



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr. S. Ellery

**Respondent:** Mid and West Wales Fire and Rescue Service

**HELD AT/BY:** Wrexham & Mold by CVP      **on:** 9<sup>th</sup> – 13<sup>th</sup> May 2022

**BEFORE:** Employment Judge T. Vincent Ryan  
Ms L. Owen  
Ms J. Kiely

## REPRESENTATION:

**Claimant:** Ms A. Johns, Counsel

**Respondent:** Mr A. Roberts, Counsel

**JUDGMENT** having been sent to the parties on 16<sup>TH</sup> May 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

**The Issues:** The parties agreed a joint list of issues and they are appended to this judgment (Appendix 1)

### The Facts:

1. The parties have agreed a cast list (appendix 2), a chronology (appendix 3) and a glossary (appendix 4). These appendices are endorsed and adopted by the Tribunal; the Tribunal confirms they set out the Tribunal's findings of fact in their respective contexts.
2. The claimant was employed by the respondent as a firefighter from April 1997 until his dismissal on notice on 11th March 2021. The claimant was a very experienced, highly competent, committed and conscientious firefighter whose service was valued by the respondent. Despite the events leading to the claimant's ultimate dismissal the tribunal finds that at all material times the claimant wanted to remain

in employment and the respondent wanted to retain the claimant's services. Both parties made considerable efforts to arrive at workable solutions to issues that arose, with the view to maintaining the employment relationship. That said, we find that the claimant's subjective view was that the respondent showed a determined unwillingness to positively engage in issues arising from his disability and to seek solutions to the work-based problems that arose in consequence of his disability; whilst the Tribunal sympathises with the claimant's opinion and understands his disappointment and hurt at the ending of the employment relationship, the Tribunal finds that there was no determined unwillingness to positively engage in such issues or to seek solutions on the part of the respondent. It could have done more and it could have done differently, but the respondent was willing to, and did, engage positively in the issues that arose and it did seek solutions.

3. The claimant's disability is hearing loss with tinnitus. The claimant underwent audiometry tests in March 2017 and potential abnormality was detected with reduced high frequency hearing, particularly on the right side, and at that stage it was thought possibly to be mild noise-induced hearing loss. It appears that the claimant's hearing loss was progressive. The claimant was serially and appropriately referred by the respondent to occupational health doctors, and he was seen by a consultant audio vestibular physician, all of whom provided reports to the respondent. Those reports confirmed that the claimant was fit to work but that extended or repeated noise exposure at or above 85 decibels could cause him further hearing loss, that for every 3 decibel increase in volume above 85 decibels, hearing loss could be increased by up to 50% (that is the claimant's hearing could be reduced to that extent), and exposure to noise at 100 decibels could cause injury.
4. While that is the background medical situation, the chain of events leading to the claimant's eventual dismissal started with an incident at work on 12th October 2018. During BA training a DSU alarm on a colleague's suit went off, its volume causing the claimant a personal injury affecting his hearing. The parties know and understand the volumes at various times at which that alarm sounds and the reasons.
5. In consequence of that event the claimant commenced wearing ear protection whilst at work. He reported the incident. Because of the incident and the claimant's preference to wear ear protection, the respondent, principally through Ms Edwards took the following action:
  - 5.1. An assessment with noise measurements was carried out at the station where the incident occurred;
  - 5.2. Cirrus was engaged;
  - 5.3. there was liaison with Celtic hearing;
  - 5.4. Inquiries were made of other services including South Wales,, Berkshire. and Lancashire as to how they managed situations and circumstances such as affected the claimant at work;

