: Claimant's retirement on 8 March 2021

194. In September 2020, the Respondents were still seeking a full health update and medical report about the possibility of the Claimant returning to work and whether any adjustments could be made to facilitate that. The Claimant accepted the contemporaneous evidence shows a '*clear offer to make reasonable adjustments as soon as medical opinion said it was appropriate*'.

195. When the Claimant agreed to having contact by post, the Respondents immediately put into place agreed adjustments which would enable the Claimant to participate in partnership meeting remotely. Mrs Lord would send an agenda and information in the post for the Claimant in advance of the partnership meeting so that the Claimant could add items, provide his input or request information. She would answer any request for information provide copies and post it out before the meeting, so that the Claimant was able to contribute to and be involved in partnership decisions. Her evidence about the steps she took from September 2020 was not challenged. It was also supported by the contemporaneous evidence we saw in relation to two urgent partnership issues that arose before the Claimant's retirement relating to the premises and the loan.

196. The firm operated from two premises Number 7 and Number 9 North Church Street. A health and safety evaluation of the premises at No 7 had found the premises were 'below an acceptable level' and identified the problems which required urgent corrective action for the premises to be safe. The firm's solicitors had advised the Respondents that because the lease was a full repair lease, the firm would be responsible for the repairs. In early October 2020 the Claimant was provided with all the available information and a proposed action plan to tackle the issues identified which were to be considered at a partnership meeting on 23 October 2020.

197. At that partners meeting, Mrs Lord and Miss Russell proposed a move out of No 7 and No 9 Church Street to a new location, 10 Paradise Square. These premises were owned by the same landlord who agreed that the firm could move out of Number 7 without having to deal with any of the repairs thereby releasing the firm from its obligations under the existing lease. The landlord was offering a solution which protected the firm from the costs of the repairs, and the insurance risks of continuing to operate from unsafe premises. The Claimant refused to enter a new lease and refused to agree to the move. Mrs Lord and Miss Russell voted for the move. Mr Jones abstained from voting because he was retiring at the end of March 2021 and did not think it was appropriate to be a signatory to any new lease. Without the Claimant's consent, the firm could not take up the offer made by the landlord and the insurance on No 7 would remain invalid until the repairs were carried out.

198. The second issue that arose at this time was the Coronavirus Business Interruption Loan ('CBIL'). It was a difficult time for the firm which like other

businesses was forced to close during the lockdown. The firm was able to obtain a loan of £700,000 from the government on very favourable terms but there was a government set deadline of 31 January 2021 for the application. On 6 January 2021, Mrs Lord resent the Claimant a copy of all the information she had previously provided about obtaining the loan because the situation was becoming very urgent and the Claimant was not responding. She invited the Claimant to speak separately to the bank manager and the firm's accountant, both of whom had been consulted by the Respondents if he needed any assurances about the loan. The Claimant admitted he received all the information about the loan. The eligibility criteria required the business to show it would be viable were it not for the pandemic and it had been adversely impacted by the coronavirus. The Claimant said he understood CBIL and was familiar with it. He knew that financially the firm was in crisis and urgently needed this loan and accepted that Mrs Lord and Miss Russell were worried about the firm's ability to survive the situation. Despite understanding and accepting the seriousness of the situation for the firm, the Claimant refused to agree to the loan. He instructed his solicitors to warn the Respondents' solicitors that if the firm obtained the loan without his agreement, Mrs Lord and Miss Russell would be acting in breach of the LLP agreement. This was a striking stance for the Claimant to take knowing how important the CBIL loan was for the future viability of the firm.

199. It was even more striking because at this time the Claimant had insisted the firm take out a loan to pay the partners' tax which was due to be paid on 31 January 2021 when the firm had the option to defer the tax payment. All the other partners had agreed to the deferral. On 25 January 2021, the Claimant wrote to his partners insisting his tax liability was paid in full and was not deferred. It was clear from the correspondence that the Claimant was able to proactively engage in discussions with the Respondents to ensure tax on his profit share was paid in full and on time. Even the Claimant's solicitors became involved and insisted the Claimant's tax liability was paid on time and could not be deferred. The Respondent paid the Claimant's tax liability in full as a result of those express instructions.

200. On 4 February 2021, Mrs Lord wrote to the Claimant providing him with the agenda and information for the partners meeting to be held on 26 February 2021. She confirmed a decision needed to be made at that meeting about the premises and the CBIL loan(the deadline to apply having been extended to 31.3.21) and asked the Claimant to let her know if he required any further information before that meeting.

201. On 17 February 2021, having not had any further contact Mrs Lord sent a chaser letter to the Claimant reiterating the importance of having the Claimant's vote on the premises and the loan.

202. On 25 February 2021 the Claimant communicated his decision to his partners through Mr Jones. He abstained from voting on the premises move and he refused to agree to the CBIL loan.

203. On the same day, Mrs Lord wrote to the Claimant urging him to speak to the bank about the loan if he had concerns about it. She also invited the Claimant to speak to firm's accountant. Although the bank had sanctioned the loan, the firm could not obtain the loan without the Claimant's express

agreement. Mrs Lord requested the Claimant confirm his agreement to the loan by 5 March 2021. She could not have made it any clearer as to the urgency of the situation.

204. On 2 March 2021 Mrs Lord sent another letter to the Claimant notifying him that an urgent partners meeting had been arranged on 10 March 2021 to discuss CBIL and the premises. The letter written in very clear direct and concise terms. The material parts are:

> *"1. The CBIL. If this remains unauthorised then the firm is not financially viable.*
>
> *2. Number 7. If you continue to abstain from voting on this issue, then we are left with a building which is not fit for habitation and poses a health and safety risk to our staff and client. By virtue of you not authorising the CBILS then we shall have insufficient funds to deal with dilapidations moving forward.*
>
> *As a result of the above issues we now need to consider our business continuity plan in line with our fiduciary duties to the LLP.*
>
> *We now need to consider whether it remains finically viable to continue to run the firm in light of the clear financial difficulties that present themselves as a result of you failing to authorise CBIL and preventing the move out of No 7 Church Street"*

205. By abstaining from voting on the premises and refusing to agree to the CBIL the Claimant was not only preventing the firm from moving out of unsafe premises but he was also preventing the firm from obtaining a loan to carry out the necessary repairs to make the existing premises safe. By this stage Mrs Lord had done her best to persuade the Claimant that these decisions were being made in the best interests of the firm. She had provided all the available information, she had repeatedly invited him to speak separately to the Bank manager and the firm's accountant, both of whom had been consulted by the Respondents. The Claimant did not take up any of those offers. The Claimant understood he was being asked to agree to the loan "*on the basis that it might not be financially viable for the firm to continue without the loan'*(paragraph 128 witness statement) and in cross examination accepted that the firm was in '*absolute crisis*'.

206. Given those undisputed facts about the attempts Mrs Lord made to try to persuade the Claimant to agree to CBIL it is surprising that the Claimant has alleged that he was 'excluded' from that management decision an allegation which was only withdrawn at this hearing.

207. In cross examination the Claimant accepted his inability to agree an interest free government Covid loan and his veto on moving out of the unsafe premises meant that the Respondents were forced to consider liquidation. The Claimant accepted that he knew that he had a difficult choice to make to either vote for the loan or for the firm to go into liquidation. He had all the information he needed to agree a loan. It was offered on favourable terms at a time when the firm was in '***absolute crisis'*** and could not have continued without the loan. Unfortunately, having made the decision not to agree to the premises move or to the loan the Claimant was not prepared to back down and was placed in the situation of having to face the consequences of his decisions.

