RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr A Hurle**

Respondent: **London Fire Commissioner**

Heard at: **East London Hearing Centre (in public by video)**

On: **13 and 14 July 2022**
in chambers 15 July and 3 October 2022

Before: **Employment Judge Moor**
Members: **Ms M Long**
Mr B Wakefield

Representation
Claimant: Mr J Franklin, counsel
Respondent: Miss R Thomas, counsel

RESERVED

FIRST REMEDY JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. **The total amount of lost earnings (not including loss of pension), injury to feelings and interest attributable to the discrimination is £68,751. The calculation is set out in Appendix A attached.**

2. **The Respondent made an interim payment of £19,474.96 to the Claimant on 7 March 2020: we apportion £9,738 to past financial loss and £9,737 to injured feelings. Thus the amount remaining payable (not including pension loss) before grossing-up is £49,276. The Respondent is ordered to pay this to the Claimant.**

3. **The parties must agree the grossed-up figure in respect of the losses so far calculated (not including pension loss) within 14 days and the Respondent should pay the additional amount after grossing-up within 14 days of such agreement.**

4. **The figure for pension loss will be calculated after a further hearing.**

5. **The principles applied to the calculation of financial loss are as follows:**

    5.1. **There was a 75% chance that the Claimant would return to work by 14 July 2019.**

    5.2. **There was a 60% chance that the Claimant would remain in work until retirement.**

    5.3. **There was a 10% chance, beginning from 1 January 2029, that the Claimant would have been promoted to Borough Commander before retirement.**

    5.4. **If he had remained in employment the Claimant would have completed development by 31 December 2020.**

    5.5. **If he had remained in employment, the Claimant would have retired at 55 years of age i.e. on 12 September 2035.**

    5.6. **The Claimant has not failed to mitigate his loss.**

    5.7. **Future loss of earnings (but not pension) will end on 31 December 2024.**

    5.8. **From 1 July 2026 the Claimant will be earning sufficient income from his businesses to invest £3,000 into a private pension scheme until his 55th birthday i.e. until 12 September 2035.**

6. **The amount awarded for Injury to Feelings (before interest and ACAS uplift) is £25,000, this includes an element for aggravated damages of £4,000.**

7. **The award for Injury to Feelings (less the interim payment of £9,737) is increased by 12.5% because of the Respondent's unreasonable breach of the ACAS Code on Discipline and Grievance at Work.**

8. **Interest is awarded according to the approach set out in the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996, making appropriate allowance for receipt of the interim payment.**

9. **We will calculate Pension Loss by using the 7-step method set out in the Principles for Compensating Pension Loss. The parties may make submissions as to whether actuarial evidence is required to calculate any figure within any step. The Tribunal will make case management orders for this to be achieved at the next preliminary hearing.**

10. **Recoupment does not apply because this is a remedy for unlawful discrimination.**

REASONS

1. The Liability Judgment in this case was sent to the parties on 25 November 2020. The Respondent's appeal was dismissed on 18 January 2022, hence the delay in hearing evidence on remedy.

2. We thank all parties for attending the hearing remotely by video. While there was the odd connection difficulty, these were overcome, and we are satisfied that those attending the hearing could do so effectively. It was a public hearing and access to it was notified on the Tribunal daily list.

3. We apologise to the parties for the delay in this judgment. Many remedy points are disputed. We did not complete our deliberations on the final day of the hearing and planned to finish deliberating on 12 August 2022. A listing problem beyond our control meant that we could not do so until 3 October 2022.

Issues

4. The representatives prepared a detailed and useful List of Issues (attached to this judgment as Appendix B), provided skeleton arguments and the relevant authorities for which we thank them. We were also helped by their oral and, in the Respondent's case, written closing submissions.

Findings of Fact

5. Having heard the evidence of Mr Hurle, Mr Ryan, Ms Tapp, Ms Bonham and Ms Bayley, and having considered the documents referred to us in the evidence and submissions, we make the following findings of fact (in addition to the findings of fact in our Liability Judgment). Our references use the following abbreviations:

   5.1. Remedy Bundle page: RB.#

   5.2. Liability Bundle page: LB.#

   5.3. Liability Judgment paragraph number: L.#.

6. Mr Franklin observed that parts of the Respondent's witness statements prepared for this remedy hearing directly contradicted findings of fact and/or the conclusions in our liability judgment. No application for a reconsideration has been made. Justice requires finality. Miss Thomas made it clear that she did not rely on any facts in those statements that contradicted the findings of our liability judgment.

7. A note on job titles: at some stage the title of Station Manager was changed to Station Commander. We refer to Station Manager to avoid confusion.

Experience as a firefighter

8. The Claimant had been a firefighter since he was 18 years of age, until he was dismissed by the Respondent aged 39. His father was a firefighter. He always wanted to be one.

9. The Claimant is now 42 years of age. His date of birth is 12 September 1980.

10. The Claimant started work as a retained firefighter, with Hampshire Fire and Rescue Service ('Hampshire'), in his hometown, Romsey, Hampshire. He was promoted to Leading Firefighter in the retained service when he was aged 21. Meanwhile he worked in an adhesives factory. He started in the whole-time Fire Service in 2002 (aged around 22) with the Respondent at Westminster. He transferred, whole-time, to Hampshire in 2005, after about 3 years, when his wife was expecting their second child. From then until late 2018 he remained at Hampshire in both whole-time and retained firefighter roles. He has spent 21 years in retained roles and 16 years in wholetime roles in the Fire Service.

11. The Claimant was promoted to Watch Manager in his retained role in October 2014 (i.e. 12 years after his last promotion within that role).

12. During the last two years in his whole-time role with Hampshire, the Claimant was seconded to run two organisational change projects delivering significant savings and a change in shift patterns. In these secondments he worked at Watch Manager level. He was invited to join Hampshire's 'Firefly' programme: fast-track training for those recognised as having high potential in the Fire Service.

13. The Claimant received occasional plaudits for his work at incidents from senior colleagues. He received the Queen's Fire Brigade Long Service and Good Conduct Medal after 20 years' service in 2018.

14. The Claimant involved himself in many, significant community activities as part of his effort to involve Romsey fire station locally. He worked on resilience with the town council after flooding and on its Emergency Planning Committee. He was proud to be recognised locally as 'the face' of the Fire Service.

15. From his work in the Fire Service the Claimant evidently gained enormous fulfilment, self-esteem and status. It was his vocation.

16. In his two roles with Hampshire, he worked about 112 hours a week; some of these hours were at home on-call in his retained role. In the last year of his retained role he did not go on any turn-outs: in the latter half he was on a period of agreed garden leave while his grievance was investigated. He resigned in December 2018, after securing promotion to the Respondent.

17. The appointment process for the promoted transfer to the Respondent as Station Manager was competitive and rigorous. Despite the Claimant's ill health, his experience at Hampshire and his family challenges (see below), he was successful. He was appointed on 15 November 2018 with effect from 2 January 2019 (L.30). This was 5 years after his promotion to Watch Manager in his retained role and 2 years after he began working at that level in his wholetime role.

18. We accept that his transfer to London was a 'beacon of hope' for him to continue his career away from the stress he experienced at Hampshire.

External sources of stress

19. In 2016 the Claimant was involved in a road traffic accident with his daughter, then aged 10. Her mental health deteriorated. When he transferred to London, she was aged about 12 and not yet receiving the educational and health support she needed. We have detailed her decline in early 2019 at L.46: she was distressed at the time he was away from home; she had become withdrawn and was getting up very early (4am) to see him off, making her tired for her school day.

20. The Claimant's daughter continued to need his support but, at some point, gained educational and medical external support from three different sources. In the last two years, from July 2020 to July 2022 she has improved such that she is now planning to go to college and into further education beyond. Thus, in 2019 and to a lesser extent thereafter, the Claimant daughter still needed more support from him as a parent than usual.

21. The Claimant's wife had longstanding mental ill health, which required him to support her more at home with their two daughters. There were some days where she could not function well at all. He described this in February 2019 as a major source of stress. He states, and we accept, that he could plan her care for timetabled absences from home. Since 2019, she has improved with medical support and therapy. This improvement is illustrated by Universal Credit records showing she obtained a part-time job from April to July 2021. She now works, unpaid, in his museum charity.

22. During the last 3 years, 2016-2018, in his retained role at Hampshire, the Claimant felt bullied and faced what he has described as malicious disciplinary allegations. The Claimant felt unwell at times and his experience at work made him feel stressed. Once he raised a grievance, he had further stress during its investigation and appeal. During 2018 he took a period of agreed garden leave from his retained role. When he obtained the promotional transfer to the Respondent, he saw this as a way of removing himself from the sources of stress at Hampshire (L.31).

23. The Claimant showed some resilience by staying in work at Hampshire until mid 2018 and working long hours despite these work challenges on top of the extra support he had to give at home.

Mental ill health

24. In hindsight, the Claimant had started to experience depressive symptoms in the last few years of his employment with Hampshire.

25. In the liability judgment we found that the Claimant's mental ill health declined further early in his employment with the Respondent (L.53-56). He was formally diagnosed with depression on 19 February 2019; in March 2019 he was described by an Occupational Health adviser ('OH') as having increasing anxiety. OH described how his current commute was severely affecting his mental health and advised that consideration of a move to a station closer to home would be beneficial. Their continued later advice was that prognosis depended on a 'resolution of the issues'. This was the phrase the Respondent was content with after meddling with OH

advice, because they did not wish the Claimant to use OH advice to advance his case for a transfer (L.62 and L.68).

26. In employment with the Respondent, the Claimant could go to counselling sessions with its Counselling and Trauma Services ('CTS'). He attended six sessions between 7 March 2019 and 5 June 2019. CTS sent a report to OH (see RB.1347 under 'data last inputted').

26.1. He was advised by the counsellor that some of his symptoms indicated post-traumatic stress disorder ('PTSD'): though this was not a formal diagnosis.

26.2. By the last session (June 2019) on the positive side the counsellor reported that the Claimant appeared '*not to be so emotionally triggered in the therapy room'*. He showed more clarity and insight and '*demonstrated a commitment to address his emotional vulnerability'*.

26.3. On the negative side he presented '*with high affect'*. At the beginning, emotional regulation was a challenge for him. He needed to improve before the therapy known as eye movement desensitisation reprocessing ('EMDR') could be fully utilised.

26.4. The Claimant started some desensitisation therapy, aimed at reducing his PTSD symptoms, and only after that could EMDR begin (RB.1348).

27. On 16 April 2019 the Claimant made an employment tribunal claim against Hampshire for unfair constructive dismissal and disability discrimination (RB.958f). He alleged bullying and harassment by colleagues over a 3 year period; lack of support once he had raised a grievance; victimisation and other issues. He stated that he had had periods of absence due to stress and depression/anxiety. He explained that it was soon after his leaving that he was formally diagnosed with depression and PTSD. He said this had had a huge impact on his life affecting sleep, appetite, emotions, temper and general ability to cope with ordinary day to day activities (RB.982). In his ET1 form he stated in his new job he saw his family less than in his old job. He alleged that the effect of the Hampshire alleged bullying had caused him to be signed off from his new job. At this stage he was representing himself. He later obtained the help of solicitors. This claim added further stress to the Claimant's load from April 2019. He started it while experiencing the significant downturn in his mental health we described in our liability judgment.

28. By letter of 26 April 2019 the Respondent informed the Claimant that the information on his application form may not be correct and that this question over its authenticity could affect his continued employment (L.74-75.) The Claimant was already unwell and this letter was devastating. He was unable sleep for worry and seriously considered taking his own life. This letter was not part of the unlawful discrimination we have found. This shows that the threat to his continued employment triggered worsening mental health.

29. In June 2019 the Claimant was still feeling anxious. He was sleeping poorly and could not easily engage his brain to perform tasks. By 28 June 2019 he was worried there was no prospect of change to give him a foothold to begin recovery and get back to work which was where he wanted to be (L.106).

30. By 1 July 2019 the Respondent had decided to drop the allegation about the Claimant's eligibility for the role (L.107) but did not inform the Claimant. It was left hanging over him.

31. On 10 July 2019 BC Prasad informed the Claimant that he was likely to be invited to a stage 3 disciplinary meeting. He received the formal invitation to it on 6 August (L.108 and L.114). This news was a further major blow to the Claimant's well-being. He received the news while on a family holiday in Cornwell. He anticipated his dismissal and responded so badly that the holiday had to be cut short.

32. In late August 2019 the Claimant attended *italk*, a therapy service in his local area, having been referred to it by his GP back in February 2019. He was assessed as having PTSD 'relating to experiences you had at work' and anxiety and depression. A record of this encounter in the GP notes (RB.1384) suggests the difficulties with his current employer have caused significant anxiety and low mood and triggered distressing memories of fatalities attended whilst working in the service (at Hampshire). In August 2019 he was added to *italk's* waiting list for treatment.

33. The Claimant says if he had not been disciplined by the Respondent, he would not have sought treatment from *italk* but continued to use CTS. He considers his PTSD therapy would not have been delayed because the CTS counsellor was prepared to start it. If there had been no discrimination, we agree the Claimant would have had ongoing therapy with CTS; however, it is also likely he would have gone to *italk* for an assessment.

34. We remind ourselves that all the way up to dismissal (in other words after the failure to transfer) OH reported that the Claimant was likely to be fit for work in the foreseeable future (L.127.1, L.118). The report on 5 June 2019 suggested a 6-8 week period for medication to be assessed and that that the prognosis depended upon a resolution of the issues. The reasonable adjustment should have come within three weeks of this report.