- 5.5. Manufacturers' data and specifications, including safety documentation, was checked in respect of various forms of ear protectors and the claimant's hearing aid;
- 5.6. telephone enquiries were made of manufacturers, including 3M who manufactured the claimant's eventual preferred ear protection;
- 5.7. there was liaison with all relevant senior officers and departments within the respondent's service, including corporate risk and health and safety and training concerning the claimant's situations and the circumstances pertaining;
- 5.8. risk assessments were undertaken and reconsidered;
- 5.9. research was carried out including by reference to the Health and Safety at Work Act and the Control of Noise at Work Regulations;
- 5.10. a case manager was appointed to liaise with the claimant and to report back to the respondent;
- 5.11. Ms Edwards met with the claimant and on two separate occasions provided him with alternative forms of ear protection, one active one passive;
- 5.12. the claimant was asked to trial the ear protectors and report back as he thought fit and to express his preference making any comments and observations on his trial that he felt were significant and in any manner he wished. He did so through email correspondence and via the case manager Ashley Hopkins;
- 5.13. as previously stated the claimant was repeatedly referred to occupational health doctors and an appropriate consultant;
- 5.14. the technical above data and confirmation of the claimant's views were passed on to three meetings of the Fitness Advisory Panel (FAP). The claimant's case manager was, unusually, allowed to participate at FAP meetings, at the invitation of Ms Edwards.
- 5.15. based on all of this data the claimant's case was referred to an Independent Qualified Medical Practitioner (IQMP) in accordance with the regulatory procedure.
- 5.16. the respondent considered the claimant's grievance and deferred concluding its ultimate decision on the claimant's future based on the IQMP's recommendation, pending the grievance outcome, such that once again C had the opportunity to say all that he wanted about his views on the safe use of ear protection in an operational setting; the respondent considered his representations. The claimant makes no claim with regard to the handling of his grievance.

6. Neither Ms Edwards nor any other officer of the respondent sat down in a formal meeting with the claimant to go through, summarise, analyse and discuss the considerable amount of data and information obtained. In that sense there was no negotiation over alternative strategies. Despite the recommendation made in various medical reports that there be an individual personal test by the claimant. That said, the claimant's satisfaction with the 3M EEP and his preference for active protection over passive protection, and his belief that he could function safely in an operational situation even using breathing apparatus was known and fully understood by the respondent; it was taken into account by the respondent before it decided to terminate the claimant's employment. The claimant subjectively, and in the circumstances unreasonably, believed that he was not being listened to and not being consulted. The tribunal finds to the contrary. The respondent could have managed the discussions with the claimant in a more empathetic manner to avoid or minimise his feelings of exclusion, however subjective and without reasonable cause. In fact the respondent ascertained, knew, understood and took into account the claimant's representations about wearing ear protection, his preferred form of ear protection, and that he felt he could operate safely with it.
7. The respondent's abiding concern was that ear protection would compromise available PPE, specifically the DSU on the Drager BA suit. There is a variable alarm indicating whether or not a firefighter has moved within a certain length of time; it increases in volume; the volume is significant in terms of that duration and also the distance between the apparently inert firefighter and his or her colleague or buddy in the same operational situation. The respondent ascertained that the preferred active ear protection would flatten the sound and level it out at an acceptable, to the claimant, 82 DB. All sounds in that operational situation would then be heard at that level. It is accepted that the likelihood is the operational situation would be noisy with perhaps the sound of machinery and almost certainly of various alarms and sirens. Where hearing is the primary sense being relied upon potentially in a smoke filled room, the firefighters hearing would be muted by ear protection whilst he or she worked with colleagues operating under different auditory circumstances.
8. The respondent was concerned that active ear protection, designed and made for an industrial or construction setting and not an operational fire emergency setting, would be unsafe. The equipment is electronic and therefore not intrinsically safe. Noises that ought to be heard at particular levels for a given reason would be flattened out and reduced in volume; lesser sounds would be amplified to the same volume thus creating an artificial situation where all noise would be heard at the same level. Data could not be obtained to safely establish that even if these other objections could be overcome the ear protection would work at potentially high temperatures of 200 - 300 degrees centigrade. In the event that the equipment did not work the claimant could be exposed to DSU alarms at a volume in excess of the damaging 100 decibels proscribed by the various physicians who had advised.
9. After careful consideration and taking all matters into account including the claimant's preference and his rationale, the respondent concluded that it could not safely allow the use of active ear protection for firefighters using BA. The respondent was concerned at the implications for the safety of others if it allowed the claimant his way and others then also asked for the same accommodation; as potentially risky as one firefighter wearing active ear protection with BA was, the

risks would be magnified if more than one firefighter did so in the same operational situation.