208. The Claimant resigned with immediate effect by email sent on 8 March 2021. The Claimant's resignation was accepted at the urgent partners meeting on 10 March 2021.Following the Claimant's retirement the Respondents obtained the interest free CBILS loan, avoided liquidation, moved out of the unsafe premises and signed a new lease.

209. The Claimant says he resigned as "*a direct result of the discriminatory treatment starting in Claim 2 which continued with the alleged unlawful treatment in Claim 2, as a result of his GP's advice, he felt his position became untenable and he had no option but to retire*" His last GP's fit note expired on 8 March 2021.

210. At the time of the Claimant's retirement Mrs Lord and Miss Russell believed the Claimant knew that by 'obstructing' these important decisions he was putting himself at risk if the firm collapsed. They believed that by resigning the Claimant avoided having to be at or involved in the crunch meeting on 10 March 2021 when he would have had to decide whether to cooperate with his partners and agree to the loan or disagree and see the firm fold.

211. After the Claimant's retirement and in accordance with the LLP agreement the Claimant ceased to be a designated partner and then became an 'outgoing member' and a creditor of the LLP in relation to any undrawn balance of his profit share, capital and interest on capital. While the Capital and Interest are easily identifiable and calculable and no issue arises about that between the parties and the amount due has now been paid (less a tax liability deducted from the Capital Account which may/may not be an issue between the parties in the future). Clause 21(5) of the LLP Agreement provides that "where there is a dispute about the undrawn balance of profit share between the Outgoing Member and Designated Members it is for the Accountant to decide "any sums *as in the opinion of the Accountants (acting as experts and not as arbitrators) are required to be paid to the Outgoing Member to represent the value of his share in the LLP at his Leaving Date"*. The LLP agreement clearly envisages that in any dispute about the sums to be paid to the outgoing member to represent the value of his share in the LLP at his leaving date it is a decision for the LLP Accountants to make not the designated or outgoing member.

212. On 31 March 2021 (see Claimant's witness statement paragraph 63.2 letter dated 31 March 2021) Mrs Lord wrote to the Claimant confirming:

    "We have asked the LLP Accountant to calculate what is due to you and I attach their calculation for your information. The monthly figure of £5,689.17 represents what you are owed from both your capital and current account, less the PHI payments you have received…. I confirm that we will revisit what is owed to you following the outcome of the Remedy Hearing".

213. At paragraph 65.7 and 65.8 the Tribunal have set out the correspondence that follows and highlighted some text from the letter dated 27 July 2021 from the Claimant to Respondents in which the Claimant acknowledged the " **payment of my income tax on my full profit share"** and "***reaffirm(ed) that payment of my Current Account balance is not appropriate until decided by the Employment Tribunal".*** In response the Respondents confirmed that in "***accordance with your requests we shall not commence payments of your current account at this stage".***

214. On 31 March 2021 the Accountants had calculated the value of the Claimant's share at his leaving date and decided that as an outgoing member the PHI payments received (£206,921.00) should be deducted from his estimated current account balance. As at 31/3/21 the profit share forecasts were £336,731.00 leaving an amount owed to the Claimant of £129,810 which is disputed. It was left for the Remedy hearing to decide if the £206,921.00 in dispute was a loss flowing from any unlawful discrimination for which damages should properly be awarded in accordance with Section 124 Equality Act 2010.

Applicable Law

215. These complaints of unlawful discrimination are brought under section 45 Equality Act 2010 ('EqA').

216. Section 45(2)(d) provides that "*An LLP (A) must not discriminate against a member (B) by subjecting B to any other detriment*".

Section 45(6)(d) provides that "*An LLP must not victimise a member (B) by subjecting B any other detriment".*

Section 45(7) provides that "A duty to make reasonable adjustments applies to an LLP".

'LLP' means a limited liability partnership within the meaning of the Limited Liability Partnership Act 2000.

217. For the disability discrimination complaints Section 15 (discrimination arising from disability) and sections 20 and 21(failure to make reasonable adjustments) apply. For the victimisation complaints section 27 EqA applies.

218. For the Tribunal to have jurisdiction to consider the EqA complaints. Section 123 EqA requires that the claim is brought in time and provides that:

> "*proceedings **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"*.

219. Subsection 123(3) EqA provides that "*conduct extending over a period is to be treated as done at the end of the period and failure to do something is to be treated as occurring when the person in question decided on it*"

220. The Claimant has the burden to prove a prima facie case in relation to the alleged contraventions of Sections 15, 20 and 21 and 27 EqA.

Section 136 EqA (burden of proof) provides that:

"*(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 the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision".

221. In **Hewage and Grampian Health Board 2012 ICR 1054 SC.** The Supreme Court provided some useful guidance about the role of the burden of proof provisions:

"*They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another"*

222. If the Employment Tribunal is satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious discrimination, then that is the end of the matter (see **Laing -v- Manchester City Council 2006 ICR EAT).**

223. The 'burden of proof' provisions were considered more recently in **Royal Mail Group Ltd-v- Efobi 2021 UKSC33.** The **Hewage** guidance was referred as a useful reminder '*not to make too much of the provision'*. The Supreme Court also confirmed the correct approach to applying the provisions in discrimination cases:

"*The Claimant has the burden of proving, on the balance of probabilities, those matters which he or she wishes the Tribunal to find as facts from which the inference could properly be drawn (in the absence of any other explanation) that an unlawful act was committed. That is not the whole picture since, as discussed along with those facts which the Claimant proves the Tribunal must also take account of facts proved by the Respondent which could prevent the necessary inference being drawn*"

224. Section 15(1) EqA provides that treatment of a disabled person amounts to discrimination arising from disability when "A person (A) discriminates against a disabled person (B) if:

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

225. For a complaint under Section 15 to succeed:

1. There must be unfavourable treatment by A.
2. There must be something that arises in consequence of the B's disability.
3. The unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability and
4. The alleged discriminator(A) cannot show the unfavourable treatment is a proportionate means of achieving a legitimate aim.

226. Comprehensive guidance has been provided about those requirements in Secretary of State for Justice -v- Dunn EAT 2016/02341 and in Pnaiser -v- NHS England 2016 IRLR 170.

"*The Tribunal must first decide whether A treated B unfavourably in the respects relied upon by B. They must then determine what caused the impugned treatment or what was the reason for it. The focus at this stage*

is on the reason in the mind of A. An examination of the thought processes of A is likely to be required. The 'something' that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the unfavourable treatment and so amount to an effective reason for, or cause of it. The causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability".

227. In relation to the meaning of 'unfavourable' treatment the Supreme Court provided guidance on the meaning and whether it means the same as detriment in the case of **Williams -v Trustee of Swansea University Pension and Assurance Scheme 2019 ICR 230 SC.** It held that "*this term in section 15 was deliberately chosen by Parliament and used in preference to detriment because it has the* ***sense of placing a hurdle in front of creating a particular difficulty for disadvantaging a person****. It followed that treatment that was advantageous cannot be said to be unfavourable treatment because it was not sufficiently advantageous"*.

228. Section 27(1) EqA prohibits victimisation which occurs when: "A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act or A believes that B has done or may do a protected act".

229. Section 27(2) identifies what can constitute a protected act: (a) bringing proceedings under the EqA, (b) giving evidence or information in connection with proceedings under the EqA,(c) doing any other thing for the purposes of or in connection with the EqA (d) making an allegation(whether or not express) that A or another person has contravened the EqA.

230. It is accepted that the Claimant did protected acts falling within 27(d) by virtue of the Claimant's solicitors' letter of 6 January 2020 and 27(2)(a) by the Claimant bringing Claim 1 on 16 April 2020.