35. As it was, by 27 August 2019, OH reported the Claimant was not likely to be fit for 3 months. This was a worsening of the prognosis because, by this stage, the Claimant knew he was going to be disciplined at stage 3 and likely dismissed.

Claimant's grievance

36. The Claimant was very aggrieved that his request for a transfer was rejected. He was equally concerned to be told there was no evidence that he was disabled. The Claimant raised a formal grievance with his manager BC Prasad on 20 July 2019 (LB.462). We have re-read it as part of our deliberations on remedy. It is lengthy but structured. It identifies that he is disabled, asks for a transfer to the south west as an adjustment (L.110),

and complains about the use of the disciplinary procedure when his was a capability issue. Thus, his main grievances are the issues he succeeded on in this Tribunal claim. He asked whether the query over his application had been closed (RB.474).

37. After being chased for a response, the Respondent decided the grievance would be dealt with as part of the disciplinary proceedings.

38. In his disciplinary decision, DAC Perez set his mind against reaching a conclusion on disability (L.127.2). We found that his alternative view, that adjustments were not required because it made no difference, was unreasonable and not credible (L.127.3). We found he should not have been the decision-maker on this question because he was judging his own decision not to facilitate a transfer (L.122).

39. It is also plain from our liability judgment that DAC Perez did not deal with the question, raised in the grievance and by the TU representative at the hearing, that a disciplinary should not be taking place at all. It shamed the Claimant that he was required to admit his absence as an offence during the hearing (L.123).

40. During the disciplinary process the Claimant expressed his frustration that his earlier requests for a transfer had been ignored. His point was that, earlier on, it was more likely that he could have recovered to make a transfer effective. We found that DAC Perez's evidence that there were no vacancies at the time was not credible (L.97.1). After further disclosure for the remedy hearing, there were 5 vacancies. This has greatly upset the Claimant who can see more clearly now how opportunities for an earlier transfer could have been given.

41. We found that at the disciplinary appeal Mr Powell did not even know he had to consider the grievance as part of it (L.134). There was not therefore any effective grievance appeal.

Impact of discrimination on the Claimant

42. In our judgment, the start of the disciplinary proceedings and the dismissal considerably worsened the Claimant's mental health and its duration. He was upset and frustrated that he had not been given a transfer in July 2019 when he thought then it could have stemmed his decline.

43. In addition, the Claimant was devastated at being dismissed. The Fire Service was his vocation. He had been proud to serve, as exhibited by his upset that he has lost the opportunity to receive the medal for the Queen's platinum jubilee. On top of the loss of confidence and self-esteem that his disability had created, this was a real blow to his self-worth and sense of status. We accept he felt humiliated and embarrassed at no longer being a serving firefighter and having been dismissed from the Service. It is no exaggeration to say that he has had a grief reaction at this loss.

44. The Claimant is angry at the Respondent's approach to him: we take this into account where it relates to the use of the disciplinary procedure and the failure to facilitate a transfer.

45. The Claimant is angered and further stressed at seeing how the Respondent meddled with OH advice. This relates to the discrimination we have found because it concerned advice about potential adjustments. He was upset that the Respondent decided OH had advised he was not likely to be fit in the foreseeable future, when the opposite was their advice.

46. The Claimant was aggrieved, frustrated and upset by the Respondent's setting its face against asking about his illness and informing him there was no evidence of disability: he had described it to them clearly and OH had reported.

Circumstances if the Claimant had continued to work

47. The Claimant had previously undertaken the Watch Manager role in his retained position at Romsey Fire Station. In his wholetime role at Hampshire he had held Watch Manager grade but undertaken secondments rather than worked at this level at a fire station. Those secondments required Watch Manager level skills.

48. Mr Ryan has given evidence about his own rise through the ranks of the Respondent. He was promoted gradually to the Station Manager rank by first being eligible for temporary promotion (category c at paragraph 6 of his witness statement). Mr Ryan accepted he had more attempts at promotion to Station Manager than the Claimant.

49. Station Managers start on development. We accept Ms Tapp's evidence that the average number of days taken to complete development was 396 for those who had risen through the ranks (13 months) and 519 (around 15 months) for transferees. The manager gathers evidence for his development via his operational experience.

50. Before his dismissal, due to his absence, the Claimant had worked only a few weeks as a Station Manager in London.

51. Once development is complete, then the level of Station Manager (Competent) is achieved and pay increases. One year later this becomes Station Manager (Competent Plus), with a further pay increase (RB.1605).

52. A Station Manager is responsible for the station. The role requires a mix of operational and management skills and being able to prioritise and deal with events as they occur. It involves planning activities to meet service needs, managing members of staff at all levels, including recruitment and development, delegating this management where appropriate, supporting and guiding Station Officers and leading on operational incidents, depending on the level of seriousness. The Station Manager does not go out on every shout. Work as a firefighter involves danger and risk to life and that, of course, adds to the weight of responsibility. A good Station Manager must be resilient.

53. The commute to a station closer to home was untested for the Claimant. It would have been at least 1 hour and 20 minutes each way.

54. The 4-weekly rota involved management days. The Claimant anticipates he would have chosen 9-s (earlies), starting 7am and finishing at 4pm.

This choice was unlikely to have been refused, as Mr Ryan confirmed. The Claimant agreed he would still have been getting up early and leaving home early, around 5-5.30am. Thus, these early starts would still have created some pressure for his daughter and in his home life, but we accept that the extra time at home in the evening on those management days would have assisted in reducing that pressure. He would be back soon after his daughter returned from school. He would have had quality family time at that stage: a big difference from the commute to the north east. It makes sense to us that, if she had seen him properly at night, this will have reduced his daughter's need to get up early and see him off in the morning.

55. The rota incorporated some days off each week when the Claimant would be at home and free of any responsibility (unlike his previous work at Hampshire when his retained role required more on-call work from home and administrative and training work nearby). Looking at the example at paragraph 21 of Mr Ryan's statement, the Claimant would have had 3 complete days off in week 1, followed by 1 complete day off in week 2, resulting in 4 days off in a row over those 2 weeks. In week 3 he would have had 3 days off, 2 consecutive, and, in week 4, 3 days off, all consecutive. This would have been the same at Chingford, but it is relevant to consider what days were available for complete rest and relaxation when considering the impact of the rota on potential recovery from the mental ill health the Claimant had experienced in the first half of 2019. We consider this number of days off, and having some consecutively, will likely have aided the Claimant's recovery.

56. Nevertheless, the Claimant also had to undertake 24 hour shifts each week (usually 2 but sometimes 1), when he would work and be on-call 'camped out' overnight and then sometimes work the next day. On the example rota we have seen, in Week 1 this would have required Monday to Wednesday evening away from home, in other weeks it would have involved two days at most away from home. We accept the Claimant's evidence that he would have been able to plan any support required for his wife, knowing his rota in advance. He would also have been able to speak to his family when at his camp-out base. But it remains the case that he would have had at least a night and sometimes two away from his family each week. This would not likely have helped his daughter, who was anxious at the time her father spent away from home. This is a factor that would have been challenging for the family before his daughter obtained external support and his wife began to improve.

57. We accept that at Feltham, the Claimant was likely to have overseen a busier station than he was used to in Hampshire.

58. Ms Tapp provided some other useful evidence from the Respondent's data:

    58.1. using data gathered from a 3-year period, on average in each year, 14.33 Station Managers were promoted to Group Commander (previously Borough Commander). In oral evidence she confirmed that this was 9.5% of the eligible pool;

58.2. of the 18 transferees who had joined as Station Manager since 2004, 2 have been promoted to Group Commander before leaving. It is impossible for us to apply an equivalent percentage figure to this group because the period is so much longer and numbers are so small; RB.1441;

58.3. over a 3-year period, on average each year, 5 Group Commanders were promoted to DAC, 5.5% of the eligible pool;

58.4. of the 34 transferees who have joined the Respondent since 2004 and subsequently left, aged under 50: 21 were transferred, 2 were dismissed, 10 resigned for various reasons, and 1 role was terminated by agreement;

58.5. for the same group of the 36 transferees leaving aged over 50: the vast majority, 31, voluntarily retired and 3 moved to other brigades.

59. Ms Bayley, of People Services, gave evidence of her opinion of the chances the Claimant would have remained in work if he had been transferred. Several parts of Ms Bayley's statement directly contradicted some of our factual findings. Ms Bayley initially said she had not read the judgment. When she was taken to it, she said she had only skim-read it. She was not a medical expert. Her statement dealt with what was likely to have occurred had the Claimant been offered a transfer. Given that the assumptions she has made about the case in her evidence sometimes contradict our findings of fact, we were not helped by her opinion. Her opinion at paragraph 27 that the commute to Feltham may not have helped, disregards our liability findings. She then uses the assumption that the Claimant would have continued to be unwell to form further opinions about his chances, paragraph 29. Further, from paragraph 31-38 she considers the issue without considering our findings as to why the Claimant's health deteriorated or our finding that OH recommended a transfer closer to home or that OH indicated the prognosis depended on resolution of the issues or that he was likely fit in the foreseeable future. In Mr Franklin's questions she acknowledged that it was likely the Claimant would return and that she was not aware of his particular stressors. She gave general evidence that those with PTSD caused by incidents at work, can find it difficult to stay in the service.

After dismissal

60. The Claimant was devastated by his dismissal. We find this likely worsened his mental health as exemplified in his letter to the Southampton Tribunal in March 2020 (see below). He continued to experience depression. He continued to take anti-depressants at a high dose.

61. This litigation and the Hampshire litigation have been stressful for him. The external stressor of the Hampshire litigation would still have existed if the Respondent's discrimination had not occurred. In December 2019 the Southampton Tribunal found that he was a disabled person. The 5-day final hearing was due to start on 23 June 2020. On 20 March 2020 this was postponed due to the pandemic. This postponement caused the Claimant a great deal of upset as set out in his letter to the Southampton tribunal of 23 March 2020 (RB.451). He explained his health was

'practically destroyed' and he was still certified as sick a year later. He described the effects on him of his inability to support his vulnerable wife and daughter who both needed specialist help (see below). He explained the EMDR therapy could not begin until the Tribunal was resolved. He described his ongoing symptoms of depression, lack of sleep, and weight gain. He describes the problems of ongoing debt (with some help with his mortgage from charity and parents) and the engagement in preparing and pursuing his tribunal cases meant he often felt emotionally and physically exhausted. Even by September 2020 he was forced to turn down a project because he was not well enough. We set against this description the facts that soon after dismissal the Claimant was well enough to embark on a New Enterprise Allowance training scheme. This helped him to prepare the groundwork for his new businesses. These were set up by the beginning of March 2020 (see below). While this work was not full time, and probably took considerable determination given his state of ill health, he had been able to get on with it. These steps show the Claimant was able to function, to some extent, while he evidently had ongoing difficulties with his mental health.

62. The Claimant had a further appointment with *italk* in May 2020, after dismissal and the commencement of these proceedings (RB.1492). The psychological therapist advised that '*because you are experiencing a considerable level of stress and anxiety associated with taking your employers to an industrial tribunal and the processes leading up to this combine with your appraisal of these events … I recommend your treatment be delayed until after the outcome of the tribunal is known*'. The *iTalk* documents suggest it is the stressors with his employers that were the continuing trigger, albeit that then the symptoms were of reminders about difficult shouts. Thus the Claimant has not yet started treatment to assist with his symptoms of PTSD.

63. The Hampshire litigation was eventually settled on 19 February 2021 for £42,500.00 with no admission of liability. In the agreement, the sum was expressly divided as between £9,144 in settlement of the unfair dismissal claim and £33,356.00 in settlement of all other claims relating to events prior to termination '*namely compensation for the Claimant's alleged injury to feelings*' (RB.922). The Claimant pursued reengagement in this claim and states that this would not have been necessary to do so if his job with the Respondent had been ongoing. We agree there was a chance that settlement of the Hampshire claim would have come sooner, if he had not also been dismissed by the Respondent, because this reengagement point would not have been pursued.

64. We find the settlement of the Hampshire litigation and the success in this claim (known from late 2020) will have aided recovery from the worse of his ill health.

65. We find that after the first 18 months from dismissal the adverse effects of his depression and anxiety had lessened. And we find that now, the Claimant is much improved but still suffers from occasional bouts of despondency which can last up to 2 weeks and incapacitate him for those periods, but he is far better at coping than he was.

Steps to Replace Earnings

66. Given his initially very poor mental health, the Claimant not to look for full-time or firefighter work in the first eighteen months from his dismissal i.e. to August 2020. For example the advertised Station Manager role at West Sussex advertised in December 2019 (RB.538) would have required week by week commitment that he was then too unwell to give.

67. Instead, the Claimant decided to pursue self-employment (L.117), drawing on his Fire Service skills and experience. In late 2019/early 2020 he obtained training and advice to help him formulate business plans through the Enterprise Allowance Scheme. He was able to do this without having to devote full-time hours and while he was still unwell. He set up several companies with different trading ideas, but the ones he has developed are:

    67.1. Hampshire Fire & Medical Services ('Services'): providing event emergency response coverage; and fire and safety training for workplace health and safety and first aiders;

    67.2. HFMS Fire Engines ('Fire Engines'): to hire his collection of firefighting equipment at events like weddings and funerals and as props.

68. In March 2020, just as the Claimant's businesses were set up and in a position to trade, came the nationwide lockdown because of the coronavirus pandemic. From then until July 2021 the series of lockdowns and restrictions severely limited social events and large events and, many people had to work at home. This effectively stopped the Fire Engines business and severely limited the activities that Services could undertake. Even in the summer of 2021, many events were not scheduled because of ongoing uncertainty and the difficulty of planning them. This plainly had a huge impact on the Claimant's ability to earn anything from his nascent businesses. Nor could he anticipate when this was likely to end: at the time, it was uncertain when the pandemic would abate and whether there would be a successful vaccination programme, which did not begin until many months into the pandemic.