10. Following the referral by FAP to the IQMP and the IQMP's certification the respondent had no option under the regulatory scheme but to dismiss the claimant. The claimant did not challenge the IQMP certification, did not present new evidence, and did not appeal the decision to dismiss. He could have done anyone or more of these things but chose not to so.
11. The Tribunal understands that the claimant feels there was a lack of analysis and explanation behind this decision and in particular at the FAP. The tribunal finds that from the minutes of the FAP meetings, and taking into account all of the attendees including Mr Hopkins, their seniority and experience and therefore suitability, the extent of the documentation before them, and the eventual written explanation in outcome correspondence, the respondent has proved that thorough and appropriate consideration was given to all relevant circumstances and factors. The respondent's main concern was the risk that active air protection would overprotect the claimant causing serious risk of injury or death to the claimant, his colleagues, and members of the public in an operational situation. This concern was genuine and conscientious. The respondent's conclusion was reached following thorough analysis and appropriate liaison.
12. Meanwhile, although the respondent's policy was not to permit firefighters to wear hearing aids in operational circumstances, the claimant was permitted to wear his hearing aids at work otherwise. He did not wish to wear his hearing aids in operational circumstances and while using the BA. He wanted to use active ear protection which would in some circumstances increase volume and in others decrease volume but always to a level that he found comfortable (82DB).

**The Law:** The parties made legal submissions as well as factual submissions; they were submitted in writing and augmented by oral submissions. Neither party took exception to the other's cited authorities or their respective interpretations. The Tribunal took account of all submissions made and we briefly summarise the relevant law below, to be read in conjunction with the parties' submissions on the law.

### 13. Disability and Discrimination:

#### 13.1 Arising: S.15 Equality Act 2010 (EqA):

- 13.1.1 A person discriminates against another if they treat that other unfavourably because of something arising in consequence of that person's disability, where the alleged discriminator cannot show that the treatment was a proportionate means of achieving a legitimate aim.
- 13.1.2 Guidance on how to approach a discrimination arising claim was given in *Pnaiser v NHS England* [2016] IRLR 170: (a) the tribunal must identify if there was unfavourable treatment, and by whom; (b) the tribunal must identify what caused the impugned treatment, or

what was the reason for it (the ‘something arising’ need not be the sole reason, but must have at least a significant, or more than trivial, influence on the unfavourable treatment); (c) motives are irrelevant; (d) the tribunal must determine whether the reason (or a reason) is ‘something arising in consequence of C’s disability; (e) the more links there are in the chain between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact; (f) this stage of the causation test requires an objective question and does not depend on the thought processes of the alleged discriminator; (g) it is not necessary for there to be a discriminatory motive, or for the alleged discriminator to know that the ‘something’ that causes the treatment arises in consequence of disability; (h) the knowledge required is of disability only; (i) it does not matter precisely in which order these questions are addressed.

13.1.3 A respondent to such a claim may not know that the “something” arose out of disability (*City of York Council v Grosset* [2018] EWCA Civ 1105. What matters is whether the unfavourable treatment was because of that “something”, which arose out of disability.

13.1.4 In deciding whether the treatment complained of was a proportionate means of achieving a legitimate aim(s), the tribunal should consider whether it was reasonably necessary and appropriate to achieve the aim (*Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15).

13.2 Indirect: S.19 EqA:

13.2.1 Indirect discrimination is where a provision, criterion or practice (PCP) which is discriminatory in relation to relevant protected characteristic is applied in circumstances where it would be applied to people who did not share the characteristic but it puts a person sharing the characteristic at a particular disadvantage compared to others and it in fact puts this person at a disadvantage where the alleged discriminator cannot show it to be a proportionate means of achieving a legitimate aim.

13.2.2 A discriminatory PCP is one which applies to everyone but puts/would put, in this case, a disabled person, at a particular disadvantage compared to others who do not live with a disability, and it must put the claimant at that disadvantage.

13.2.3 S.19 does requires that the PCP be applied to the claimant. It must also apply, or be a PCP that would apply, to employees without the disability. If a claimant establishes that a PCP indirectly discriminated against them, a respondent may be able to justify that PCP if it can show that it was a proportionate means of achieving a legitimate aim.