231. For the Claimant to establish a prima facie case of victimisation. The Tribunal must first decide whether A subjected B to a detriment, if so, what was the reason for? was it because B did a protected act?

232. The Equality and Human Rights Code of Practice on Employment 2011('EHRC') explains that unfavourable treatment means 'put at a disadvantage' (paragraph 5.7). Detriment in the context of victimisation (paragraph 9.8) is "anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage".

233. The meaning of detriment was recently considered by the EAT in Warburton-v-The Chief Constable of Northamptonshire Police EA2020/000378. It was confirmed in that case that the key test is "*Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment*" (Shamoon-v- Chief Constable of the Royal Ulster Constabulary 2003 ICR337 HL).

234. Detriment is to be interpreted widely in this context. It is not necessary to establish any physical or economic consequence. Although the test is framed by reference to a reasonable worker, it is not a wholly objective test.

It is enough that a reasonable worker might take such a view. This means that the answer to the question cannot be found only in the view taken by the Employment Tribunal itself. The Employment Tribunal might be of one view, and be perfectly reasonable in that view, but if a reasonable worker (although not all reasonable workers) might take the view that **in all the circumstances** it was to his detriment, the test is satisfied.

235. As to causation or the "reason why" the correct question was whether the protected act had a significant effect on the outcome.(see Chief Constable of West Yorkshire Police-v-Khan 2001 1WLR 1947, Nagarajan-v-London Regional Transport 2000AC 502,Chief Constable of Greater Manchester-v-Bailey 2017EWCA CIV 425 and Page-v- Lord Chancellor 2021ICR912 CA)

236. Section 20 (3) EqA imposes a duty on a person A to make reasonable adjustments "***where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage".***

237. Section 21 EqA provides that a failure to comply with Section 20(3) is a failure to comply with a duty to make reasonable adjustments.

238. Schedule 8 paragraph 20 EqA deals with the limitations on the duty to make reasonable adjustments if the employer does not have actual or constructive knowledge of disability or of the disadvantage and provides that:

> "A is not subject to a duty to make reasonable adjustments if A does not know and could not reasonably be expected to know that an interested disabled person has a disability and **is likely to be placed at the disadvantage referred to**".

239. **In Environment Agency-v- Rowan 208 IRLR 20** the EAT provided guidance on the matters an Employment Tribunal must identify before it can properly make findings of a failure to make reasonable adjustments. Firstly, t**he PCP applied by or on behalf of the employer**, or the relevant physical feature of the premises occupied by the employer. Secondly the identity of the non-disabled comparators (if appropriate) and thirdly the **nature and extent of the substantial disadvantage suffered by the disabled person**.

240. Guidance on 'what disadvantage gives rise to the duty?' is provided in the EHRC at paragraphs 6.15 and 6.16. A substantial disadvantage is something that is "*more than minor or trivial*" (section 212(1) EqA). Whether such a disadvantage exists in a particular case is a question of fact and is to be assessed on an objective basis. The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision criterion practice or physical feature or the absence of an auxiliary aid, disadvantages the disabled person in question.

241. EHRC Code at paragraph 11.23(Chapter 11) provides that: "*where a LLP is required to make adjustments for a disabled member the cost of making the adjustment must be borne by the LLP. The member may be required (because members share the costs of the LLP) to make a reasonable contribution towards the expense. In assessing the reasonableness of any contribution (or level of such contribution) particular regard should be had*

*to the **proportion in which the disabled member is entitled to share in the LLP's profits**, the cost of the reasonable contribution and the size and administrative resources of the LLP*".

Submissions

242. Both Counsel provided detailed and lengthy written closing submissions which the Tribunal considered very carefully in our deliberations.

Conclusions

Should the Tribunal imply a term into the LLP agreement 'stopping profit share income accruing to the members current account while a member is in receipt of PHI'

243. First the Tribunal decided this issue as it was invited to do by Mr Burns. It was accepted that there was no express term 'stopping profit share income accruing to the members current account while a member is in receipt of PHI' and invited the Tribunal to imply that term into the LLP agreement on the basis that it is clear from the evidence that:

    a. The PHI Policy does not permit C to be paid in work and/or receipt of LLP profit share income while also receiving PHI payments:

    b. The LLP Agreement makes provision for PHI and **therefore must** (by necessary implication) mean that a members' entitlement to earn profit share does not apply when he is totally unable to work through illness and claiming PHI instead.

244. Mr Burns invites the Tribunal to imply such a term in order for the LLP Agreement to make any sense. In his written closing submissions (paragraphs 20-21) he refers to recent leading authorities of Marks and Spencer plc-v- BNP Paribas Securities Services Trust Co (Jersey) Ltd (2016) AC 742 and the useful summary of the position given in Ali Petroleum Co of Trinidad and Tobago (2017) UKSPC 2 at (7):

    "It is enough to reiterate that the process of implying a term into the contract must not become the re-writing of the contract in a way which the court believes to be reasonable or which the court prefers to the agreement which the parties have negotiated. A term is to be implied only if it is necessary to make the contract work, and this may be if (i) it is so obvious that it goes without saying(and the parties although they did not exhypothesi, apply their minds to the point would have rounded on the notional officious bystander to say, and with one voice "Oh, of course') and/or(ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient pre-condition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement".

245. Mr Burns has identified the 'M&S principles' for implying a term which are set out at paragraph 21 (a)-(h) of his written submission. At (g) the principle highlighted is that "*the question is to be assessed at the time the contract*

was made : it is wrong to approach the question with the benefit of hindsight in the light of the particular issue that has in fact arisen. Nor is it enough to show that, had the parties foreseen the eventuality which in fact occurred, they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred".

246. The Tribunal agreed it would be wrong to approach the question with the benefit of hindsight just because a particular issue subsequently arises, like the PHI/Profit Share issue which arose in December 2019, 4 years after the LLP Agreement was made. That agreement is a detailed commercial contract made between the designated members of the LLP, all of whom are experienced solicitors. Each of the parties had invested the same amount of capital in the business each had an equal share and equal bargaining power to decide the terms of that contract. They could agree to include or exclude any term they wished to and the precise wording of the term they agreed to include in the contract.

247. Accordingly, they agreed to include clause 12(1)(g) in relation to fixed share members providing that "*for any period of illness or incapacity exceeding 6 months absence in any year or lesser periods totalling 6 months in any period the Fixed Share Member* ***shall not be entitled to any profit share****."* They decided not to include a similar term for the designated members '**stopping profit share income accruing to the members current account while he is in receipt of PHI**' or to address their minds to the contractual solution they wanted in the event that a designated member was absent for any period of illness or incapacity.

248. There was more than one possible solution to consider in relation to PHI benefit and stopping profit share, for example how long into a period of illness of the designated member before their profit share was stopped: was after days/months/or years of incapacity? How would the profit share be stopped? Would this term be inconsistent with any other express terms (the profit share allocation clause) and if so, how would any inconstancy between the express term and implied term be resolved? There were so many possibilities that the term was not capable of clear expression in precise terms depended on what the parties to the contract preferred.

249. It was not necessary to imply the suggested term to make the contract workable, or to give it business efficacy because it had been working without that term from 2015-2019 without any issues. The Tribunal did not agree with the suggestion made by Mr Burns that without the term the contract would lack commercial or practical coherence. It was also not necessary to imply the term to satisfy the obviousness test that it was so obvious that it goes without saying and the parties would have said with one voice "oh of course". There were so many possibilities to consider for any period of illness or incapacity absence that the designated members had not applied their minds to or had wished to when the contract was made for it to be so obvious to the Tribunal that the term now proposed was the one they would have agreed to. For those reasons the Tribunal does not imply any term into the LLP agreement 'stopping profit share income accruing to the members current account while the member is in receipt of PHI.