69. In early May 2020 the Claimant applied for and obtained government Bounce Back loans of £50,000 each for Services and Fire Engines. The amount of the loan had to represent 25% of anticipated annual turnover. Miss Thomas questioned the size of the loans applied for, given these were fledgling businesses. The Claimant maintained and we accept that he relied on independent advice received from New Horizons, a company working for the DWP, and that his estimates were supported by business plans. The loan applications were administered through Barclays Bank. These loans effectively helped his businesses through the period they were restricted. They did so by replicating part of the income they expected to receive. (Just as the furlough scheme replaced earnings for workers.)

70. The Bounce Back loans did not require any repayment in the first year. Thereafter they must be repaid over 5 years at interest rates of 2.5% (£833 per month).

71. The Claimant was the owner of his companies and the only person who could draw profit from them as income.

72. In the Engines business the Claimant used the full amount of the Bounce Back loan to purchase the fire engine equipment he would use for events.

73. In the Services business we find it is likely that the Claimant used some of the Bounce Back loan to fund continuing overheads for example, vehicle and insurance costs. But we find it likely that this second loan was not fully expended, because the business did not have its usual costs of providing services. Doing the best we can on limited information, we find it likely only 25% of the bounce back loan was needed to cover the Services overheads. We find it likely that the Claimant drew the remaining part of the loan from the business as income between May 2020 and 2021. This was appropriate as the whole point of the loans was to support business income during the pandemic.

74. The Claimant has worked to publicise his businesses, attending networking events locally via Chambers of Commerce and small business groups. He has set up websites for both companies. We accept the evidence of the marketing work he has done.

75. We find the Claimant's poor health had improved by the middle of 2021 (see above). By then, for much of the time, he was well enough to work on his businesses gearing them up for any work he could obtain after the restrictions were lifted. We find this first year of real trading will have been difficult for the Claimant and accept neither business earned profits from which he could draw an income.

76. We do not accept the Claimant's evidence that he did not expect to earn any profit in his businesses for some years. In fact the business plans, with adviser input, show an expectation of profit sooner and loans were provided on this basis. While we consider these business plans look optimistic, it is simply not the case that he had such low expectations of his businesses that he expected to earn nothing for several years.

77. Once the Claimant felt well enough to work full time i.e. by mid 2020, he did not apply for firefighter jobs locally. West Sussex or Dorset & Wiltshire Fire Services were within a similar commute albeit at lower pay rates than the Respondent. The Claimant says he did not apply later for jobs there because he had lost his competencies after a year. We accept this evidence: we have considered the advertisements in the remedy bundle. It is correct that they either required the applicant to have the relevant competencies or be serving.

78. The Claimant also tested his view that his lack of up-to-date competencies and/or the stigma he suspected he now faced would prevent him from working in the Fire Service by applying to Hampshire for a Firefighter (Control) role in August 2021. This was at a lower level to the roles he had held. His application was rejected without interview.

79. The Claimant did not apply for jobs nationally because did not wish to move his family because of their support needs: his wife and daughter by this time had both obtained the benefit of local external support.

80. The Claimant did not look for other full time jobs. His decision to pursue his businesses was part of a plan to provide work associated with the Fire Service, using the experience and skills he had gained. He anticipated ultimately much higher income in these businesses than he could gain in other employed work.

Earnings up to October 2022 and until 30 June 2023

Engines income

81. The Engines' Business Plan for 2020/21, dated 3 February 2020, shows an expectation of costs in the first year of about £26,000 and expected income of a minimum of £21,600 and an 'optimum' of £86,400 (RB.779). Obviously this was a pre-pandemic forecast. If the minimum is done then this business will not make a profit. There is no evidence of invoices or earnings that show the Engines business making a profit for 1 July 2021 to 1 July 2022. This is likely because of the problems of the pandemic we described above and the uncertainties for events over the summer of 2021.

82. In our judgment however, this summer 2022, the Claimant is likely to have earned some income through Engines: by then his marketing efforts will have helped and there were many postponed weddings taking place. We have used the figures in the forecast at RB.779 to help us estimate earnings. For the summer, July, August, September 2022, we consider he is likely to have undertaken at least 1.5 times his monthly minimum over the summer months i.e. between 4 and 5 weddings and hires. This would give an income of around £8,100. We then deduct estimated costs of £900 per month and the bounce back loan repayment of about £900 per month. Our rough and ready estimate is therefore a profit representing his drawn income of around £2,700.

Services income

83. The Services' business plan for 2020/21 (RB.645) suggests monthly costs of around £1000 (to which we add the loan repayment) making £1900. The forecast suggests a minimum income of around £27,750 per month. This was ambitious. The pandemic prevented much of this business. Given the difficulties of 2020/1 and the difficulties of restarting from July 2021, we do not consider it likely the Claimant will reach this minimum.

84. One of the best indicators as to how the Services business is progressing are the invoices for 2022 [RB.1599 –RB1648]:

    84.1. May 2022 £445;

    84.2. June 2022 £3600; £200; £400; £350; £450; 450; 450; 475, a total £5,965;

    84.3. July 2022 £380; 3600; 250; 1050, a total of £5,280.

They show the Services business is now undertaking work and expecting payments. It is booking future work. The Claimant says he expects to receive £2000 per month from Services up to July 2023. On the basis of

June and July 2022 and forecasted costs, we consider this estimate a little pessimistic. We consider Services is likely to have made a gross profit of £2500 per month from 1 July 2022 onwards, which the Claimant will draw as income. Thus £7,500 to date.

Benefits

85. The Claimant applied for and received Universal Credit ('UC') from 7 November 2019 onwards. UC is calculated according to a couple's income and household circumstances. The Claimant's wife did not work before or after the claim. We therefore take into account the whole of the benefit received because it effectively replaced the Claimant's loss of income. They received £23,307.91 in Universal Credit since dismissal (1029).

Other matters

86. Mr Ryan took 7 years to gain promotion from Station Manager (competent) to Group Commander. This was a competitive process.

87. Opportunities for promotion within the Fire Service are more limited if the applicant applied for roles only in a certain area.

88. For periods where a firefighter is struggling with operational duties because of a disability the Claimant argues that a reasonable adjustment may have been to place him in a non-operational role temporarily. While it is impossible to decide this with any certainty, we take into account that the Respondent is a large Fire Service and there was therefore some chance that a temporary non-operational role may have been found for temporary periods if the Claimant had ever been unable through disability for a short time to undertake operational duties. We also consider that this chance would have been limited by timings and the competition for such roles from other firefighters in the service.

89. We refer to the findings we made about the Respondent's Managing Absence Policy ('MAP') at L.144-148. Its usual trigger for a sickness absence meeting would be an absence of 6 months; if absence continued then there would be a further meeting at 9 months and a final meeting at 12 months (L.148.4). By 1 July 2019 the Claimant had not reached this trigger. Clause 6 of the MAP anticipated that a return to work could be facilitated by modified duties while recovery took place and dismissal was a last resort.

90. In his calculations of future earnings, the Claimant has assumed 3% salary increases from 1 July 2022. It is difficult to anticipate how public sector awards will progress. While the government will aim to keep them low, inflation is increasing. In the circumstances an assumption of 3% is reasonable.

Apology

91. On 9 February 2022 Ms Bonham, Assistant Director for People Services wrote to apologise to the Claimant. She explained that she had reviewed our judgment to identify and recommend improvements to avoid similar situations occurring in the future. She referred to the work that had already

been done on the Respondent's 'Togetherness Strategy' including equality, diversity and inclusion training to all staff. She referred to a 'refresh' of its Wellbeing Strategy to develop a dedicated Mental Health Policy including a review of the way the Respondent manages the absence of disabled employees. We accept, from her evidence, that steps have been taken within the Respondent to learn lessons from this case and to try to ensure it will not happen again. Specifically, she mentioned a review of the transfer policy to ensure all managers are familiar with how it could be used to facilitate reasonable adjustments. She ended by appreciating that this work did not change his experience and offered her '*apologies on behalf of the Respondent for the fact that steps were not taken to facilitate your transfer to an alternative post, that your circumstances were managed under the disciplinary process … and that ultimately you were dismissed in the way that you were.'* (RB.927)

92. The Claimant did not feel able to accept the apology. He responded to her by describing his experience and potential; he felt that Ms Bonham could not be impartial, given her employment with the Respondent; he felt the apology had come too late, over a year after judgment and only after the appeal had failed. He felt it was therefore an attempt to limit exposure to compensation. He applauded work on equality and inclusion but was concerned that no one senior had taken responsibility for the unlawful conduct and thus queried whether change could take place.

93. Ms Bonham also told us that she had received an assurance from Mr Simpson at the OH provider that pressure had not been put on the OH advisers by the Respondent. This contradicts the findings of our liability judgment and we do not take it into account. Even if we were able to do so, the evidence is too general to undermine our findings: we have not heard from the individuals involved and do not know the extent of Mr Simpson's investigation.

Pension

94. The Fire Service pension scheme has always been a defined benefit scheme. It changed from a final salary scheme, the 1992 FPS, to a Career Average Revalued Earnings (CARE) scheme, the 2015 FPS. This followed the Hutton Commission report. Members moved to the new scheme for future accrual but maintained the final salary for the value of the pension rights they had secured up until then. A proper assessment of the substantial loss of a CARE scheme must consider the lost 'slices' of pensionable pay that, but for the unlawful conduct, would have been 'banked' while the Claimant continued to work.

95. The pension scheme benefits allow firefighter members to retire and take their pension benefits in full before state pension age. This is obviously a big incentive for firefighters to retire. Not all did so, but it can be seen from Ms Tapp's statistics that, over aged 50, voluntary retirement was by far the main reason for leaving.

    95.1. Under the 1992 FPS this date for the Claimant was 12 September 2033, at age 53, after which time the Claimant would have accrued 25 years' reckonable service.

95.2. Under the 2015 FPS the normal retirement age is 60.

95.3. The Claimant argues (in the List of Issues) that after the McLeod judgment he would likely have elected, when drawing down his pension benefits, to receive the legacy scheme (1992 FPS) benefits but an election does not need to be made until the time.

96. The Claimant's lost employment benefits include loss of deferred pension benefits.

97. It is also the case that the Claimant will not now be able to take his *accrued* pension benefits until aged 60 under the 1992 FPS and aged 67 under the 2015 FPS. This represents a further loss, if we find he would have in fact retired before these dates.

Submissions

98. Mr Franklin and Miss Thomas have both put a huge amount of work into assisting us. They have each given us much to consider. We refer to their written skeleton arguments.

Legal Principles

Statutory Tort

99. In assessing loss we must place the Claimant in the position he would have been in if the discrimination had not occurred. An award for financial loss or injured feelings must be attributable to the discrimination we have found.

100. This assessment is necessarily hypothetical. The assessment itself is not a finding of fact but will be informed by the relevant evidence before us. We will consider and weigh the factors that point to the Claimant returning to work and remaining in work and those that point in the opposite direction.

101. We consider the guidance in Ministry of Defence v Cannock [1994] ICR 918. We can adopt a percentage chance approach if that is appropriate on the evidence before us, which can include statistical material. We can apply cumulative percentage chances, if appropriate, to different stages in the assessment.

102. We can consider the chance, not only of withdrawal, but of promotion, if there is evidence supporting this. A Claimant's unchallenged assertion that he would have been promoted is not a fact. We apply the guidance in Cannock at p953, cited by Miss Thomas:

> *Next, the question of promotion. There is many a slip between cup and lip, and tribunals should be wary of assessing the chances of promotion on the high side. It is not a question of fact; it is a question of assessing the chances and applying the percentage figure to the higher pay.*

103. Where there is future earnings loss over a long period we can consider whether it is appropriate to identify that period and loss and reduce for the chance of withdrawal factors and make an adjustment for accelerated

receipt. (In this case neither party has suggested the Ogden tables approach for lost earnings.)

104. Miss Thomas drew our attention to the general guidance in Cannock at p950H:

> *We suggest that tribunals do not simply make calculations under various different heads, and then add them up and award the total sum. A sense of due proportion involves looking at the individual components of any award and then looking at the total to make sure that the total award seems a sensible and just reflection of the chances which have been assessed.*

Mitigation

105. Mr Franklin drew our attention to the useful summary of the principles on mitigation in Cooper Contracting v Lindsey UKEAT/0184/15 by Langstaff P, which refers to the leading cases:

    105.1. we need to be satisfied that the Claimant acted reasonably in mitigating (taking steps to reduce) his loss;

    105.2. he should be unaffected by the hope of compensation;

    105.3. it is for the Respondent to show that the Claimant acted unreasonably. This is different from showing that the Claimant did not adopt an alternative reasonable step;

    105.4. the test is objective, but takes into account the Claimant's circumstances, including his state of mind.

106. The Respondent suggested the test is to ask whether *all* reasonable steps have been taken. We do not consider the word 'all' is helpful. There may be several reasonable options and it is not up to the Respondent to make the choice. The test is to take reasonable steps to mitigate the loss: to act as a reasonable person. The Respondent will succeed where it can show the other party has acted unreasonably, see Sedley LJ in Wilding v BT [2002] All ER 278, para 55.

Injury to Feelings

107. The award for injury to feelings must compensate for the hurt feelings the Claimant has experienced attributable to the discrimination.