13.2.4 The effect of PCPs may be considered in combination (MoD v DeBique [2010] IRLR 471).

13.3 Reasonable adjustments:

13.3.1 S.20 & s.21 EqA: where a PCP, or a physical feature, puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a duty on an employer to make reasonable adjustments to avoid the disadvantage. It is necessary to identify: (a) the PCP applied by or on behalf of the employer; (b) the identity of non-disabled comparators (where appropriate); (c) the nature and extent of the substantial disadvantage suffered by the claimant (see Environment Agency v Rowan [2008] IRLR 20).

13.3.2 'Practice' connotes something which occurs on more than on a one-off occasion and has an element of repetition about it (Nottingham City Transport Ltd v Harvey [2013] EqLR 4).

13.3.3 Substantial means more than minor or trivial. The disadvantage must arise from the disability (Newcastle upon Tyne Hospitals NHS Foundation Trust v Bagley UKEAT/0417/11). Identification of a substantial disadvantage involves the accumulative assessment of the PCPs. Physical features or lack of auxiliary aids (Environment Agency v Rowan [2008] IRLR 218). Not being able to work as efficiently or productively as colleagues who do not live with disabilities may amount to a substantial disadvantage in this context.

13.3.4 The duty does not arise if R did not know, and could not reasonably have been expected to know, both that C was disabled and that C was likely to be at a substantial disadvantage in comparison with persons who are not disabled (Secretary of State for Work and Pensions v Alam [2010] IRLR 283).

13.3.5 Paragraph 6.28 of the EHRC Code of Practice recommends that when deciding what is a reasonable step for an employer to have to take some of the factors that should be considered are: whether taking any particular steps would be effective in preventing the substantial disadvantage; the practicability of the step; the financial and other costs of making the adjustment and the extent of disruption caused; the extent of the employer's financial or other resources; the availability to the employer of financial or other assistance to help make an adjustment (e.g. through Access to Work); the type and size of employer.

13.3.6 Where the duty arises, an employer who was unaware of the duty to make reasonable adjustments may still show that it was not in breach of the relevant duty because a particular step would not have been a reasonable one to take. The question is whether,

objectively, the employer complied with its obligations or not (Tarbuck v Sainsbury's Supermarket Ltd [2006] IRLR 664, paragraph 71).

13.3.7 An employee does not have to suggest any, or any particular, adjustments at the material time and may even first make the suggestion during a final hearing (Project Management Institute v Latif [2007] IRLR 579).

#### 14 Unfair Dismissal:

- 14.1 By virtue of section 94 Employment Rights Act 1996 (ERA) and employee has a right not to be unfairly dismissed by his or her employer.
- 14.2 Section 95 ERA describes circumstances in which an employee is dismissed as including where the contract under which he or she is employed is terminated by the employer whether with or without notice.
- 14.3 Section 98 ERA specifies potentially fair reasons as being those relating to capability (by reference to health or qualifications), conduct, redundancy or legal requirement. In addition to those potentially fair reasons section 98(1)(b) also permits of dismissal (subject to the provisions below) for "Some Other Substantial Reason of a kind such as to justify the dismissal of an employee holding the position which the employee held" ("SOSR"). Section 98(4) ERA provides that where an employer has proven that the dismissal was for a potentially fair reason including the possibility of it being an SOSR then the determination of whether the dismissal is fair or unfair depends on whether in the circumstances the employer acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the employee.
- 14.4 Such questions shall be determined by the Tribunal in accordance with equity and the substantial merits of the case. A Tribunal is to take into account the reasons shown by the employer and the size and administrative resources of the employer's undertaking.
- 14.5 The respondent to a claim must establish the reason for the dismissal and it is for the Tribunal to determine the actual reason and whether the dismissal was fair and reasonable.
- 14.6 A Tribunal must not substitute its judgement for that of an employer, finding what it would have done had it been the employer. It must determine the fairness, reasonableness and equity of the employer's actions and decisions.

#### **Application of law to facts:**

- 15 There was a PCP that firefighters may be exposed to sounds greater than 100DB.