How should the Tribunal decide Claim 1 Remedy Issues?

250. The remedy list of issues for the admitted discrimination in Claim 1 have already been identified. PHI payments received by the Claimant will be only be taken into account by the Tribunal, if they are relevant to remedy, if profit share is awarded as a loss that flows naturally and directly from any unlawful discrimination (see remedy list of issues for past and future financial **loss** at paragraph 18).

Past Financial Loss (EqA 2010 section 124)

3.2. **But for the unlawful discrimination**, what profit share would have been paid to the Claimant by the Respondents for the financial years 2018/2019 and 2019/2020: and

3.3. What sums has the Claimant received by way of Permanent Health Insurance during this period and should any, or all of these sums be deducted from the loss of profit share when calculating any past financial loss?

4. Future Financial losses

4.1. In accordance with the principles set out at para 3.1 above, what, if any compensation related to the period from the remedy hearing onwards is required to put the Claimant into the financial position he would have been in but for the unlawful discrimination (the Respondent's position is that there is no ongoing loss)".

251. The Tribunal has not therefore decided the remedy issue Mr Cordrey invited it to, as to whether the Respondent should be permitted to resile from their (disputed) "unequivocal written concession" made before the Claim 1 liability judgment that profit share will be awarded to the Claimant, with the only dispute being how to correctly calculate that profit share (see paragraph 19). The Tribunal's view is that if the parties do not agree remedy in Claim 1 the Tribunal will decide the remedy issues as identified and can only award compensation if the loss flows naturally and directly from the admitted discrimination and should be properly be awarded to the Claimant and is supported by evidence. In relation to the disputed concession the Tribunal agreed with Mr Burns that the principle of 'res-judicata' applies to the Claim 1 Liability Judgment and any dispute about the terms upon which liability was settled between the parties at that hearing before judgment was issued by Employment Judge Maidment would require an application for reconsideration to the Employment Judge and cannot be decided by this Tribunal which is bound by that earlier judgment.

252. The Tribunal has also not decided what the correct construction and interaction is between the LLP and PHI because it was not necessary for it to be decided as part of the liability judgment. The Tribunal has set out in its findings the relevant terms of the LLP and PHI policies to understand the parties' positions on the disputed issues and to decide the facts relevant to the detriment/unfavourable treatment complaints. The parties accept this is not an issue of discrimination in the list of issues and unless it is a remedy issue it is not clear to the Tribunal how or why it should resolve a contract dispute about the LLP agreement which has expressly been carved out of the Claim 1 liability judgment and may be brought in another Court if it cannot be resolved. As far as the insurance contract between the Claimant

and Aviva is concerned the interaction and correct construction of that contract will now have been considered by Aviva, who will have seen the LLP agreement and the financial information provided by the Claimant. If the parties consider it is relevant to remedy, then it will be necessary for the Tribunal to see Aviva's answers to the questions and their reasons for suspending the benefit, if it affects any loss of income claim made in respect of any unlawful discrimination. Similarly if the parties consider a remedy issue involves consideration of the 'insurance exception' rule which the parties must ensure the Tribunal has all the relevant information at the remedy hearing and any applicable case law so that representations about this can be considered at the remedy hearing.

Liability Issues in Claim 2 : Victimisation/discrimination arising from disability.

253. The issues the Tribunal had to decide were whether the alleged conduct occurred? For the victimisation complaints the issue was whether that conduct had occurred did it amount to a detriment? If so, did the first claim (protected act) have a significant effect on the outcome? For the discrimination arising from disability if the alleged occurred, the issue was whether the conduct amounted to unfavourable treatment? If so, was the reason for that unfavourable treatment something arising in consequence of the Claimant's disability?

Allegation 1: Withholding Profit Share

Claimant's written submissions

254. Mr Cordrey submits (paragraph 79 and 80 written submissions) that the Respondents were withholding profit share as part of a tactic to pressure the Claimant to resign. He submits Miss Russell and Mrs Lord have taken approximately £360,000 of profit out of the business over the last three years whilst the Claimant has received nothing. The reason the Claimant has received nothing is the same reason that they sought to expel him from the firm and marginalise and exclude him: because of his sickness absence, his entitlement to PHI and profit share and the fact he had issued a discrimination claim against them.

Respondents' written submissions

255. Mr Burns submits (paragraphs 76-83) that the alleged conduct of 'withholding' profit is not made out on the undisputed facts. Profit share is payable in 3 ways, monthly drawings of £5,000 on account of profit share, payments of income tax on profit share to HMRC on behalf of each member and any additional drawings of profit decided by the members if there is excess in the members' current account and good cashflow to enable profit to be taken.

256. It is common ground that all members have been treated the same in relation to the payment of income tax. The accounts were filed on the Claimant's insistence, as if he was entitled to full profit share without any deduction due to PHI - therefore all members have drawn profit share on account of income tax. Albeit the Claimant has filed contradictory accounts on 1 November 2021 to show that he earned no profit and was not required to pay income tax during 2019 and 2020. Mr Burns submits the Claimant's motivation for doing so appears '*rather murky*'.

257. Mr Burns submits that it is also common ground that the Claimant has not taken monthly drawings of £5,000 while in receipts of £6-7,000 in monthly PHI payments. These drawings were not paid with his agreement initially. It is assumed that he did not want the Respondent to pay him monthly drawings as he wanted instead to take the profit as a lump sum so he could pay it into his pension fund and represent to Aviva that it was actually paid 'directly' from the LLP to 'his pension pot'. Therefore, it is not thought that this is part of his claim of withholding. None of the members have had any profit share in excess of monthly drawings throughout the period of Claim 2. There has not been the cashflow to pay out further profit share even if there had been no dispute. Mr Burns relies on the Claimant's repeated concession (made during the Tribunal's questioning and in re-examination) that lack of cashflow was the reason why he had not been paid profit share before his retirement. It was also conceded that the reason why the LLP members have not been paid any profit share as an annual lump sum over and above drawings is due to Covid - related cash flow which the Respondents submit have nothing to do with disability or the Claimant bringing his first claim on 16 April 2020.

Conclusions on Allegation 1: Withholding Profit Share

258. The Tribunal preferred and accepted all of Mr Burns submissions on this allegation which were supported by the findings of fact made by the Tribunal at paragraphs 117-137. Firstly, Mr Burns has correctly assumed the reason why the Claimant was not paid his monthly drawings from October 2018 was because of the common understanding of the parties that profit share paid by the firm would affect the income protection benefit paid by Aviva, the Claimant could not have both. As the Claimant confirmed to his partners on 27 September 2018 "***under the terms of the insurance I cannot be paid by the firm after 4 October 2018"***. The timing of the Claimant's communication to his partners fits with the Insurer's written confirmation email of 26 September 2018, that any continuing income would be taken into account in calculating the benefit entitlement and could exhaust/exceed the PHI payment made by the Insurer which could result in an overpayment of benefit which would be reclaimed. The Insurer was being transparent with the Claimant before it made any payments and made it clear there was an ongoing duty of disclosure of medical incapacity and of financial information. Two years later in October 2020 the Claimant wrote to the LLP's new accountant to provide some background and confirmed "***I ceased taking any drawings from the LLP in October 2018 when a personal PHI scheme commenced"*** .He confirmed that position at this hearing in his witness statement "***I have never suggested that I would take my profit share as drawings during the period I was in receipt of the PHI benefit***"(see paragraph 105). The decision not to take any monthly drawings from October 2018, was a decision made by the Claimant because it suited him and was financially in his best interests. The Claimant now seeks to unfairly portray Miss Russell and Mrs Lord as the greedy partners paying themselves the drawings they were entitled to be paid for working from October 2018 and not paying him when he was totally unable to work and was claiming benefit for his lost income under the terms of the insurance.