    107.1. We must not compensate for hurt feelings relating to other issues.

    107.2. We should not aim to punish the Respondent by the award.

    107.3. We must be aware of the need to set the level of award that is not so low or high that it would diminish respect for the policy underlying anti-discrimination legislation.

107.4. We should have regard to the value of money and consider the level of personal injury awards (using the guidance set out in the Judicial College Guidelines).

108. The bandings set out in Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102 CA are useful starting point in assessing the level of injured feelings. We remind ourselves that the bands in Vento refer to the *acts* of discrimination and that our job is to compensate for the *impact* of those acts upon the Claimant. We must set our award based on our findings about that impact.

109. We consider the period over which the Claimant has suffered or is likely to continue to suffer injured feelings. The nature of the feelings impacted and degree of impact; the impact on home and working life; and the likely recovery path.

110. The Vento bands refer to injury to feelings for less serious cases, for example those caused by a one-off act (the lower band); more serious cases (the middle band); and the most serious of cases, for example a lengthy campaign of harassment (the upper band). At the time of presentation of the claim these bands were: low £900 - £8,800; middle £8,800- £26,300; high £26,300 – £44,000.

111. Where there is more than one act of discrimination, then it is usual to make a global award of injury to feelings, to avoid double-counting.

Aggravated Damages

112. It is open to us to make an award for aggravated damages. The principles are agreed and set out at paragraph 6.1 of the list of issues. The conduct justifying aggravated damages is:

112.1. behaving in a high-handed, malicious, insulting or oppressive way:

112.2. spiteful, prejudicial or vindictive conduct intending to wound and which is likely to cause more distress than if done without such a motive;

112.3. subsequent conduct: for example conducting the trial in an unnecessarily oppressive manner, failing to apologise, failing to treat the Claimant with requisite seriousness.

113. An award of aggravated damages is compensatory, Commissioner of the Police of the Metropolis v Shaw [2012] ICR 464 EAT. It reflects the extent to which those aggravating features have *increased the impact* of the discriminatory conduct on the claimant and thus his injured feelings. We agree with the observations in Shaw that it is doubtful whether the practice of awarding aggravated damages as a separate head of compensation is a good thing. There is often no bright line between the unlawful conduct and any aggravating feature of it. A separate award can lead to tribunals unconsciously adopting a punitive approach and/or the risk of double-counting. In Shaw, at paragraphs 25-28, the EAT suggested that we make a total award for injury to feelings and, if appropriate, formulate any element of aggravated damages as a sub-set of it.

ACAS Uplift

114. Under s207A of the Trade Union and Labour Relations (Consolidation) Act 1992, it is admissible for us to consider the ACAS Code of Practice on Discipline and Grievance at Work (‘the ACAS Code’).

115. Under Section s207A(2), if it appears to us that:

(a) the claim to which proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

[we] may, if [we] consider it just and equitable in all the circumstances to do so, increase any award [we] make to the employee by no more than 25%.

116. We remind ourselves of the importance of taking a structured approach under section 207A(2).

117. The ACAS Code applies in this case because the Claimant raised a grievance about the failure to adjust. The following paragraphs may be relevant after a formal grievance is made:

117.1. para 4: employers should carry out any necessary investigations, to establish the facts of the case;

117.2. para 33: ‘employers should arrange for a formal [grievance] meeting to be held without unreasonable delay …’;

117.3. para 40: following the meeting employers should ‘decide on what action, if any, to take to resolve the grievance. The employee should be informed that they can appeal if they are not content with the action taken’;

117.4. para 43 states the appeal should be dealt with impartially;

117.5. para 46 ‘Where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily suspended in order to deal with the grievance. Where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently.’

118. We must confine our reasoning, on whether to make an uplift or the size of any uplift, to the nature of the failure rather than extraneous matters. We must consider whether the failure was deliberate or inadvertent; the extent to which the Code was followed, if at all; whether there were any mitigating reasons for not following the Code.

119. Abbey National plc v Chagger [2010] ICR 397 CA, concerned a case brought in respect of the old law about statutory procedures. That law allowed a tribunal to reduce the uplift for failure to follow procedures below the usual minimum of 10% where there was an ‘exceptional circumstance’.

The Court of Appeal (in a non-binding part of its judgment) acknowledged that the size of an award could itself be an 'exceptional circumstance' for not applying or reducing the minimum 10% uplift, see paragraph 102. The court decided the uplift operated '*as an incentive to encourage parties to use the statutory procedures. We do not think Parliament would have intended the sums awarded to be wholly disproportionate to the nature of the breach.'* In that case a 10% award would have had that effect and the Court of Appeal decided it was open to the Tribunal to reduce the percentage. (Wardle v Credit Agricole Corporate and Investment Bank [2011] ICR 1290 CA, is an example of a case where the tribunal left the final decision on uplift until after the final figure under the various heads of calculations had been reached, to ensure any uplift was not disproportionate.)

120. The more recent case (that I had in mind and mentioned during submissions but could not recall its name) is Slade and another v Biggs and another [2022] IRLR 216 EAT. It confirms we should apply a final 'sense-check' by looking at the figure represented by the uplift and ask ourselves whether it is disproportionate in all the circumstances. While the EAT confirmed in Slade that wholly disproportionate amounts should be scaled down, it warned that those who pay large sums should not inevitably be given the benefit of a non-statutory ceiling, which has no application to smaller claims.

121. We also have in mind we must be alive to the question of double-counting as between the awards for injury to feelings and any ACAS uplift. This issue is not straightforward, given that an ACAS uplift can be compensatory, for example it might compensate for a lost opportunity to persuade an employer to adopt a different approach, but it is also punitive, acting as an incentive to follow the Code (as explained in Biggs). In Base Childrenswear v Otshudie EAT/0267/18 an award of aggravated damages in relation to a failure to deal with a grievance was partly reduced because there had been an ACAS uplift partly for the same issue.

122. As part of our discretion, given those principles, it seems to us that we could decide to uplift some awards and not others if it was just and equitable (fair) so to do and we give reasons.

123. Where an interim payment has been made by an employer prior to the remedies hearing, and that payment has been accepted by the employee, any uplift under section 207A will only be applied to the amount of compensation that remains outstanding, see Tim Arrow and Sons (a firm) v Onley EAT 0527/08.

Likely Retirement Date

124. We have considered chapter 3 of the Pension Loss Principles (see below) as to the choice of likely retirement date.

125. Paragraph 3.20(b) suggests that in general the Tribunal will proceed as follows: '*If the Claimant has accrued significant occupational pension rights in a scheme with a normal retirement age (and an entitlement to an unreduced pension) below state pension age, the tribunal will assume*

retirement at the scheme's normal retirement age.' It is for us to decide what are 'significant' benefits.

126. This age can be displaced by evidence from the parties, paragraph 3.21.

Accelerated Receipt

127. The Respondent argues for an adjustment for accelerated receipt on any award of future loss. The Claimant acknowledges the need to do so where there is a substantial period of future loss.

128. The theory of an accelerated receipt award is simply stated: an award for future losses is made before the loss is experienced. Should we, therefore, adjust the award to account for the interest that might be earned on such a sum or the loss of value of such a sum if interest rates are not keeping up with inflation? If the award is relatively low, then it is usually inappropriate to do so, but for higher awards we note the guidance of Peter Gibson LJ in Bentwood Bros (Manchester) Ltd v Shepherd [2003] IRLR 364 (para 16):

> The conventional discount of 5% [as it then was] which one finds referred to in the textbooks, such as Harvey on Industrial Relations and Employment Law, is designed to reflect, as I understand it, the annual yield that would be obtainable on investment of the sum paid, though it is rather higher than the 4.5% figure which, until fairly recently, was applied in personal injuries cases. Now, by statute, that figure has been reduced to 2.5% [as it then was] for such cases. Of course, if the amounts are very small, tribunals may be excused from introducing this complication; but in principle tribunals ought not to ignore the fact of accelerated receipt. They may take it into account in more than one way. The conventional way in which accelerated receipt is recognised in ordinary civil cases in the courts is through the multiplier to be applied to the multiplicand.

129. In Benchmark Dental Laboratories Group Ltd v Perfitt EAT 0304/04, the EAT noted that the rate prescribed for use in personal injury cases is set by the Lord Chancellor under section 1 of the Damages Act 1996 (as amended now by section 10 of the Civil Liability Act 2018). It observed that, although employment tribunals were not bound by this rate, it would be good practice for us to adopt it. This rate is now -0.25% per year. This reflects that future loss sums awarded now will lose value because of low interest rates and higher inflation. The amended section A1(2) Of the Damages Act 1996 provides that *subsection (1) does not however prevent the court taking a different rate of return into account if any party to the proceedings shows that it is more appropriate in the case in question*.

130. In that case, the period of future loss was 8 years. The Tribunal had calculated actual loss and then applied a 2.5 per cent discount for accelerated receipt to the whole sum. The EAT decided that it was an error to apply the discount rate to the whole period of loss because the benefit of early receipt was greater earlier on. It allowed that one way to recognise this, was to apply a total discount of 4 years x 2.5% to half the (future) award. Another, more accurate way, might be to use the Ogden

Tables to find an appropriate multiplier which already incorporates accelerated receipt.

131. If we apply the 7 step method to future pension loss then the multiplier approach incorporates accelerated receipt and we would not apply it.

132. If we choose to make an accelerated receipt adjustment it must be made to the award for future losses after our assessment of chance but before any other adjustments (like an ACAS uplift and grossing up) are made.

Interest

133. We may award interest on past loss under the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. The interest rate is the Judgment Act rate, currently 8% per year. The Regulations provide we may award interest:

    133.1. on past financial loss from the mid-point from the date of the discrimination to the date of calculation, Reg 6(1)(b).

    133.2. on injured feelings from the date of the discrimination, Reg 6(1)(a).

Grossing-up

134. Grossing up is the process by which the sum we award is increased to ensure that any tax paid on it is included in the sum ordered. The parties have agreed to calculate grossing-up once the total figure is decided.

Pension Loss

135. We have set out the principles on pension loss at the end of this judgment.

Application of Facts and Law to Issues

136. The Respondent accepts the Claimant would have been transferred but for the discrimination. They made this clear at an earlier preliminary hearing. We have not, therefore, had to consider what vacancies were available at the relevant time and what chance the Claimant had of being transferred to one of them.

Issue 1:1 Chance of a Return to work

137. If a reasonable adjustment of a transfer to Feltham had been offered on 1 July 2019, what was the chance the Claimant would have returned to work?

138. We have already decided that there was a real chance of such a return, probably not immediately but within a relatively short time (L.218). At that point we understood the vacancy at Feltham arose some time between 20 May and 27 June. The parties have agreed we should consider the chance at 1 July 2019.

139. The first factor in favour of a real chance of return is that OH advised a move closer to home (L.218.1). While this was back in March 2019, we consider it likely that, without the meddling of the Respondent, this would have been the ongoing advice. In any event, even the more general OH

advice 'prognosis depending on a resolution of the issues' favoured a transfer. The offer of a transfer by the end of June 2019, would have resolved the main issue. It would have meant the Claimant would not have had to raise a grievance about his disability and the need for an adjustment. We consider there is a very good chance the decline in the prognosis seen on 23 August 2019 (to a 3-month recovery period) would not have occurred, because, by then, the Claimant would have had the offer of the transfer and not have been facing disciplinary allegations: a resolution of the issues that a good prognosis depended upon. Thus the limited medical evidence we have points towards the offer of a transfer being a great help to recovery.

140. The second factor in favour of a return, is that the Claimant would undoubtedly have had a much shorter commute on management days leaving him quality time to spend with his family in the evenings of those days (L.218.2). We maintain this finding after the evidence we have heard during remedy. He would have been able to choose -9s; this would have meant a later start but still an early start at around 5.30am but a much earlier return home. While his daughter would still likely have been rising early, this was not at 4am but after 5am and he had time in the evening to support her. This would have reduced his anxiety about not having time to support her and not spending any time with his family, which in turn would have improved his confidence, which in turn would have readied him for work.

141. The third factor in favour of a return, and one we weigh heavily, is the boost in morale that such a transfer would have given the Claimant (L.218.3). He would have felt listened to, understood that he was being supported. He had asked for the transfer because he thought it would help him back into work. His mental health declined when he realised he might be disciplined. We consider the offer of a transfer and the support it showed would very likely have had the opposite effect: an immediate boost, which would likely have greatly assisted in a recovery.

142. We consider that, to make the offer of a transfer effective, the Respondent would have told the Claimant, at the same time, of its decision to drop its concern about the 'authenticity' of his application. (A decision made on 1 July 2019, L.107). This too would have relieved a significant source of stress and assisted with a mental health turnaround.

143. A further factor that points towards the likelihood of a return is that the Claimant had shown some resilience in the last few years (until February 2019) despite the difficulties in his family life and in his previous job and his growing mental ill health. He had continued to work in Hampshire until the agreed garden leave in mid 2018. And, in May 2019, the Claimant had tried to return to work even when unwell. This shows us he was determined, if at all possible, to make this job work.