- 16 This PCP put the claimant at a substantial disadvantage compared to those who were not so disabled because being exposed to sounds of more than 100DB could place him at a greater, and an unacceptable, risk of harm.
- 17 In the light of our findings of fact the tribunal concludes that using the 3M EEP would not have been a reasonable adjustment as it would compromise other PPE contrary to the respondent's standard operating practise and good practise. The DSU/ADSU would be compromised. The claimant, his colleagues, and members of the public would potentially be put at risk. There was an unacceptable risk of overprotection. In the given circumstances the claimant, and therefore his buddy as there should be two firefighters at all times in operational circumstances, would have to withdraw from an operational situation. The tribunal appreciates and endorses the example given by Mr. Roberts in his written submission, as amended, where he explains the implications of overprotection in circumstances where the claimant wearing active ear protection would be trying to locate a colleague whose alarm had sounded. For all these reasons the respondent and a reasonable and genuine concern about setting a precedent if it allowed the claimant what he contends for; that would cause further jeopardy.
- 18 The adjustment contended for by the claimant would not have been a reasonable adjustment and the respondent has not failed in its duty either in consequence of the PCP or any failure to provide an auxiliary aid.
- 19 Notice of dismissal and dismissal are unfavourable.
- 20 The claimant was unable to work in an operational situation in certain circumstances where noise levels would be above 85DB for prolonged periods or where they peaked at, or in excess of, 100DB because of his disability.
- 21 Given the respondent's conscientious approach as found by the Tribunal and its abiding concern and obligation to protect the health and safety of its employees and the public, the respondent acted to achieve its legitimate aim. With the appropriate referrals to OH, to the specialist, the FAP and the IQMP (all furnished with the appropriate findings of the respondent's research and the claimant's views as expressed directly, through email or via his case manager) the respondent's actions were a proportionate means of achieving that legitimate aim, protection of health and safety.
- 22 The respondent permitted the claimant to work wearing hearing aids but it did not permit him to wear hearing aids in an operational situation especially when using breathing apparatus. The claimant wore hearing aids in and around the station, in non-operational situations. He did not ask to or wish to wear his hearing aids in operational situations when wearing BA. The claimant has not established a group disadvantage in respect of the indirect discrimination claim. The claimant has not established that he was put at a disadvantage by the PCP as it operated in these circumstances. As the hearing aids were not guaranteed to work at the temperatures that may pertain in an operational situation, they were not intrinsically safe, they could not be worn with essential BA, and could not in any event have been worn with the contended-for active ear protection the respondent

has in any event acted in a proportionate manner to achieve its legitimate aim with regard to health and safety.

- 23 Turning to the unfair dismissal claim there is no point taken by the claimant alleging procedural unfairness. The procedure is regulatory and it was followed properly. The alleged unfairness in relation to the dismissal was with regard to failure to consult and to investigate reasonably. The tribunal has found that whilst consultation could have been conducted in another manner and in a way that would perhaps have placated the claimant it was nevertheless appropriate and effective. The technical investigation and paper exercise including assessments, analysis, discussion with manufacturers and other services was thorough and conscientious and therefore not unreasonable.
- 24 With regard to time issues, in view of the primary findings they probably fall away. Rather late in the day the respondent has contended that the reasonable adjustments claim contained in the first claim form was presented out of time whereas the unfair dismissal claim is in time. That took Mr. Jones by surprise and was perhaps unfair. Whilst the point is now academic the tribunal considers that the issue of reasonable adjustments was a live one beyond the date that the respondent initially said that the claimant could not wear active ear protection whilst wearing breathing apparatus in April 2020. That issue continued to arise through the serial referral for medical advice, the active consultation with the claimant through his case manager, up to and including consideration of reasonable adjustments by the FAP and the obligation on the IQMP to comment on the making of or omission to make reasonable adjustments. There was therefore no discrete alleged act of discrimination in April 2020 but a continuing act, a series of acts and course of conduct right up to the ultimate decision to dismiss based on the certification of the IQMP. The reasonable adjustments claim was presented in time and even if we are wrong on that we would have granted a just and equitable extension in the above circumstances.
- 25 With regard to the second claim, that the dismissal was discriminatory and contrary to section 15 Equality Act 2010 because the notice that had been the subject of the previous claim had now taken effect on the 11th of March 2021, the Tribunal finds that the claimant's submissions are correct on this point; the claim was submitted within three months of the effective date of termination. Even if we are wrong on that, if the claimant had succeeded on the facts the tribunal would have allowed a just and equitable extension of time as the second claim is inextricably bound up with the first claim and appears almost to be an amendment, a re-labelling exercise based on the same facts with no prejudice to the respondent, the balance of prejudice being against the claimant.
- 26 For all the above reasons whilst the tribunal finds that the claims were in time they all fail and are dismissed.