259. At the end of each LLP accounting period in December 2018/2019 and 2019/2020 the LLP Accounts were approved and agreed by the equity partners. The Claimant knew his full profit share had been allocated (without reduction) to his current account and that his tax liability on his profit share was declared to HMRC and paid in full on time at his insistence. He accepted there was no cash flow available for the whole Claim 2 period and that was the reason why unpaid profit share was not distributed to any designated member. The LLP accounts showed profit share had not been 'withheld' from him and had been correctly allocated to him in the LLP accounts. The Respondents correctly pleaded in their response that it has been evident to the Claimant that the Respondents' have not withheld the Claimant's profit share for discriminatory reasons (see paragraph 68). It was evident that was his understanding in July 2020 in the further and better particulars provided for Claim 1 and to the LLP accountant in October 2020 his concern was about missing any distribution of profit share made to the other designated members and it would have been apparent from the accounts that had not happened because the firm did not have the available funds. At all times up until the Claimant's retirement on 8 March 2021 the Claimant knew his full profit share had been allocated to his current account and had not been withheld yet has continued to present a case fundamentally contrary to the evidence.

260. When the Claimant retired on 8 March 2021, he retired knowing his full unpaid profit share had been allocated to his current account. As at the leaving date the Claimant was no longer a designated member and became an "outgoing member" of the LLP whose unpaid profit share and capital became a debt of the firm. On 31 March 2021 in accordance with the terms of the LLP agreement the LLP accountant calculated his entitlement as at the leaving date. The accountant deducted PHI payments received by the Claimant and then calculated a monthly repayment figure for 3 years to 31 March 2024. The Respondents wanted to start repaying the Claimant to reduce the debt from his capital and current account, but the Claimant insisted he was not to be paid anything from the balance of his current account until the Tribunal decided remedy. The Respondents complied with his instruction which he reaffirmed, for the 'avoidance of any doubt'. In light of those incontrovertible facts (known to the Claimant), it was difficult for the Tribunal to understand why the second claim was presented in June 2021 alleging that as a designated member he was subjected to unlawful discrimination in January 2020 when he knew his profit share had not been withheld from him.

261. Mr Cordrey has not identified any of the evidence from which the Tribunal could make the necessary findings of facts to establish a prima facie case of unlawful discrimination that the Respondents were withholding the Claimant's profit share. Instead the submission made focusses on Miss Russell and Mrs Lord unfairly taking advantage of the situation by taking their monthly drawings and paying the Claimant nothing when in reality the situation was being engineered by the Claimant to achieve the outcome that was most advantageous to him. Unfortunately, the Respondents would not legitimise that plan because they believed it was dishonest, wrong and potential insurance fraud. The Tribunal finds the alleged conduct of the Respondents 'withholding profit share' is not proved. It follows that there was no detrimental/unfavourable treatment by the Respondents.

Allegation 2: Continuing to question the Claimant's honesty and integrity in applying for and receiving income protection (PHI) and accusing him of misleading his insurers,

Claimant's written submissions

262. Mr Cordrey did not address the Tribunal on this allegation in his written closing submissions which he limited to the allegations of withholding profit share, excluding the Claimant from some management decisions, the Claimant's retirement and reasonable adjustments.

Respondents' written submissions

263. Mr Burns submits that the Respondents had genuine and justified concerns about the PHI claim and the Claimant's failure to tell Mr Munday the full story as he submits was revealed during the course of the hearing. This was not something in consequence of his disability or his claim but entirely caused by the Claimant's questionable conduct in trying to claim both PHI and profit share. It is very difficult to see how, in the light of the evidence given to the Tribunal, that the Claimant could have honestly believed he was entitled to both. He said was unable to answer the Judge's question about why he did not tell his insurers that he did have earnings declared to HMRC when they had twice emphasised that this would affect his PHI payments. Mr Burns submits that the cross examination made very clear that the Claimant has engaged in very dubious conduct and reluctantly and unusually invited the Tribunal to find that the Claimant has been actively dishonest rather than just very foolish. It is now clear that he has sought to hide behind oral advice from Mr Munday, oral advice from HMRC all to suggest that he genuinely believed that he could simultaneously be paid PHI income protection payments and the very income that they were supposed to insure. The Respondents suspected all along that he could not genuinely and honestly believe that to be the case-he was an experienced and intelligent solicitor and partner. Their suspicions were confirmed by the views of the LLP Accountants. The Claimant accepted the correct analysis in the propositions that were put to him about how the insurance policy and profit costs work that if the LLP paid out normally the insurance would not pay out which were agreed by the Claimant confirming that was his understanding at the time.

Conclusions on allegation 2: Continuing to question the Claimant's honesty and integrity in applying for and receiving income protection (PHI) and accusing him of misleading his insurers

264. The Tribunal reminded itself that 'detriment' is to be interpreted widely in this context. It is not necessary to establish any physical or economic consequence. Although the test is framed by reference to a reasonable worker, it is not a wholly objective test. It is enough that a reasonable worker might take such a view. This means that the answer to the question cannot be found only in the view taken by the Tribunal itself. The Tribunal might be of one view, and be perfectly reasonable in that view, but if a reasonable worker (although not all reasonable workers) might take the view that in all the circumstances it was to his detriment, the test is satisfied.

265. The Tribunal has unusually in these reasons set out all the evidence in chief on this allegation, which was given by the Claimant (orally and by way of

documents) to evaluate the credibility of the evidence the Claimant gave to decide whether it support his allegation that the Respondents had by continuing to question his honesty and integrity in Claim 2 and suggested that he was misleading his insurer were subjecting him to unlawful discrimination and victimisation? To argue this was a detriment and these questions were unjustified the Claimant asserts he was **'completely transparent with Aviva about the unpaid profit share and the tax paid'** and provided them with all the documentation. The Respondents do not agree that the Claimant had been completely transparent either with them or with Aviva and has been selective about the information he has disclosed and has supressed material facts/information. They were concerned they could be implicated in potential wrongdoing/ insurance fraud and wanted to obtain appropriate assurances from the Claimant/Insurer to protect the designated members and the LLP.

266. The findings of fact made by the Tribunal(paragraphs 125, 128, 144-154) support the Respondents belief at the time that the Claimant was not being completely transparent about the unpaid profit share or tax .The Claimant was a Senior Solicitor and an experienced Managing Partner who had detailed knowledge of the firm's finances, partnership tax and individual members tax liabilities. Historically the Respondents and the Claimant had always correctly treated profit share as earned income of the LLP until the Claimant changed his mind in November 2021 by filling amended nil tax returns. Up to that point and for more than 20 years he worked under the common understanding that "*when members of an LLP file their personal tax returns, they are required to include as a taxable profit from the LLP whatever sum has been allocated to them in the partnership statement contained within the LLP's partnership return: section 8(1B)-(1)(C) of the Taxes Management Act 1970*. He knew 'receipt' was not the taxable event in the LLP. The Claimant confirmed his understanding of his personal tax liability to the new LLP accountant in October 2020. He confirmed it was his intention to continue to be proactively involved in the calculation of the members income tax and confirmed his personal accountant would be submitting his tax returns. He insisted his tax on his unpaid profit share was paid on time. Consistent with that position, his tax return was submitted in January 2021 with the advice and assistance of his accountant declaring income (profit share) in the same way as it had always been declared. The Tribunal found the Claimant's enquiry to HMRC involved selective reporting of information and was extremely suspicious and self-serving. The nil tax returns were provided to AVIVA to persuade the Insurer that there were no 'continuing payments' in an attempt to explain the Claimant's omission in declaring his 'continuing income'. If that new tax return was correct, the LLP accounts approved by the Claimant and filed at Companies House each year allocating him his full profit share were incorrect. The Claimant has continued to unfairly blame the First Respondent and/or the First Respondent's accountant for 'wrongly' paying his tax on profit share when he knew it was paid correctly on his unpaid profit share with his knowledge and approval. His case was fundamentally contrary to the evidence and his evidence at this hearing was untruthful and was misleading.