144. We next consider the 'withdrawal' factors that, it is submitted, reduce the chance of any return to work.

145. First, the Claimant had been diagnosed with depression in early 2019 and it had been explained to him he had symptoms of PTSD (if not a formal

diagnosis). He had gone from coping to not coping. We found this was primarily due to the decline in his daughter's health and thoughts about his inability to support his family, especially his daughter, because of the longer time away from home that his commute demanded. Further in May 2019 he had reached rock bottom with thoughts of taking his own life likely triggered by the letter casting doubt on the authenticity of his application. We have weighed this pre-existing poor mental ill health as a factor. We do not consider it outweighs the OH advice we refer to above and the significant boost in morale the offer of a transfer would have represented. By mid-July 2019, the risk of allegations about his application would have been removed. The stress of losing his job over this will have gone. Nor would he have been sent the letter in July stating that there was no evidence of disability, instead he would have felt listened to and supported. There is a chance that he could not recover from this sufficiently to return, but we do not consider, taking all the circumstances into account, that this chance outweighs the factors pointing to a return. We have found that the rejection of a transfer and the dismissal process significantly worsened his mental ill health.

146. Second, the Claimant still had to support his daughter and wife who themselves had mental ill health. We agree that these challenges are a factor in considering the overall chance of a return. His anxiety would still have been affected by the situation at home. He knew his daughter would still have been getting up early with him, even on a shorter commute, and she would not, at that time, have been receiving the external support. There is a chance that the family situation meant he could not make a recovery, but he also knew that the shorter commute would give him more family time. Thus, we consider that there is a much stronger chance that the family challenges would likely have spurred the Claimant on to trying to make the transfer work: it was what he had been asking for because he thought it would make a difference.

147. Third, the stress of pursuing the tribunal case against Hampshire would have continued and this impacted upon on his mental ill health. Again, however, we consider this factor is more relevant to whether the Claimant could have sustained work. We agree with his assessment that, the more success he made of work with the Respondent, the less important the Hampshire litigation became, so far as future losses were concerned. Getting back to work was a way of making the Hampshire litigation less important to him.

148. Weighing those factors overall we judge there was a high chance of a return to the transferred post from 14 July 2019: a 75% chance. We consider the factors pointing to a return are weightier than those that might have prevented any return at all for the reasons we have given.

Issue 1.3: Development

149. If the Claimant had returned how long would it have taken him to complete his development?

150. Factors suggesting that the Claimant would take longer than average to complete development are that: the Claimant was new to the service; he

had not worked the Watch Manager role in a station, and he had vulnerable mental health and may well therefore have had some absences from work. We do not consider any of his service before July 2019 because of his long absence: in the transferred role, he would effectively be making a fresh start. Against those factors we have considered his determination to succeed and the fact that he had gained promotion at the first opportunity through a competitive process and had been selected by Hampshire on their Firefly programme as someone with potential.

151. We have taken into account the statistics provided by Ms Tapp and Mr Ryan's evidence of the need to be operationally active.

152. Weighing all these factors we consider, if he had stayed in employment, it would have taken the Claimant a longer than the average for transferees to complete his development, likely at the end of 2020 (17.5 months from transfer: 24 months from starting).

153. If there was a limit on the length of development, we find this would likely have been adjusted to take into account the absences and the Claimant would have become Station Manager competent by the end of 2020.

Issues 1.2 and 1.4: prospect of sustained employment to retirement

154. We will apply one percentage chance to the prospect of continued employment for development and beyond. Neither side argued that the period should be broken down into shorter periods.

155. In our judgment, until retirement, the Claimant would have striven not to leaving work voluntarily: his was a vocation; he was determined to work as a firefighter; he had long experience and had fought hard for the opportunity of a transfer prior to his dismissal. He was unlikely to want to transfer back to his local service given the difficulties he had experienced there. And his pay with London was higher than pay with neighbouring services (Dorset or Sussex), which were still a similar commute away**.** We consider these factors in the Claimant's case outweigh the figures provided by Ms Tapp that around a third of transferees subsequently left voluntarily before they were 50.

156. The immediate disciplinary allegations would not have been hanging over him, the source of the last and most long-lasting decline in his mental health.

157. He had shown some resilience in the past during the last difficult years with Hampshire when, in hindsight, he was experiencing ill health.

158. The transfer would have shown him the Respondent wished to support his recovery. The OH prognosis was improved if the issues were resolved. OH had always advised fitness in the foreseeable future.

159. We also consider the factors above that led us to conclude there was a high chance of a successful return after transfer.

160. Nevertheless there are some significant 'withdrawal' factors:

160.1. His was a new and challenging job at a busier station;

160.2. He had a long commute and a rota that kept him away from home for some nights. His wife and daughter required his support at least in the first couple of years.

160.3. Initially the stress of the ongoing Hampshire litigation.

160.4. He had vulnerable mental health, including symptoms of PTSD.

We take into account, also, how the first three would impact on the fourth.

161. The transfer would effectively have been a new job for the Claimant with some challenges: at a busier station than he was used to; managing, at a higher level, new people; and being managed by someone new to him. There is a strain in making these new relationships and finding one's feet at a new level and in gaining the team's trust. Against that we consider on balance that our findings suggest the Claimant had the potential to cope with extra responsibility: his lengthy experience and love of the job and first-time successful promotion; his secondments; and the Firefly programme had picked him out as someone with potential. He was used, as a firefighter, to working with teams. He had some years' experience in a London station at Westminster. He enjoyed the firefighting role. It gave him self-worth. He was used to the risk of danger and risk to life that went along with it. As a Station Manager he would not go out on every 'shout'. He will also have been glad to get away from a situation he found to be bullying at Hampshire. On balance we take this factor into account but do not regard it as weighty as the Respondent submits.

162. The commute was still at least 1 hour 20 minutes each way. This would have been tiring. But it was a shorter commute and would have reduced the pressure on his daughter and enabled him better to support his family in the evening. This will have reduced his own anxiety. There were also days off each week, some consecutive that will have aided his recovery. But the '24s' away from home will have created the risk of strain on him because he could not be at home personally to support his family. This risk factor is not as great as the Respondent contends, because 24s were timetabled and family support could be planned in advance. Further, the need for the Claimant's support reduced as his daughter and wife improved with external support.

163. The family circumstances significantly improved (from 2019 for the Claimant's wife who by April 2021 was able to work; and from July 2020 for the Claimant's daughter who by 2022 was able to go to college). While this was a stressor in the first two years it lessened in that time as both obtained external support and made independent progress with work and study.

164. The ongoing litigation with Hampshire was an external source of stress that would have existed absent the discrimination. This is shown in the counselling evidence and the Claimant's letter about the postponement of the Hampshire hearing. Each step in the proceedings would have been a reminder of events that may well have triggered his symptoms of PTSD and this would have risked his ability to work.

164.1. But absent the discrimination and had the Claimant returned to work, he would not have been pressing for reengagement in the negotiations. In our judgment therefore it is likely have resolved sooner.

164.2. Similarly, the longer the Claimant stayed in work the more this stressor reduced, because the Claimant could feel more stable in his new job and there was less 'riding' on the litigation.

164.3. In any event this stressor ended on 21 February 2021 (19 months after the transfer would have taken place) on settlement.

165. The Claimant had vulnerable mental ill health. He had had a significant decline in early 2019 made worse by the failure to make the transfer, the disciplinary procedure and dismissal. Without these factors we consider a sooner recovery would have been much more likely. In our judgment on the evidence, if a transfer had been offered there was a good chance that it would have stemmed his decline. Nevertheless, given the 4 months of absence until 14 July 2019 and symptoms of PTSD and prior mental ill health, there was a chance of relapse. The long commute, the family circumstances, the greater responsibility in a new role and the Hampshire litigation all added strain. We have weighed in the balance the chance of significant relapse.

166. We consider the PTSD therapy is likely to have started earlier if the Claimant had not been dismissed from the Respondent because:

166.1. therapy with CTS would have continued and they were content to do EDMR even though the Hampshire tribunal was continuing;

166.2. the offer of a transfer to Feltham and the dropping of disciplinary allegations created the chance of reducing his symptoms such as to enable CTS to begin their EMDR therapy sooner, as they hoped in their report;

166.3. while there is the chance that the CTS counsellor would also have advised to await the outcome of the Hampshire litigation before beginning EMDR therapy, there was a better chance of the Hampshire litigation settling earlier if there was no reengagement issue.

167. If such therapy had started sooner then there was a better chance of the Claimant overcoming his PTSD symptoms.

168. We have considered Ms Bayley's evidence that firefighters with PTSD often leave the service. She did not know the Claimant's triggers. We found that the triggers were the difficulties with his employers. The transfer would have plainly lessened those triggers, though they continued to exist with each step in the Hampshire litigation.

169. Overall, we consider it likely that the Claimant would have been vulnerable to further but shorter absences for mental ill health to deal with bumps in the road to recovery and particular spikes relating to steps in the

Hampshire litigation. We consider it less likely that he would have had a mental health decline necessitating long absence.

170. A review meeting under the MAP had not been triggered by July 2019 because the Claimant had not been off for 6 months. Post-transfer, the Respondent may have held capability meetings with the Claimant, but these are far more supportive than disciplinary processes. The triggers may have been adjusted to take into account short absences. We also consider that dismissal for the Respondent on capability grounds was a last resort and that the Respondent would likely have had to consider with him whether any adjustments could have helped, for example to hours, even on a temporary basis to avoid it. Plainly there was a chance of dismissal in the worst case: that the Claimant was too ill to sustain a return.

171. Overall we consider the factors in favour of sustaining employment outweigh the factors against: his determination; his long record of service; the prospect of fulfilling work and pursuing his vocation; the gradual improvement of the situation at home; the lessening importance of the Hampshire litigation as his work in London became better established; the chance that temporary non-operational work may have been available for short periods; and the better chance of earlier PTSD therapy. Although our analysis of each withdrawal factor reduces its strength, when taken together, they are also substantial. We acknowledge that there was a chance they would have created stressors that damaged the Claimant's health enough for him to be unable to continue in work, even with determination, a supportive policy and appropriate adjustments. Doing our best to weight all the factors we have set out, we can we put the chance at remaining in sustained employment until retirement at 60%.

Issue 1.7: Promotion

172. We do not accept the Claimant's assertion that he would have gained promotion quickly. This is because: he would likely have taken longer than most to finish development; he was likely vulnerable to short absences for mental health reasons, which would have prevented him from building up experience as quickly; he had not had experience of management at a station at the grade below and therefore will have needed more time to evidence this experience in any promotion application.

173. There is however evidence that points to the Claimant having potential for this promoted post: he was picked out by Hampshire as someone with high potential; he had long experience in the service; he gained promotion to Station Manager at the first opportunity. After the first few years the family stress had lessened and the Hampshire litigation stress was removed.

174. He may still have set some geographical limits upon those jobs he was prepared to apply for given the commute, but there is a chance he may not have done, given the improved family situation.

175. The promotion process was competitive. The more senior job required resilience. On average each year only 9.5% of the eligible pool were

promoted. Over about 17 years, only 2 of the 18 transferees to Station Manager were promoted. It took Mr Ryan 7 years to obtain promotion up through the ranks to Group Commander.

176. We consider the guidance in Cannock that we should not be too optimistic about promotional chances. This is particularly so here when we are asked to assess the promotional chances when cannot know for sure how the Claimant would have performed in the substantive Station Manager role.

177. Overall weighing up the factors, balancing out his potential and the longer time likely needed to show experience, we consider the Claimant had a 10% chance of promotion, but that this chance only began after 8 years of being a competent Station Master, i.e. from 1 January 2029 (aged 48).

178. Only 5.5% of Group Commanders were promoted in any year from the eligible pool. The Claimant could not have considered promotion until a good few years in the Group Commander role. Given the limited chance of the first promotion and the chance that the Claimant will have retired before being ready for further promotion (see below), we consider the chance of further promotion too low to sensibly assess.

Issue 1.6: When would the Claimant's employment have been terminated if not on capability grounds. (Retirement Age)

179. Our starting point is the normal retirement age under the pension scheme if it is sooner than state pension age, paragraph 3.20 of the Principles. The difficulty here is that the two schemes had two different normal retirement dates: 12 September 2033 (aged 53) under the 1992 scheme and 12 September 2040 (aged 60) under the 2015 scheme.

180. The Claimant asserts he would have retired at age 60.

181. We consider there is a good chance the Claimant would have retired at the earlier date of the legacy scheme. By this time he would have been working in the Fire Service for three decades and would have had the prospect of receiving at least a portion of his pension benefits, perhaps more with his McLeod choice. He would have gained much satisfaction from reaching this milestone. We consider this long service by then would have begun to outweigh his vocation and love for the Service. We also consider the chance of his continuing to have vulnerable mental health. He would have continued to have the physically and mentally challenging work of being an operational firefighter and manager. He would still have had a tiring commute.

182. There was some chance of the Claimant continuing to work, which reflects both the small chance of his having been promoted and chasing for promotion and his love for the work. We factor this in by adding 2 years to the default retirement age.

183. Overall we consider the withdrawal factors mean that the Claimant would likely have retired on his 55th birthday i.e. 12 September 2035.

Issue 1.8.1 Loss of sick pay

184. We agree that the Claimant should be repaid the lost pay from 14 August 2019 when his sick pay was reduced to a half, subject to adjustments. If he had returned to work on 14 July 2019, he would not have had his sick pay reduced because his absence would not have lasted 6 months.

Issue 1.8 Period for compensation

185. We have identified the periods for compensation in our reasoning above and set them out the attached calculation.

Issue 3: Mitigation

Mitigation to Date

186. In our judgment it was reasonable for the Claimant to start his businesses in all the circumstances. In the first 18 months he was not well enough to look for equivalent full-time work. His skills and experience were fire service-related. The business ideas he had were reasonable ones that took advantage of his skills and were scalable. He obtained independent advice for his business plans. The businesses were a genuine attempt to develop a profitable enterprise and mitigate his loss. Contrary to his evidence to us, the business plans showed he expected his business to profit in the first few years and at a level whereby he could soon mitigate his loss. His business ideas were sufficiently credible that he was able to borrow money with the advice from an agency employed by the state and through a scheme administered by a reputable bank.