Employment Judge T.V. Ryan  
Date: 13<sup>th</sup> July 2022

JUDGMENT SENT TO THE PARTIES ON 21 July 2022

Case no – 1600261/2021

FOR THE TRIBUNAL OFFICE Mr N Roche

## APPENDIX 1

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### LIST OF ISSUES

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#### 1. Jurisdiction

Is the Claimant's claim issued under case number 1600841/2021 time-barred? The Respondent avers that he alleged act of discrimination arose on 22 December 2020, when the Claimant was informed that his employment would terminate. The Claimant appears to have contacted ACAS to initiate early conciliation on 9 June 2021 and subsequently submitted his claim on 11 June 2021, significantly outside of the limitation period in section 123 of the Equality Act 2010.

The Claimant has confirmed that claim 1600841/2021 is a claim for disability discrimination specifically in respect of his dismissal, which took effect on 11 March 2021 (The decision to dismiss was communicated on 18 December 2020, confirmed in writing on 22 December 2020. Claims for disability discrimination in respect of the decision to dismiss and a claim for unfair dismissal were lodged on 26 February 2021 under case number 1600261/2021 and the Respondent does not contend that these claims are out of time).

Regarding claim number 1600841/2021, dismissal took effect on 11 March 2021, the Claimant entered into ACAS Early Conciliation between 9 – 11 June 2021 and the claim was lodged on 11 June 2021. The Claimant contends that claim number 1600841/2021 is therefore in time.

#### 2. Unfair dismissal

2.1. Was the reason (or the principal reason) for the Claimant's dismissal a potentially fair reason under section 98 of the Employment Rights Act 1996 ('ERA')? Namely capability or some other substantial reason to justify dismissal.

2.2. Did the Respondent act reasonably in the circumstances, including its size and administrative resources, in treating this as a sufficient reason for the Claimant's dismissal (section 98(4) of the ERA 1996)? In particular:

2.2.1. Did the Respondent follow a fair procedure in dismissing the Claimant? The Claimant avers that a fair procedure was not followed because he avers that the Respondent failed to adequately consult with the Claimant regarding the 3M EEP;

2.2.2. Did the Respondent carry out a reasonable investigation to establish whether or not dismissal was a reasonable outcome in all the circumstances? The Claimant avers that a reasonable investigation was not carried out.

2.2.3. Did the Respondent, in all the circumstances, act reasonably in treating that reason as a sufficient reason for dismissal?

3. Disability discrimination

3.1. Failure to make reasonable adjustments;

3.1.1. Was a PCP applied by or on behalf of the Respondent? The Claimant says that the Respondent operates a PCP of requiring firefighters to be able to be exposed to sounds of greater than 100db. The Respondent agrees that firefighters will be exposed to sounds of greater than 100db in the operational environment.

3.1.2. If any such PCP was applied to the Claimant, did that PCP put the Claimant at a substantial disadvantage compared to those who are not disabled? s20(3) Equality Act 2010. The Claimant avers that the above PCP puts him at a substantial disadvantage because being exposed to sounds of more than 100db can place him at a greater (and unacceptable) risk of harm than it places a person without his disability.

3.1.3. Non-disabled comparators are firefighters who do not share the claimant's disability.

3.1.4. If any such substantial disadvantage was suffered, what is the nature and extent of the substantial disadvantage suffered by the Claimant in comparison to the non-disabled comparators?

3.1.5. What reasonable steps were the Respondent required to take to avoid any such substantial disadvantage? s20(3) Equality Act 2010. The Claimant avers that a reasonable adjustment of allowing him to wear the 3M EEP device would have alleviated this disadvantage. The Respondent denies that it failed to make reasonable adjustments in relation to the PCPs alleged to have been applied to the Claimant or at all.