267. The Claimant's assertion that he was being 'completely transparent' with the Aviva and had disclosed all the information they requested was also untrue. It had taken the Claimant 3 years (September 2018 to September

2021) to provide information requested by Aviva. Up to then the Claimant had only disclosed historical information to support the initial assessment of his claim leaving Aviva to assume(wrongly) that there was no ongoing continuing income declared to HMRC. The Claimant never verbally informed Mr Munday that he was receiving continuing income on which tax had been paid twice yearly (January and July) in 2019, 2020, 2021 in the total sum of £252,283.53. He gave unsatisfactory evidence that did not explain the omission. It had taken more than 14 months (December 2019 to February 2021) for the Claimant to answer the Respondent's questions about PHI/Profit Share and a further 6 months before the Respondents solicitors went on to make their own direct reasonable enquiries with Aviva, because the Claimant was unwilling to cooperate with making a joint enquiry. The questions the Respondents wanted to ask Aviva were not misleading. The answers have been provided to the Claimant but have not been shared with the Respondents or the Tribunal. They are said to have resulted in PHI payments being suspended from November 2021, presumably because the financial information the Claimant provided in September 2021 disclosed continuing income which affected the PHI benefit which had been the Respondents' position all along.

268. The Tribunal agreed with Mr Burns submissions which were supported by the findings of fact. Unfortunately, the overall impression the Tribunal had of the Claimant was that he was not a truthful witness he was not completely transparent and had given misleading evidence to the Tribunal in an attempt to hide the true facts because they were unhelpful to his case. However, it was not the Tribunal's view as to the Claimant's honesty and integrity that was relevant to decide if he had been subjected to a detriment by the Respondents' continuing to question the Claimant's honesty and integrity in applying for and receiving income protection (PHI) and accusing him of misleading his insurers.

269. The key issue is whether "the treatment is of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment" The relevant circumstances of the treatment of the worker are that he is an equity partner in a law firm, which pays the partners' premiums for income protection benefit to compensate the partner for lost income as a result of medical incapacity. The partners agree that while the worker is in receipt of income protection benefit, he cannot be paid by the firm. A year later the worker changes his mind and wants the other partners agree to pay him by way of an annual lump sum made directly into his pension so that he can be paid by the firm and by the insurer. There is then a dispute between the partners about whether it was appropriate for the firm to make payments in the way suggested based on their understanding of insurance and potential fraud. The firm and the other partners are concerned that if they agreed to do what the worker suggests they could be implicated in potential insurance fraud/dishonesty. In those circumstance they seek appropriate assurances from the worker and his solicitors to protect their position. The firm and the other partners were not satisfied by the responses provided to those enquiries and seek the worker's agreement to making a joint insurance enquiry with the workers solicitors so the insurer can provide the appropriate assurances. The worker is uncooperative and unwilling to

make those joint enquiries. As a result, the firm and the other partners attempt to make their own enquiries with the insurer. The insurer conducts its own investigation and requests the worker provides financial information. Payment of income protection benefit is then suspended pending further investigation. The worker complains the continuing enquiries made by the firm and the partners about the insurance and payment by the firm were unjustified because he has been completely transparent with the insurer.

270. Would a reasonable worker in those circumstances view continuing enquiries being made of the worker's insurance claim and receipt of benefit as a detriment or unfavourable treatment? The Claimant would be put at a disadvantage if the continuing enquiries were unjustified because he had provided satisfactory responses to the questions asked and had cooperated with a joint enquiry. That was not the position because the Claimant was not being transparent with the Insurer or with the Respondent and he had not disclosed all information about unpaid profit share and tax paid. The reason why the Respondents continued to ask questions was because they were not satisfied by the response the Claimant had given to them or by the very limited information the Claimant was prepared to voluntarily disclose to them. They were genuinely concerned, and the Tribunal have found, that information was being supressed from the Respondents and from the Insurer. The continued questioning was not in all the circumstances a detriment or unfavourable treatment. All designated members of an LLP have responsibilities to each other and the LLP to act in good faith and would be expected to seek appropriate assurances to protect the LLP. If the Tribunal was wrong in its view that it was not a detriment or unfavourable treatment, the Tribunal agreed with Mr Burns submissions that the reason why, the Respondents continued to ask questions was clear from the positive findings of fact the Tribunal was able to make that it was not because of anything arising in consequence of the Claimant's disability or because of his first claim to the Tribunal, it was because of the Claimant's lack of transparency, his unsatisfactory responses to questions, his unwillingness to cooperate with any joint enquiry, which did not alleviate the genuinely held concerns the Respondents' held at the time that they could be implicated in insurance fraud.

Conclusions on allegation 3 :The Second and Third Respondents, paying themselves interest on Capital on or around 10 February 2021 but not paying the Claimant's interest on Capital until 1 April 2021.

271. The Tribunal's findings of fact are set out at paragraphs 138-143. The Tribunal found it was reasonable for the Respondents to request assurances from the Claimant before making payments from the firm to protect their position so that they could not be implicated in any wrongdoing. If the Claimant was being completely transparent with the Insurers and with the Respondents, he cannot explain why he was unwilling to provide the assurances requested.

272. Objectively viewed the Tribunal concluded this treatment was not such a kind that a reasonable worker would or might take the view that in all the circumstances including the previous history. It was not detrimental or unfavourable treatment. Even if it was the Tribunal concluded that the reason why those assurances were sought was not because of anything arising in consequence of the Claimant's disability or his first claim to the

Tribunal, it was because of the Claimant's lack of transparency, his unsatisfactory responses to requests for information from the insurer, his willingness to cooperate with any joint enquiries, and the genuinely held concerns the Respondents held at the time that they could be implicated in insurance fraud.

Conclusions on allegation 4: Failing to reinstate the Claimant to the positions of Managing Partner: Client Care Partner: Compliance COLP: Compliance COFA: Credit controller and/or Data Protection Manager.

273. The Tribunal's findings of fact are set out at paragraphs 172-176. It is accepted the Claimant was not reinstated into the role of Managing Partner, Client Care Partner: Compliance COLP: Compliance COFA: Credit Controller and/or Data Protection Manager because the Claimant was assessed as medically unfit for work, he was in receipt of PHI benefit on the basis he was totally unfit to work and any return to work had been ruled out on the fit notes throughout the Claim 2 period.

274. Miss Lord and Miss Russell had assumed the role of Joint Managing Partners and shared those responsibilities during the Claimant's absence. Mrs Lord did not agree with the suggestion made by Mr Cordrey that as a 'gesture of good will' she should have restored the Claimant's Managing Partner 'title' without requiring him to perform any of the responsibilities of the role. She said it would be misleading and inappropriate for the firm to misrepresent the position in that way. In his closing submissions Mr Burns reminded the Tribunal that this reframed detriment was not the pleaded detriment. The Tribunal agreed that was not the pleaded detriment and that it was unreasonable and inappropriate for the Respondents to run the firm in the misleading way suggested.

275. The alleged conduct is not made out on the facts. The complaint of detriment/unfavourable treatment is not well founded.