187. The development of the businesses was severely restricted by the pandemic – not something the Claimant could have anticipated. There was no certainty how long it would last. He had already done planning and preparation for the business. It was reasonable, given this uncertainty, to wait for things to improve and in the meantime make further preparations and plans.

188. Then from May 2020 to the end of restrictions it was reasonable of the Claimant to use some of the Bounce Back loan to Services as personal income. The Bounce Back Loans were intended to keep businesses impacted by the pandemic going by replicating some of their income. As the sole owner, the Claimant could reasonably draw income from them. We have found it likely that between May 2020 and 1 July 2021 the Claimant drew £37,500. The loans likely supported the Claimant in his decision not to give up the businesses during the pandemic. This was reasonable: it is what they were for. We have calculated future profits taking into account the loan repayments.

189. We find it reasonable for the Claimant not to have applied for firefighter jobs once his health had improved somewhat. His experimental job application in August 2021 had not given him any confidence that this alternative route was likely to bear fruit. Further, because he had not served for over 12 months his competencies had expired and this was a criterion in the firefighter job advertisements we have seen. In any event, by this stage he was committed to his businesses through the loans he had obtained and the work he had done.

190. We have asked ourselves whether the whole of the Universal Credit received should be deducted or half. It is a benefit paid for the whole household. The claim began when the Claimant lost his employment. Claimant has described himself as the sole breadwinner. His wife did not work until May to November 2021, when she received a small sum in part-time earnings. Her work did not prevent the Universal Credit claim from continuing. We have concluded it would be fair to deduct the whole of the UC amount because it was attributable, in the main, to the Claimant's lack of work.

Future Mitigation

191. For the future, the Claimant considers he will fully mitigate his lost earnings by July 2027**.** This is overly pessimistic. We bear in mind his own forecasts and the way in which Services is already booking work and becoming busy. He put the second Bounce Back loan to good use in the Engines business by buying assets that can bring in an income. We take into account that the Claimant has recovered his health to some extent already and is likely to improve once the litigation has ended and further therapy can begin. Taking all these factors into account we consider a gradual increase in profits is likely bringing the Claimant to parity with his lost earnings by the end of the calendar year 2024, i.e. midway through the business year July 2024/5.

192. We estimate for the winter 2022 /spring 2023 Engines will make an equivalent amount to its likely summer earnings in profit £2,700, there being fewer weddings in those months. (A total of about £5,400 for the July/June 2022/23 year.) We estimate income from Engines will increase as word of mouth about the events done this year will increase interest and the Claimant's marketing efforts will begin to pay off.

193. We estimated that Services is likely to make a profit of £2,500 per month for the rest of the year July/June 2022/2023.

194. The total for both businesses for the year 1 July 2022/23 we consider the Claimant is likely to earn gross £35,400.

195. For simplicity, we have used an income tax calculator to estimate roughly net income using April/March annual rates.

196. The Claimant anticipates that he will be able to fully mitigate his loss of earnings over the next 5 years, by July 2027, through his businesses. But his business plans paint a much rosier picture. Now that the problems of the pandemic are behind it, the recent invoices of the Services business show good activity. The Claimant's health is improving and he will benefit from delayed therapy once this litigation is completed. In the Engines business he has the appliances bought with the loan and the planning work he has been able to do during the pandemic. He does have, however, more costs in the repayment of the Bounce Back loans. Overall, we consider the Claimant's businesses will go from strength to strength having survived this difficult start and now that he will be able to give more of his time and attention to them. The more events he does, the more training he gives, the more money he will make. He has lengthy and

marketable experience to draw on. His businesses are very much based on skills he possesses. Now that he has begun to operate, word of mouth will also help him progress. It is a difficult estimate to make. Following the guidance in Wardle, we have tried to reach a balance between the businesses doing really well and having a slower start. On balance, taking all these factors into account, we consider the Claimant's estimate too pessimistic.

197. We estimate the Claimant will achieve a steady increase in his business in net income year on year from July/June.

    197.1. In 2022/23 year we estimate net earnings around £27,000 (as compared with around £40,000 in the old job);

    197.2. in 2023/24 we consider an increase in net income of around £6,000 to £33,000 a year (as compared with around £43,500 in the old job); and

    197.3. in the last 6 months of 2024 we estimate a half year net increase of £3,500 to a half year net income of about £20,000 (as compared with £22,300 in the old job) and reaching parity with Station Commander earnings in the next half year. Thus future loss of earnings stops at 31 December 2024.

198. It is also our best estimate that the business plans show the potential for growth beyond this. In our judgment after another 18 months, i.e. by 1 July 2026 this further growth will allow the Claimant to invest £3,000 a year in a private pension until he is 55 i.e. 12 September 2035. This figure represents the Wardle balance between doing a great deal better and growth flattening off. We consider the Claimant will stop making contributions at this date because this when he is likely to be able to draw a Fire Service pension in any event.

199. We do not count the chance of being promoted to Borough Commander in mitigation: this small chance of such a promotion does not arise until 2029. We consider it likely there is an equal chance that earnings in business will keep up with such a promotion.

Issue 5. Injury to Feelings

200. By the time the failure to facilitate the transfer had occurred, the Claimant was already experiencing significant hurt feelings not attributable to the discrimination. We do not take them into account:

    200.1. the significant impact upon his feelings and mental health caused by his experiences at and having to leave his work in Hampshire. This included the significant impact on his mental health (depression and anxiety and symptoms of PTSD) and significant upset and anger. He also remains upset and embarrassed no longer to be recognised as the face of the Fire Service in Romsey. He had to leave Hampshire where he had worked for 21 years. These injured feelings have been compensated for in the settlement with Hampshire to the value of £33,356.00. We make sure not to include them in our assessment, they are clearly divisible from it;

200.2. the shame he felt at the decline in his mental health causing outbursts of temper towards his family: this was before the discrimination took place;

200.3. the stress his commute and family situation created and anxiety about having to offer more support to his wife and daughter, that led to his decline in early 2019;

200.4. the significant increase in anxiety that he felt upon receiving the Respondent's letter about the accuracy of his job application and this potential disciplinary matter hanging over him sending him to rock bottom (described at L.75);

200.5. his frustration and upset about his grievance not being dealt with. This was significant because the grievance was about the matters we have found were discrimination. It was a lost opportunity to put things right while still employed. But the failure to deal with it was not an act of discrimination and therefore not something we count towards injured feelings;

200.6. his feelings and upset that the Respondent has chosen to defend his claim. This claim was a difficult one to determine, the Respondent had the right to defend it, and its appeal was reasonable. At the remedy stage both sides have put their case at the highest and lowest and we have therefore been required to decide the issues;

200.7. the stress and anxiety created by the Hampshire litigation including the postponement of the final hearing, which created significant hurt feelings described in the Claimant's letter to the Tribunal.

201. We take into account that the acts of discrimination here removed the Claimant from his career as a firefighter. There was a real prospect that if the adjustment had been made the Claimant would get back to work and a real chance that he could stay in work thereafter. The Claimant's hurt feelings about this are significant and easily divisible from those matters we have set out above. His was a vocation. He is desperately upset to have lost it, knowing there was a chance, through his employment with the Respondent, that he could have remained in service.

202. At the failure to transfer stage, the lost opportunity to keep his job and prove himself was hugely frustrating and upsetting for him. Being told that there was no evidence for disability made him aggrieved and concerned, as did the later effort not to consider disability as part of the disciplinary.

203. The Claimant experienced great stress in the disciplinary, knowing that stage 3 was likely to result in dismissal. Dismissal itself, the forced removal from a job he did not wish to leave, was deeply humiliating. We take into account his shame at having to admit, as an offence, absences that were no fault of his.

204. It is true that the Claimant was vulnerable to further upset because of his declining mental ill health, but we must take him as we find him. We count

the loss of pride in doing the job, the embarrassment of no longer being a serving firefighter: feelings of grief at its loss, described as a ball in his chest. While these feelings will decline to some degree as his business progresses, they will persist to some extent because he is no longer serving.

205. His loss of self-worth and hurt feelings that he could not any longer provide for his family will reduce as his business progresses.

206. Since our judgment in November 2020 the Claimant will have felt vindicated, but he remains angered at the Respondent's discriminatory actions and failures. We expect that these hurt feelings will reduce to some extent at the conclusion of the hearing and receipt of compensation.

207. To avoid double-counting, we prefer to make a global award representing the amount that will compensate for the whole of the Claimant's injured feelings attributable to the discrimination we have found.

208. We next consider whether any features of the Respondent's conduct related to the discrimination were aggravating (in accordance with the above definition) and, if so, whether they exacerbated the Claimant's injured feelings already described.

209. We agree only in part with Mr Franklin's submissions. The process we have had to undertake to assess each alleged element of the aggravated damages claim is a good illustration of the point in Shaw, that there is often no bright line to be found between the unlawful conduct and a feature of it that could be described as aggravating. We have done our best to decide that line.

210. The following features of the Respondent's conduct were plainly high-handed treatment in relation to the discrimination we have found. In relation to each we ask whether there is an aggravation of the injured feelings we have already counted.

    210.1. Issues 6.5.1: setting its face against asking questions about his disability and contending there was no evidence of disability when it could not have done so in all conscience. We have already counted the impact of this in our description of the hurt feelings above and do not count the impact again.

    210.2. Issue 6.5.3: DAC Perez setting his mind against considering disability at the disciplinary hearing, L.102, L.203 (what we originally called 'wilful blindness'), L.127.2. Similarly, we have already taken the hurt feelings about this into account above.

    210.3. Issue 6.5.2: seeking OH advice that was 'acceptable' to it: in other words meddling with OH advice because it did not want the Claimant to use OH advice to advance his case for a transfer L.65-68; L.240.5. Upon seeing this in the evidence for the Tribunal, the Claimant was angered because it blunted the OH advice and made his request for the adjustment weaker. This related to the failure to make the adjustment and we consider it an extra and new element of hurt feelings;

210.4. Issue 6.5.5: in August 2019 using the disciplinary procedure when it knew that the policy had changed on 1 August 2019 and it was no longer to be used for absence-related matters (L.105, L115). The use of the disciplinary procedure was a source of great shame for the Claimant; this was a point his union official made at the time. But we have already taken the impact of this into account in our description of his injured feelings.

210.5. Issue 6.5.11: DAC Perez lack of credibility in his evidence to us that there were no transfer vacancies, when he had not checked (L.97.1). The Claimant's hurt at the thought of the lost opportunity a transfer represented has been intensified by hearing that management did not take his request seriously at the time by considering whether there were vacancies. This is an aggravating feature relating to the failure to transfer and we consider it an extra and new element of hurt feelings.

211. We do not take into account other matters pressed upon us by Mr Franklin, which we regard either as matters that are not part of the unlawful discrimination; or matters not attributable to the discrimination we have found:

211.1. the delay in conceding disability, Issue 6.5.4. The dates put forward by the Claimant are incorrect: the Respondent conceded disability at a relatively early stage of the claim on 4 August 2020;

211.2. the delay in apologising, Issue 6.5.24. We recognise that parties to litigation should be able to defend, so far as is reasonable, the decisions they made. The Respondent appealed our decision on disability and some of that appeal was reasonably arguable and required a full appeal hearing. The Respondent did not apologise until that appeal had been decided against them: this was a reasonable approach. The apology was supported by evidence from Ms Bonham of the significant work the Respondent's personnel department has undertaken to learn from our judgment. In the circumstances, the apology and its delay were not high-handed;

211.3. the allegations concerning the Claimant's job application and the delay in informing him that they had been dropped do not relate to the discrimination we have found and we do not take them into account, Issues 6.5.6 and 6.5.7;

211.4. we do not take into account failing to deal with the grievance, see our reasons above, Issues 6.5.8 and 6.5.20;

211.5. issues concerning the disciplinary procedure 6.5.9 and 6.5.14 formed part of the overall problem of using a disciplinary procedure for absences and the failure to make adjustments earlier. We have already taken these matters into account in assessing injured feelings;

211.6. while we might quibble with some of the language, the criticisms of DAC Perez' reasoning at Issues 6.5.15, 6.5.16, 6.5.17, 6.5.18 and

6.5.19 were part of the reasons why we rejected the Respondent's objective justification defence. We have taken injury to feeling into account for this dismissal and the approach to it by DAC Perez and it would be double-counting to add them into a further aggravated damages award;

211.7. the Respondent may have been wrong not to provide information about vacancies earlier, issue 6.5.12, but we decided in our liability judgment that there was a likely vacancy and we assess injury to feelings on the basis of the lost opportunity to be transferred to it;

211.8. issues 6.5.13 and 6.5.21 relate to the Respondent's use of redacted documents, which kept the identities of those involved in decision-making hidden until the hearing itself. It was plainly wrong, but we have decided not to take this into account because it could have been resolved earlier by the Claimant making an application to the Tribunal. Further we have recorded that BC Prasad was mistaken;

211.9. issue 6.5.22 repeats the significant loss caused by the discrimination that we have assessed under the injury to feelings;

211.10. no particulars have been given for Issue 6.5.23;

211.11. parts of Ms Bayley's written evidence contradicted the findings of fact in our liability judgment. We have decided not to consider this an aggravating feature of the conduct of the litigation because Ms Bayley had not really read our judgment and Miss Thomas made it clear during the hearing that she would not rely on those parts of her evidence.