3.1.6. At or through what time period were those steps required?

3.1.7. Further, or in the alternative the Claimant claims he was put at a disadvantage in relation to the risk of exposure to sounds of more than 100db compared to persons who do not have his disability, and that the provision of an auxiliary aid, namely the 3M EEP, would have alleviated this disadvantage. Section 20 Equality Act 2010. The Respondent avers that it took all reasonable steps in order to provide auxiliary aids to the Claimant. Further and in the alternative it is denied that the provision of the 3M EEP would have alleviated any substantial disadvantage as particularised by the Claimant or otherwise.

3.2. Discrimination arising from disability

3.2.1. Did Respondent treat the Claimant unfavourably? It is agreed that his being served notice of dismissal and his dismissal amounts to unfavourable treatment.

3.2.2. What was the "something" which arose in consequence of the Claimant's disability? The Claimant avers that the "something arising" from his disability was being unable to work due to the noise levels he would be exposed to in his role as an operational firefighter.

3.2.3. Can the Respondent show that the treatment is a proportionate means of achieving a legitimate aim? s15(1)(b) Equality Act 2010. The Respondent avers that it has an obligation to protect the health and safety of its employees, including the Claimant and the Claimant's treatment was a proportionate means of achieving that aim.

### 3.3. Indirect disability discrimination

3.3.1. Was a PCP applied by or on behalf of the Respondent? The Claimant avers that the Respondent operates a PCP of requiring firefighters to be able to work without hearing aids. The Respondent operates a PCP of requiring firefighters to be able to work without a hearing aid in the operational environment.

3.3.2. Was any such PCP discriminatory in relation to the Claimant's protected characteristic of disability, as:

3.3.2.1. the Respondent applies or would apply it to persons with whom the Claimant does not share the characteristic;

3.3.2.2. the Respondent puts, or would put persons with whom Claimant shares the characteristic at a particular disadvantage when compared with persons with whom the Claimant does not share it; and

3.3.2.3. it puts, or would put, the Claimant at that disadvantage. S19(2) Equality Act 2010.

3.3.2.4. Can the Respondent show the PCP to be a proportionate means of achieving a legitimate aim S19(2) Equality Act 2010. The Respondent avers that it has an obligation to protect the health and safety of its employees, including the Claimant and the Claimant's treatment was a proportionate means of achieving that aim.

**APPENDIX 2****CAST LIST**

<b>Name</b>	<b>Role</b>
Seamus Doyle	Health Safety and Welfare Project Manager
Emma Edwards (nee Richmond)	Health, Safety and Welfare Manager
Steven Ellery	Claimant, Firefighter
Steven Ellis	Engineer, 3M EEP
Dr K Griffiths	Occupational Health doctor
Sue Harding	Human Resources Manager
Simon Jenkins	Corporate Head of Response
Dr Richard Jones	Occupational Health doctor
Simon Jones	Claimant's FBU Representative
Dr S Khirwadkar	Independent Qualified Medical Practitioner (IQMP)
Paul Langston	Human Resources Officer
Deiniol Lloyd	Claimant's FBU Representative
Sean Lloyd	Project Lead for Community Risk Management Planning (held meeting with Claimant to confirm his
Mark Miles	Head of Human Resources
Dr Deepak Rajenderkumar	Consultant Audiovestibular Physician
Stephen Rees	Human Resources Manager
Alexandria Roberts	Head of Corporate Risk
Stephen Rowlands	Head of Service Delivery
Sion Slaymaker	Group Manager (Grievance Officer)
Sarah Tillman	HR Officer - Pensions
Roger Thomas	Chief Fire Officer (Grievance Appeal Officer)
Richard Woodhead	Head of People Development