Conclusions on allegation 5 : Withholding information from the Claimant: minutes of partner's meetings: details of management decisions and supporting documents and correspondence: budgets and finance reports including information about Work in Progress

276. The Tribunal's findings of fact are set out at paragraphs 176-179. The Respondents did not withhold information from the Claimant. The alleged conduct is not made out on the facts. The complaint of detriment/ unfavourable treatment is not well founded.

Conclusions on allegation 6 : Excluding the Claimant from partner's and/or management meetings.

277. The Tribunal's findings of fact are set out at paragraphs 180-182. The Claimant was included in all partners meeting and was not excluded from any partners meetings. The alleged conduct is not made out on the facts. The complaint of detriment/ unfavourable treatment is not well founded and is dismissed.

278. The 'therapeutic' limitation put in place by the Insurer only permitted attendance at partners meeting not management meetings involving the day to day management of the firm. The Claimant did not expect to attend those meetings and the Respondents did not require him to attend those

meeting while his fitness to work rule out a return to work with or without adjustments. The Claimant confirmed it was 'impossible' for him to have any face to face with Mrs Lord or Miss Russell and that was the reason why he did not attend any partners meeting in person or remotely so in reality the Claimant would not have attended management meetings.

279. It was a reasonable for the Respondents not to include the Claimant in management meetings when day to day management responsibilities had been assumed by Mrs Lord and Miss Russell as the joint managing partners. Objectively viewed the Tribunal concluded this treatment was not such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment or unfavourable treatment. The complaint of detriment/unfavourable treatment is not well founded.

Conclusions on allegation 7 : Excluding the Claimant from management decisions including the decisions to appoint new accountants, to terminate the First Respondent's relationship with Peninsula, and to make a financial settlement to a former member of the First Respondent

280. The Tribunal's findings of fact are set out at paragraphs 183-187. Out of 8 original allegations only 3 remained to be pursued as unlawful treatment with no explanation provided to explain why the claimant accepted the majority of the decisions were lawful management decisions taken by the joint manging partners who had lawfully assume the role and had taken over the responsibilities of that role.

281. The Claimant was not excluded from the partnership decision to appoint new accountants. He was consulted, his input was accepted by Mrs Lord and Miss Russell and as a result of his input the partners agreed to appoint a different accountancy practice. On 29 October 2020, the Claimant wrote to the new accountants accepting their appointment. The alleged conduct is not made out on the facts. The complaint of detriment/ unfavourable treatment is not well founded.

282. The decision to terminate the First Respondent's relationship with Peninsula in July 2020 was made during the pandemic because the HR manager had reported difficulties to the managing partners that Peninsula who were not answering queries or provide advice in a timely manner which left the firm in a 'vulnerable' position at a difficult time. Mrs Lord and Miss Russell as the managing partners made a reasonable management decision to end the contract with Peninsula and find a provider that could better meet the firm's needs instead of leaving the firm in a vulnerable condition. Given those undisputed facts we find the complain that the Claimant reasonably believed he was being subjected to a detriment or unfavourable treatment is not well founded.

283. The Claimant was not excluded from the partnership decision to make a settlement payment to a former member on the legal advice of the First Respondent's solicitors. The Claimant was included in all the emails and was provided with a copy the legal advice obtained by the firm which advised a settlement. A settlement was concluded based on the legal advice obtained by the firm. It was reasonable for the partners to make that decision and follow the legal advice obtained by the First Respondent's solicitors. In closing submissions, it was conceded that the Claimant had been 'partially involved' in that decision. Despite making that concession the

complaint was not withdrawn. Given those undisputed facts we find the complain that the Claimant reasonably believed he was being subjected to a detriment or unfavourable treatment is not well founded.

Conclusions on allegation 8: Subjecting the Claimant to a barrage of correspondence and maintaining a hostile and aggressive tone and content in their communications with him.

284. The Tribunal's findings of fact are set out at paragraphs 188-193.

285. This alleged detriment is not referred to at all in Mr Cordrey's closing submission but is dealt with by Mr Burns at paragraph 70-71 of his closing submissions.

286. We agreed with the short and valid point Mr Burns makes that of the 4 examples the Claimant has referred to in his witness statement, 3 of the letters were sent between the solicitors litigating in Claim 1 and were not sent directly to the Claimant. Parties in litigation adopt a combative tone at times. The Claimant as an experienced solicitor is familiar with how that litigation process works.

287. In relation to the correspondence with Mrs Lord it was reasonable for Mrs Lord as the joint managing partner to be able to communicate her feelings in a clear and frank way to a fellow partner at a time of crisis. She was communicating her genuinely held view that the Claimant was behaving unreasonably by refusing to agree to a loan she believed was (and has proved to be) in the best interests of the firm. The Claimant accepted it was sent at a time when the firm was in 'absolute crisis' and that Mrs Lord and Miss Russell appeared to be worried about the firm. Objectively viewed the Tribunal concluded the letters sent by Mrs Lord or the letters exchanged between the parties' solicitors during litigation was not treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment or unfavourable treatment. The complaint is not well founded and is dismissed.

Allegation 9: Claimant's retirement on 8 March 2021

288. The Tribunal were able to make very clear positive findings that did not support any of the alleged unlawful pre-retirement discrimination and the Claimant has failed to prove a prima facie case of discrimination arising from disability or victimisation. Dealing then with the retirement. Was the Claimant's decision to retire an act of unlawful discrimination or victimisation by the Respondents? Did the Respondent treat the Claimant unfavourably because of something arising from disability or was the Claimant subjected to a detriment because the Claimant did a protected act? It must be remembered that the unfavourable or detrimental act was not a decision made by the Respondent it was the Claimant's decision to retire with immediate effect on 8 March 2021.

Claimant's written submissions

289. Mr Cordrey has made very brief written closing submissions about the reason why the Claimant retired on 8 March 2021(paragraph 81-83). He submits that the Claimant's decision to retire was significantly influenced by the alleged discrimination relied upon in Claim 2 and was therefore *of itself*, an act of unlawful discrimination on the Respondent's part. He relies upon

the first admitted act of discrimination in Claim 1 which was the commencement of attempts to expel the Claimant from the Respondent on 28 November 2019, with a range of further discriminatory steps taken to marginalise and remove the Claimant throughout November, December 2019 and January 2020. He submits that in around January 2020, the Respondents made a decision to withhold the Claimant's profit share, ostensibly on the basis that he was not entitled to payment of his profit share and at the same time retain income protection PHI payments which he had been paid in consequence of his disability. He submits that whether taken cumulatively with the admitted discrimination of Claim 1 or taking the conduct particularised in Claim 2, the loss of the future years of profit share flows naturally and directly from the Respondent's discriminatory conduct.

Respondents' written submissions

290. Mr Burns submissions (paragraph 83-88) are detailed and rely upon the undisputed contemporaneous documentary evidence and Claimant's own evidence about the circumstances that existed at the time he made his decision to retire. He submits that evidence reveals the real reason why the Claimant resigned on 8th March 2021 which was that he did not want to have to choose between supporting the proposal for a CBIL loan and premises move or allowing the firm to go into liquidation. Had he stayed as a partner and continued to veto the crisis proposals liquidation was inevitable. He retired on the last day of his fit note to avoid the crunch decision. His retirement was not caused by discrimination or victimisation but by the economic and organisational pressures facing the firm

Conclusions on allegation 9: Claimant's retirement on 8 March 2021

291. The Tribunal's findings of fact are set out at paragraphs 194-214. Although Mr Cordrey's closing submissions are silent on the timing and circumstances as at 8 March 2021, the Tribunal could not ignore those circumstances to decide what had significantly influenced the Claimant in making that decision on that day. We reminded ourselves that it is for the Claimant to prove on the balance of probabilities the matters which he wished the Tribunal to find, from which an inference could properly be drawn that his decision to resign was an unlawful act of discrimination arising from disability or because he had done a protected act.