212. Overall, we consider our assessment the award for injury to feelings attributable to the discrimination should be in the middle Vento category. This is a serious case because it involves significant and persistent hurt feelings arising from the loss of a job and the lost opportunity that the transfer represented to stay in work. We do not agree that somehow, because there were only two acts of discrimination, that the assessment should be in the lower category. It is to misunderstand Vento to suggest that on 'one-off' acts should always result in the lower band: it depends on the impact of those acts. The discrimination here still meant the Claimant was unlawfully dismissed and his hopes of continuing his career were dashed. This has had a huge impact on his feelings because his sense of self-worth and status was wrapped up in his work with the Fire Service. He was disciplined when he should have been offered a transfer causing him a great deal of stress, shame and upset. Two of the aggravating features we have set out above added an extra slug of anger and upset to those hurt feelings.

213. Nor do we agree that injured feelings here fall into the most serious category: we take into account that the Claimant had already suffered significant hurt feelings for matters not attributable to the dismissal that he canvasses in his witness statement before us.

214. In considering where in the band the award should fall we have taken into account the following factors:

    214.1. The severity of those feelings: we have set this out above.

    214.2. The duration of the hurt feelings. From mid 2018 and continuing in large part.

    214.3. The prospect of amelioration. The Claimant's hurt feelings will reduce with time. The end of the litigation will provide a point from which he can move on. But in our judgment the knowledge that the discrimination prevented him from working in a job that was his vocation will persist, there will be some ongoing impact on his self-worth.

215. Doing our best to find a figure that properly compensates those feelings we have described, without double-counting, we judge injury to feelings at £25,000 in total. If we are required to identify what part of that figure compensates for the exacerbation of injury caused by the aggravating features of the discrimination, we assess it as including £4,000 for aggravated damages.

216. We have made sure to test this final figure by considering its value in money terms. We have considered the Judicial College Guidelines for injuries such as moderate psychiatric injury; facial deformation; significant scarring; and backpain. We have done so not because the injured feelings are those injuries but to test whether, by analogy, our award of injured feelings is commensurate with awards for general damages in a type of case of similar seriousness. Having looked at that range of awards, we are comfortable that our award for general damages (injury to feelings) is not out of kilter.

Issue 7 Hampshire Settlement

217. We do not take into account the amount the Claimant received in settlement with Hampshire. This concerned an entirely different set of facts that occurred before the Claimant's employment with the Respondent. We have been careful to ignore those hurt feelings arising from that employment, which we regard as divisible from those we have set out above.

Issue 8. ACAS Code

Was the Respondent in breach of any paragraphs of the ACAS Code?

218. The Respondent organised a grievance meeting by stating that it was be dealt with as part of the disciplinary hearing; paragraph 46 allows for this. However, at the disciplinary meeting we have found the grievance was not dealt with at all or not credibly. Mr Perez did not respond to the grievance about the wrong procedure. He did not grapple with the question whether the Claimant was disabled. He did not deal with the transfer request credibly. He was not impartial in that he was judging his own decision not to facilitate a transfer. In not responding to these significant parts of the grievance, the Respondent was in breach of paragraphs 4 (not

investigating whether the Claimant was disabled); paragraph 33 in the sense that, in substance, the disciplinary meeting was not a grievance meeting: it would be emptied of any meaning if all the Respondent had to do was name a meeting as a grievance meeting.

219. By having no grievance appeal the Respondent was in breach of paragraph 42 of the Code.

Were the breaches unreasonable?

220. In our judgment the breach of paragraph 33 was unreasonable. This was not merely mistaken or inept treatment. The grievance letter raised serious issues and Mr Perez either did not give a decision on them or dealt with them unreasonably or not credibly. This was not an employer trying genuinely to respond: it did not take the complaint seriously or give it due consideration. There is no mitigating feature that we can see.

221. The breach of paragraph 42 was also unreasonable. The lack of an appeal by an impartial person prevented the Claimant from having a chance to resolve his serious grievance before the end of his employment.

If so, is it just and equitable to increase any award?

222. Subject to the size of the awards, in our judgment it would be fair to apply an uplift because it would recognise the significant opportunity lost to the Claimant in resolving his grievance that was the result of these breaches. If the Respondent had considered the grievance, it may well have avoided breaching the Equality Act. Further this is a large employer, with personnel department, who should be encouraged, by an uplift, to deal with grievances in accordance with the Code or alternatively punished by an uplift for failing to have done so.

223. We take injury to feelings and financial loss awards separately. The overall award will be substantial. But in relation to injury to feelings we consider that it would nevertheless be fair to apply an uplift to this award. This is because this award does not compensate fully for the hurt feelings in relation to the grievance failures. We have compensated for the hurt feelings relating to not considering whether he was disabled and the 'wilful blindness' in relation to that. But the Claimant's feelings were further hurt by his knowledge that the failure to deal with his grievance meant he lost a crucial opportunity to avoid discrimination and a chance to stay in work. This employer is a large employer. It has the personnel resources. The lost opportunity was considerable. There is no mitigation for it. In our judgment it is just and equitable to uplift the award by 12.5%. The size of the uplift would have been higher were it not for the overall size of the compensation award. We apply the uplift to the figure for injury to feelings after deduction of the interim payment, as per Tim Arrow.

224. In relation to financial loss we consider the balance of factors is different. The financial loss award fully compensates the Claimant for his losses and the total award will be substantial. Loss of earnings is already around £40,000. To this will be added 45% of 16 year's pension loss (less pension mitigation). We bear in mind the guidance both in Chagger and Basewear. In our judgment, the size of the loss of earnings award is sufficiently

substantial to outweigh the other factors meaning it is not just and equitable to increase the financial loss award by an uplift.

Issue 9. Interest on past loss.

225. In this case there are two dates for the discrimination: the date of the failure to make adjustments (at the latest 1 July 2019) and the date of dismissal (24 October 2019). We have decided it is fair that the 'date of the discrimination' should be the date of dismissal: the Claimant was earning some pay until then and his injury to feelings arise from the dismissal as well as the failure to adjust.

226. How do we divide, if at all, the interim payment made on 7 March 2022 between the two types of loss? The Respondent argued that there was a low chance of continued employment and that the amount for injured feelings should have been in the lower Vento band (up to £8,800). It cannot have anticipated, therefore, that the whole of the interim payment related to injured feelings. In fairness therefore we split the interim sum 50/50 between injured feelings and financial loss: £9,738 for lost earning and £9,737 for injured feelings.

227. We recognise that the Judgement Act interest rate of 8% may not reflect the interest which would have actually accrued on past loss, given interest rates have been lower. Neither party has submitted we should apply interest on a different basis. Our future earnings calculations do not reflect increasing interest rates and may therefore be in reality low. The calculation of loss and interest is more of an art than an exact science. Overall we consider it fair to apply interest in accordance with the approach set out by Parliament in the Regulations.

228. We calculate interest in two parts for both past financial loss and injured feelings: for the whole sum between date of dismissal and interim payment (24 October 2019 to 7 March 2022); and then to the whole sum less the interim amount from 7 March 2022 to the calculation date of 3 October 2022.

    228.1. For injury to feelings: the number of days between 24 October 2019 and 7 March 2022 is 865 days and from 7 March 2022 to the calculation day of 3 October 2022 is 210 days.

    228.2. For financial loss the number of days to the midpoint between 24 October 2019 and 1 March 2022 is 432.5 days and to the midpoint between 1 March 2022 and 3 October is 105 days.

Issue 10. Accelerated receipt.

229. The period of future loss of earnings is too short, 18 months, for it to be necessary to apply an accelerated receipt figure. It is incorporated into pension loss by the multiplier used in the 7-step method.

Standing back and looking at loss of earnings overall

230. On our first day of deliberations we found the facts and made some decisions in principle. At our second chambers discussion, we finalised our

decisions in principle. Once the figures were calculated, we stood back and considered whether the individual components and the total seemed proportionate and were a just reflection of the chances which we had assessed. We then considered the ACAS uplift.

Issue 2: Pension Principles

Simple or complex?

231. The Claimant has experienced pension loss reduced by the chances of returning and staying in work and reduced, to some extent, by his ability to contribute some money into a personal pension in the way we have described.

232. We have considered the Principles for Compensating Pension Loss Fourth Edition (Third Revision) 2021 ('the Principles'). They do not have the force of law but are very useful guidance.

233. We must do our best to identify a sum of money that puts the Claimant back in the position he would have been in but for the unlawful conduct. In relation to pension, the Claimant will need to be compensated for the future loss of receiving a reduced pension and, potentially, later. This should represent the net pension benefits (after tax is paid on the anticipated pension).

234. The pension here is a defined benefit scheme.

235. The Principles establish an assumption that, if the Claimant has accrued significant occupational pension rights in a scheme with a normal retirement age (and entitlement to an unreduced pension) below state pension age, then the Tribunal will assume retirement at the normal retirement age unless that is displaced by evidence from either party, paragraph 1.10(a).

236. The Claimant has not claimed loss of state pension – understandably, because he will have time to pay the necessary national insurance contributions. We will not therefore award any loss of state pension.

237. A simple case is appropriate even in a defined benefit scheme where the period of loss relates to a relatively short period or where there is a large withdrawal factor meaning it is disproportionate to engage in complex analysis (para 1.10(e)). The Respondent argues that this is a simple case.

238. A more complex approach is usually required in defined benefit schemes where there is a longer period of loss.

239. If we do not accept the simple method is appropriate, the parties agree we cannot complete any calculation using the complex method, but they seek our decision on which method is appropriate. The Principles also suggest the parties be given a time-limited opportunity to seek to agree the value of pension loss, using any findings we have made at this stage.

240. In our judgment this is not a simple pension calculation case. There was a defined benefit scheme; the period of pension loss is not short; the

Claimant will not be able fully to mitigate his pension loss; and the withdrawal factors are not so large as to make it disproportionate to engage in complex analysis.

7-step method or expert or blended?

241. Paragraphs 5.41f of the Principles deal with complex defined benefit cases. Calculation of loss will involve choosing one of two approaches or sometimes a blend. The first approach involves use of the Ogden tables (the 7 step method). The second involves expert evidence, usually from an actuary.

242. The Ogden Tables are used by the courts to help try to capture a single figure representing the present capital value of future loss. For ongoing recurrent loss they use a system of multiplicands (annual amounts) and multipliers (numbers of years). In broad terms:

242.1. the multiplicand is the present-day value of one year's recurrent future loss;

242.2. the multiplier is a figure derived from the Ogden Tables to take into account for example the length of time a person will live in retirement. They use mortality data from the Office for National Statistics (ONS);

242.3. the multiplier differs with the rate of investment return (the 'discount rate'). This is fixed by the Lord Chancellor under Section A1 of the Damages Act 1996. On 15 July 2019 the discount rate was increased to -0.25%. The EAT has confirmed it is good practice for the Tribunal to use the court-set discount rate;

242.4. the Ogden tables were updated in May 2021.

243. The 7-steps (from paragraph 5.54 of the Principles) are as follows:

244. Step 1: we identify what the Claimant's net pension income would have been at retirement age if dismissal had not occurred:

244.1. Para 3.20 gives guidance for deciding retirement age (see below).

244.2. The Respondent scheme administrators should be able to provide gross figures of what pension income would have been at today's rates if they had continued to work until retirement at today's rates. We anticipate that it will be possible to do this in accordance with the choice that the Claimant makes after the McLeod judgment with the provision of two alternative incorporating the chance of promotion.

244.3. We then, as part of step 1, apply the percentage chance withdrawal factors decided already.

244.4. The gross figure is converted into a net figure using HMRC online calculator.

245. Step 2: we identify what the Claimant's net pension income will actually be at retirement age, in the light of their dismissal and mitigation.

    245.1. We will direct that the Respondent's scheme provide figures for the projected pension benefits the Claimant will actually receive.

    245.2. We will direct the Claimant should obtain examples from pension providers of what kind of pension contributions of £3,000 a year from 1 July 2026 to 12 September 2035 would provide.

    245.3. The parties should seek to agree these figures.

246. Step 3 para 5.57: we deduct the figure from step 2 from the figure in step 1.

247. Step 4: using the Ogden tables we identify a multiplier for the period over which that annual net loss is to be awarded:

    247.1. We agree with the 2 year age adjustment recommended at paragraph 5.58.

    247.2. We will use the tables provided in the Principles.

    247.3. We will give the parties an opportunity to agree this figure or make submissions on this figure in the light of our first remedy judgment.

248. Step 5: we multiply the figure from step 3 (multiplicand) with the figure from step 4 (multiplier).

249. Step 6: Most defined benefit schemes do not provide a lump sum, but the parties will inform us of the position.

250. Step 7: Grossing up for whole award.

251. We consider it ought to be possible to decide this case using the 7-step method. It will be cheaper and there is much room for agreement; however we will hear submissions on whether actuarial evidence is necessary in relation to any step (see paragraph 5.62f) and who should pay for it.

252. In line with the Principles, we will direct that the Respondent seek the following information from its pension scheme:

    252.1. figures for the projected pension benefits the Claimant will actually receive;

    252.2. figures of what pension income would have been at today's rates if the Claimant had continued to work until retirement at today's rates. We anticipate that it will be possible to do this in accordance with the choice that the Claimant makes after the McLeod judgment by providing of two alternative figures and incorporating the chance of promotion.

253. We will direct too that the Claimant obtains two alternative values of the private pension investment we have decided he will be able to make in mitigation.