**APPENDIX 3****CHRONOLOGY**

<b>Date</b>	<b>Event</b>
April 1997	The Claimant commenced employment as a Fire Fighter
2017	Claimant first identified as having some hearing loss
12 October 2018	The Claimant suffered pain whilst wearing Breathing Apparatus during an exercise
24 October 2018	Occupational health assessment
19 February 2019	Claimant attends an occupational health referral and is deemed as not fit to work
28 March 2019	Respondent conducts assessment of noise readings at the fire station that the Claimant is based (Port Talbot)
19 June 2019	ENT specialist provides medical report
05 September 2019	ENT specialist provides second medical report
05 November 2019	Meeting between the Respondent's Alexandria Roberts and the Claimant
19 November 2019	Occupational health assessment
19 December 2019	Claimant returns to work on restricted duties
23 December 2019	Meeting between the Respondent's Emma Edwards and the Claimant
04 February 2020	Further meeting. Claimant is given the 3M Electronic Ear Protection 100 Peltor to trial.
6 February and 11 April 2020	Claimant provides feedback regarding 3M EEP ear defenders
19 April 2020	Claimant is told he may not undertake Breathing Apparatus course while wearing hearing protection
20 April 2020	Claimant is signed as not fit to work
28 May 2020	Occupational Health report identifies that exposure to noise above 100 dB for short periods may have a detrimental effect on the Claimant
19 June 2020	Respondent's Fitness Advisory Panel meeting determines that the Claimant would not be fit to work in the operational environment in light of the risks arising from use of the ear protection
23 June 2020	Fitness Advisory Panel meeting decision communicated to the Claimant



08 July 2020	Claimant's grievance
04 August 2020	Independent Qualified Medical Practitioner (IQMP) report is published
12 August 2020	Grievance hearing
08 October 2020	Fire Ground Hearing Operational assessment
16 October 2020	Respondent receives HSE report regarding Noise at Work
23 October 2020	Grievance report and determination issued. The grievance is not upheld
01 November 2020	The Claimant appealed the grievance decision
19 November 2020	Appeal hearing
09 December 2020	Appeal hearing outcome communicated to the Claimant
18 December 2020	Meeting with the Claimant at which the Claimant's dismissal was confirmed
11 March 2021	The Claimant's dismissal took effect

## APPENDIX 4

## GLOSSARY OF USEFUL TERMS

## General Terms and Acronyms

Term	Detailed Term	Description
Active Hearing Protection		Active hearing protection that have an electronic or technological component.
BA	Breathing Apparatus	A form of PPE used by firefighters to enable them to breathe clean air in environments dangerous to life or health, also will withstand heat in the operational environment.
BA Assessment	Also referred to as the BA Course	A compulsory assessment which firefighters must undertake periodically to remain operational.
BA Entry Control Board		Safety equipment that monitors the safety of BA wearers via an entry board, recording the BA wearer and the duration of time permitted to wear the BA.
CNWR	Control of Noise at Work Regulations 2005	
DSU / ADSU	Distress Signal Unit / Automatic Distress Signal Unit	A device which emits a full alarm sound up to 112db. It is incorporated into the BA set as a safety device, which firefighters can use to signal distress or which sounds if a firefighter is immobile for 30 seconds.
Ear Pro	Abbreviation of Ear Protection	
Fireground Assessment	Fireground Hearing Operational Assessment or Trade Test	A functional assessment, which consists of 3 safety critical assessments to assess a Firefighter's hearing in a realistic environment i.e the Fire Training Ground. (Approx. 5 minutes per assessment)
Hearing Aid		Device which enhances hearing

Hearing Protector / Protection		Item that protects a wearer from noise exposure (both Passive and Active kinds)
HSE	Health and Safety Executive	
Intrinsically Safe Equipment		An electronic device which is intrinsically safe and therefore does not create an ignition risk (e.g. in areas at risk of explosions)
Overprotection		A device that provides protection to the wearer but creates an alternative risk to the wearer or another person.
Passive Hearing Protector		Hearing protectors that have no electronic or technological component.

### Equipment

Term	Detailed Term	Description
Amplivox		Active ear protectors, used by C in his International Search And Rescue (ISAR) and Urban Search And Rescue (USAR) role.
Drager BA		Breathing Apparatus manufactured by Drager. Used by R from 2018.
Peltor	3M Peltor Electronic Earplug, EEP-100	Active ear protection, manufactured by 3M. Provided by R to C to trial on 04/02/20. Specification sheet [205].
Pro 26	ACS Pro 26	Passive ear protection, manufactured by Advanced Communications Solutions. Provided by R to C to trial on 23/12/19. Specification sheet [204].
Roll down plug	3M EAR Classic Roll down ear plug	Passive ear protections, manufactured by 3M, as issued to firefighters. Specification sheet [341].
Scott Sabre BA		Breathing Apparatus manufactured by Scott Sabre. Used by R up to 2018.