292. The Claimant says he resigned as "*a direct result of the discriminatory treatment starting in Claim 1 which continued with the alleged unlawful treatment in Claim 2, as a result of his GP's advice, he felt his position became untenable and he had no option but to retire*". The Claimant has not proved any acts of unlawful discrimination have occurred in the Claim 2 period of 17 April 2020 to 8 March 2021. The last admitted act of discrimination in Claim 1 occurred in January 2020 which was the act of excluding him from a partners meeting which did not take place. If the Claimant was resigning in response to that act, he cannot explain why he continued to be a partner in the firm for over a year after that act to March 2021.

293. The reality was the Claimant had been absent from the partnership due to ill-heath from September 2018 to March 2021. The relationship between the partners had broken down from October 2019. The Claimant had refused to have any direct contact with his partners from May 2020 and only agreed to

having limited contact by post from September 2020. From that date onwards Mrs Lord was communicating with the Claimant by post and reasonable adjustments had been made to enable the Claimant to remotely participate in partnership meetings. The Claimant was included in all partners meeting up until his retirement. He was provided with all the relevant information by post in good time before the meetings and was encouraged to participate and provide feedback. Mrs Lord tried to persuade the Claimant that the CBIL loan and premises move were in the best interests of the firm. She invited the Claimant to speak to others (the firm's Bank and the firm's accountants) if he needed any reassurances about the loan. The Claimant understood why the CBIL loan was urgently needed by the firm and that it was provided on favourable terms. He knew why the firm needed to move out of premises which were deemed to be unsafe. He knew the landlord had offered new premises on favourable terms. The Claimant knew what the consequences were to the firm if those decisions were not made. While the Claimant was able to refuse to agree to taking out a loan, he knew was urgently needed for the firm's future viability, he was able to insist the firm took out a loan to pay the partners tax liability when those payments could have been deferred. Despite the Respondent's best efforts, the Claimant steadfastly refused to agree to the loan or the premises move going so far as instructing his solicitors to warn Mrs Lord and Miss Russell that they would be in breach of the LLP agreement if they proceeded without his consent.

294. The Claimant refers to resigning '*as a result of his GP's advice*' and that he felt his position '*became untenable'*. The Tribunal accept that was how the Claimant felt, but considered why he felt his position as a partner had become untenable on 8th March 2021, with immediate effect that day? We agreed with Mr Burns submissions which are supported by our findings of fact. The Claimant's last fit note expired on 8 March 2021 and he knew he had 2 days left before he had to make a crunch decision choosing between supporting the proposal for a CBIL loan and premises move or allowing the firm to go into liquidation. The fate of the firm rest in his hands. The Claimant did not want to lose face and cooperate with his partners and then continue to be in partnership with them, but he also did not want to be responsible for the firm's liquidation by continuing to veto the crisis proposals. The significant influence for the Claimant in making his decision to retire on 8 March 2021 was that it was the only way of avoiding having to make that crunch decision. That was why he chose to retire on that day instead of choosing to continue in partnership. It was his choice and an entirely voluntary decision. It was not unfavourable treatment or a detrimental treatment by the Respondents. It was not an act of unlawful disability discrimination or victimisation.

295. Finally, at the beginning of these reasons the Tribunal identified three undisputed limitations which affected the Claimant's ability to work or engage in work related activities during the Claim 2 period of 17 April 2020 to 8 March 2021. The medical limitation that ruled out the possibility of any return to work. The insurers 'therapeutic limitation' which only permitted the Claimant to attend monthly partners meetings and the Claimant's 'self-imposed limitation' based on his unwillingness to have direct contact with the Respondents. The Respondents had not imposed any of those limitations on the Claimant who does not appear to have considered how

those agreed limitations, impact on the prospects of success of his work-related complaints of unlawful disability discrimination and a failure to make reasonable adjustments.

Reasonable Adjustments

296. Dealing then with the complaint of a failure to make reasonable adjustments made pursuant to sections 20(3) and 21 Equality Act 2010. The Tribunal must firstly, identifying the PCP applied by or on behalf of the employer. Secondly the identity of the non-disabled comparators (if appropriate) and thirdly the nature and extent of the substantial disadvantage suffered by the disabled person.

297. Mr Cordrey's submission (paragraph 84) was very brief. He submits that "*despite admitting discrimination in this regard as part of Claim 1 the Respondents continued to fail to investigate and make reasonable adjustments as would have enabled the Claimant to work from home, continue with his management roles and/or return to work on a phased basis*".

298. Mr Burns' detailed submissions (paragraphs 89-94) are supported by the Tribunals findings of fact at paragraphs 167-171. Mr Burns highlighted the evidence that shows the duty to make reasonable adjustments was never engaged because the Respondents never applied any of the 4 PCP's the Claimant relies upon at the material time. The Claimant has not proved facts that could show they were applied or placed the Claimant at any substantial disadvantage. As the duty to make reasonable adjustments under section 20(3) was never engaged the Respondent cannot have failed to make reasonable adjustments under section 21. All the fit notes provided for the whole Claim 2 period ruled out a return to work with reasonable adjustments. The Claimant accepted the Respondents were offering to make reasonable adjustments as soon as the medical opinion said it was appropriate for him to return to work. In the meantime, the Respondents made the adjustments they could make for the Claimant to participate in partnership meetings remotely by post in the limited way he had permitted.

299. The Tribunal agreed with Mr Burns submission that the Claimant has the burden of proving a prima facie case that the duty to make reasonable adjustments was engaged and the respondents failed to comply with that duty. The first step is to prove the four the provisions criteria or practices were applied to the Claimant by the Respondent. The Claimant has not shown the respondent applied any requirement that he was '*fully ft to return, rather than accepting fitness to perform a therapeutic level of work*'. The Respondents followed the Claimant's lead as to his level of involvement in the firm during his sickness absence. When the Claimant refused to have any direct contact with the Respondents from May 2020 they complied with that instruction. When the Claimant agreed to have contact by post from September 2020, the Respondents complied with his instruction and adjustments were made to enable the Claimant to continue to be involved in partnership meetings remotely by post. The Claimant has not shown the First Respondent applied a requirement that he was '*fit for a full time return to participate in the firm rather than accepting a phased return*'. The Claimant was never fit to return to work on a phased basis. The Claimant has not shown the Respondent applied a requirement of '*holding partners'*

meetings at the Rotherham office rather than at the Claimant's home'. There was no requirement applied by the Respondent for the Claimant to attend meetings in the office rather than at the Claimant's home. The pleaded PCP does not fit with the Claimant's instruction of 'no direct contact'. It was not clear to the Tribunal how the Claimant can argue that a reasonable step the firm should have taken during the Claim 2 period was to hold partners meetings at his house.

300. Mr Cordrey appears to rely solely on an admission made in Claim 1 of a failure to make reasonable adjustments to support allegations of a failure to make reasonable adjustments in the Claim 2 period. None of the facts necessary to show the duty to make adjustments was in fact engaged in the Claim 2 period have been proved by the Claimant. The complaint fails at the first hurdle and was another complaint of unlawful disability discrimination which was fundamentally contrary to the evidence. The Tribunal preferred and accepted Mr Burns submissions supported by the evidence and by the findings of fact. The complaint of a failure to make reasonable adjustments is not well founded and is also dismissed.

301. As a result of those conclusions the only matters that remain to be determined at the remedy hearing are remedy for the admitted discrimination in Claim 1 as identified in the remedy list of issues and the Claimant's outstanding costs application.

Employment Judge Rogerson

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Date 29 April 2022