254. At the next Preliminary Hearing the Tribunal will hear submissions to what further evidence is required.

255. The parties will be given a time-limited opportunity to agree the pension sum, grossed-up.

256. If the parties cannot agree a second remedy hearing will be held to decide any outstanding disputes.

Employment Judge Moor

10 October 2022

Appendix A
Calculation of Losses

Date of dismissal 24 October 2019
Date of calculation 3 October 2022
Date of interim payment 7 March 2022
Date of birth 12 September 1980

Dates for pay from 1 July each year to accord with pay rises within the Respondent.
Pay Rates taken from Claimant's schedule or pay rates in bundle.
Where income netted, Salary calculator for the nearest tax year used.
Rounded up/down to nearest pound

	Loss	Received		Totals after interim
Past Loss of Earnings				
Loss of half pay as Station Commander (Dev) 16.8.19 to 24.10.19 684.96/2 x 9.86 wk	3,377			
Past loss of net pay as SC (Dev) 24.10.19 - 3.10.22 684.96 x 153.6 wk	105,210			
Loss of net increase to SC (Competent) pay from 1.1.21 – 30.6.21 (747.82 - 684.96) = 62.86 x 25.9 wk	1,628			
Loss of increase to SC (Competent) 1.7.21-31.12.21 (£61,921.20 gross) (764.53 - 684.96) = 79.57 x 26.1 wk	2,077			
Loss of increase to SC (Competent plus) 1.1.22 - 30.6.22 (766.51–684.96) = 81.55. x 25.9 wk	2,112			
Loss of increase to SC (Competent plus) 1.7.22 - 3.10.22 (774.33 - 684.96) = 89.37 x 13.4 wk	1,198			
Past loss of earnings	115,602			
Less income received				
Universal credit		(23,308)		
Bounce Back loan drawn for personal income gross 37500. Over 20/21 and 21/22 i.e. 18750 pa net £16390 per year		(32,780)		

Business income up to 3 October 2022 Engines = £2,700 gross Services = £7,500 gross Total = £10,200 gross = £7,840 net (Net as 35,400 pa gross = 27,208 net)		(7,840)		
Total income received		(63,928)		
Total past loss earnings			51,674	
Total past financial loss after Chagger adjustments 75% x 60%			**23,253**	
Less half interim payment £**9,738**		(9,738)	**<u>13,515</u>**	
Interest on past loss of 23,253 from midpoint of 24.10.19 up to 7.3.2022 8%pa x 865/2days/365			**<u>2,204</u>**	
Interest on past loss less interim payment, 13,515 from 7.3.22 to 3.10.22 8%pa for 210/2 days/365			**<u>311</u>**	
Total past loss earnings including interim payment			**25,768**	
A: Total award for past loss plus interest less interim payment				**16,030**
B. Future loss of earnings as Station Commander (Competent Plus) from 3.10.22 to 31.12.2024				
3.10.22-30.6.23 £40,265 net pa 774.33 x 38.6 wk	29,889			
1.7.23 – 30.6.24 52 x 836.81	43,514			
1.7.24 – 31.12.24 26 x 861.46	22,398			
	95,801			
Net mitigation from business taking into account loan repayments profits gradually rising to parity at 1.1.2025				
3.10.22-1.7.23 Net = 27,208 pa		(19,368)		
1.7.23/24 £33,000 net		(33,000)		
1.7.24 to 31.12.24 £20,000 net		(20,000)		
		(72,368)		
Total Future Loss of earnings			23,433	
Chagger adjustments 75% x 60% = 45%			10,545	
B. Future loss of earnings after adjustment				**10,545**
C. Injury to Feelings	25,000			
Less half interim **£9,737**		(9,737)	15,263	
ACAS increase of 12.5% on ITF minus interim award £15,263			1,908	
Interest on ITF: in two parts 24.10.19 -				
Full amount not inc ACAS 25,000 at 8% pa for 24.10.19 to 7.3.2022 865 days/365			4,740	

15,266 + ACAS uplift = 17,171 at 8% for 7 March 2022 to 3 October 2022 = 210 days/365			790	
C: ITF less interim figure plus ACAS plus interest				**22,701**
Total award to be paid A + B + C before grossing up (not including interim payment)				**49,276**
Parties to agree grossed up figure				
Total award (including interim payment)		19475	**68,751**	

APPENDIX B

AGREED LIST OF ISSUES ON REMEDY AND COSTS
Updated by the parties on 04 May 2022

COMPENSATION

What is the appropriate award of compensation pursuant to s124(2)(b) Equality Act 2010?

Financial loss

1. **Loss of Earnings**

What financial loss has been caused to the Claimant as a result of the discrimination? In particular:

1.1. If the Respondent had made the reasonable adjustment of appointing the Claimant to the vacancy in Feltham on 1st July 2019, when, if at all, would the Claimant have returned to work?

1.1.1. The Claimant says that, but for the Respondent's discriminatory conduct, he would (based upon advice from the Respondent's occupational health consultants) have been fit to return to work by 14 July 2019 or, at the latest, by 14 August 2019 (see paragraphs 78, 90, 209, 217, 220, 221 & 225 & 240.4-5 of the liability judgment)

1.1.2. The Respondent's position is that there is a very high chance that the Claimant would not have returned at all.

1.2. When, if at all, would he have been able to provide sustained attendance?

1.2.1. The Claimant says that, provided the Respondent followed its Managing Attendance Policy (MAP) in a reasonable and non-discriminatory way, he

would have been able to provide sustained attendance from the date of his return to work;

1.2.2. The Respondent contends that due to the requirements of the role, the Claimant's health and his personal circumstances the Claimant had a low percentage chance of providing sustained attendance.

1.3. If the Claimant had been so appointed in 1.1 above, what is the prospect that he would have successfully completed his SM development post and when?

1.3.1. The Claimant asserts that he would have completed his SM development by 30 June 2020 at the latest;

1.3.2. The Respondent contends that there is a low percentage chance that he would have completed SM development within 18 months or at all.

1.4. What is the chance that the Claimant would have been able to provide sustained attendance as an SM (and subsequently as a Group Manager/Commander), or in another Fire Service role, up to the date of his retirement?

1.4.1. The Claimant asserts that,

1.4.1.1. provided the Respondent followed its MAP in a reasonable and non-discriminatory way, there is a very high chance that he would have sufficiently recovered his health to provide sustained attendance in his chosen roles for the whole of his intended Fire Service career or,

1.4.1.2. if prevented from doing so by illness or injury, that he would have been willing and able to undertake alternative Fire Service employment in an adjusted role;

1.4.1.3. alternatively, if all other opportunities for redeployment were unsuccessful, because of the nature of his incapacity, it is asserted that he would have qualified for medical early retirement benefits (including immediate payment of pension without actuarial reduction for early retirement);

1.4.2. The Respondent contends that there is only a 10% chance that the Claimant would have been able to provide sustained attendance for the whole of his career.

1.5. If the Claimant was unable to provide sustained attendance as an SM when would the Claimant's employment have terminated on a non-discriminatory basis?

1.5.1. In relation to the chance of a fair ill-health capability dismissal, see the response to 1.4 above;

1.5.2. In relation to the chance of any other fair capability dismissal, the Claimant asserts that such a chance is extremely remote, given the extensive training and support offered by the Fire Service and the Claimant's history of providing excellent service and performance to it, recognised by his service promotion history;

1.5.3. In relation to the chance of a fair redundancy dismissal, the Claimant asserts that such a chance is extremely remote as the custom and practice within the Fire Service is to take all possible steps to avoid compulsory redundancies, including a freeze on recruitment, natural wastage, not back-filling vacancies and seeking volunteers for redundancy.

1.5.4. The Respondent contends that that the Claimant would have been dismissed in February 2020 under the Respondent's capability procedure or July 2020 at the latest having failed to complete the SM development within 18 months.

1.6. If the Claimant's employment was not terminated on lack of capability grounds, when (if at all) would his employment have been terminated on other fair non-discriminatory grounds?

1.6.1. See the Claimant's response to 1.4 above. The Claimant asserts that, but for his discriminatory dismissal, he would have remained in the Fire Service for the rest of his career at least up to age 60 (his normal retirement date) and that he would not have left voluntarily or been dismissed for fair and non-discriminatory reasons before that.

1.6.2. The Respondent contends that that having regard to his employment history and typical working patterns of those in the Fire Service there is a very low chance that he would have remained in employment until 60.

1.7. If the Claimant did remain in employment, would he have been promoted to Group Manager/Commander and ultimately an Area Manager/Commander/DAC? If so, when?

1.7.1. The Claimant asserts that he would have achieved promotion to Group Manager/Commander by 1 July 2025, after becoming a Station Manager (Competent) by 1 July 2020 and a Station Manager (Competent Plus) by 1 July 2021;

1.7.2. The Claimant further asserts that he would have achieved promotion to an Area Manager/Commander /DAC by 1 July 2030.

1.8. Over what period should the Claimant be compensated? The Claimant contends:

1.8.1. Losses of half salary from 16 August to 18 October 2019 (when the Claimant was on half pay for sickness);

1.8.2. Losses of full salary and pension benefits from 24 October 2019 (EDT) to 14 July 2022 (remedy hearing date);

1.8.3. Future losses of salary and pension benefits from 15 July 2022 up to 14 July 2027; and

1.8.4. Future pension losses (as below) from 24 October 2019.

2. Pension loss

In relation to the Claimant's pension losses:

2.1. Is it a simple case where losses can be calculated by reference to the value of employer pension contributions for a defined period? If so, for what period?

2.2. Or is it a complex case and, if so:

2.2.1. Whether the losses should be calculated by reference to:

2.2.1.1. the current CARE scheme benefits that have applied since 1 April 2015, or

2.2.1.2. by reference to the legacy scheme benefits, to be introduced following the decision in ***McCloud***.

the Claimant asserts that it is likely that he would have elected (when drawing down his pension benefits) to receive the legacy scheme benefits, by reason of his seniority, pay and future promotion prospects. However, such election does not need to be made until that time and he would then have made the election which is most beneficial to him;

2.2.2. and whether the Tribunal should:

2.2.2.1. adopt the 7 step approach; or

2.2.2.2. require actuarial evidence?

2.2.3. the Claimant asserts that:

2.2.3.1. the 7 step approach should be adopted and that the Respondent should (in accordance with the Presidential Guidance on calculating pension losses in complex cases) provide worked calculations of pension loss on the career progression assumptions contended for by the Claimant and on possible scenarios where (a) the Claimant (but for his discriminatory dismissal) would have remained in the Respondent's employment for 5 years, 10 years, 15 years, 20 years and 26 years from the date of his dismissal (24 October 2019) and either (b) that the Claimant will not be able to obtain future employment which provides any employer pension contributions or (c) that any future employment provides no

more than the statutory minimum employer pension contributions (3% of salary).

2.3. If actuarial evidence is required:

2.3.1. who will pay for the report; and

2.3.2. what questions must they address?

3. **Mitigation of loss**

3.1. How much income and profit has the Claimant generated from his companies Hampshire Fire and Medical Services Limited (HFMSL), Emergency Response Support Group Limited, Alpha Two Five Leadership Limited, Fire! Combat Limited, The Fire Brigade Museum Limited, HMFS Fire Engines Limited ("the Companies") since their incorporation on various dates since August 2019?

3.2. Has the Claimant taken all reasonable steps to mitigate his losses by setting up and running the Companies as his source of income and future livelihood?

3.3. The Claimant asserts that the creation of the Companies was a reasonable manner of mitigating his losses, given the difficulty in obtaining further employment in the Fire Service because of:

3.3.1. the stigma attached to his discriminatory dismissal;

3.3.2. the general requirement for current service within a Fire Service to be eligible for appointment;

3.3.3. his previous work experience, skills and qualifications (almost exclusively in the Fire Service);

3.3.4. the state of his health and fitness (including substantial weight gain as a result of continuing prescribed anti-depressants) following his dismissal, and

3.3.5. because of the lack of availability of suitable alternative employment opportunities. The Claimant asserts that no other suitable alternative employment would have generated an income to exceed that likely to be generated from the Companies;

3.4. What other steps should the Claimant have taken to mitigate his loss?

3.4.1. The Claimant asserts that it is not reasonable (even if it were possible, which he does not believe to be the case) to expect him to have applied for roles within the Fire Service at SM level, as:

3.4.1.1. the general requirement for current service within a Fire Service to be eligible for appointment;

3.4.1.2. both appointment and career progression prospects would be impacted by the stigma of his discriminatory capability dismissal;

3.4.1.3. the state of the Claimant's health and fitness since his dismissal also preclude the possibility of obtaining Fire Service employment, because of the high levels of fitness and health required by it;

3.4.2. The Claimant further asserts that it is not reasonable (even if it were possible, which he does not believe to be the case) to expect him to have applied for roles within the Fire Service at a level below that of SM, as:

3.4.2.1. the general requirement for current service within a Fire Service to be eligible for appointment;

3.4.2.2. it would be humiliating for him;

3.4.2.3. both appointment and career progression prospects would be impacted by the stigma of his discriminatory capability dismissal;

3.4.2.4. any such roles would have to be outside both the Respondent's geographical area and that of Hampshire Fire & Rescue Service, which would make it uneconomic for the Claimant to seek a role below the level of SM because of the distance and cost of undertaking such a role;

3.4.2.5. it would be unreasonable to expect him to move his home and family to other locations for financial reasons and because his family circumstances make a home move to another county impractical;

3.4.2.6. the state of the Claimant's health and fitness since his dismissal.

3.5. The Respondent contends that the Claimant should have applied for other positions in the Fire Service, at all levels from Firefighter upwards, including for full-time, part-time, retained and ad hoc work, in addition to other roles where his skills as a fire officer would have been sought after;

3.6. The Respondent further contends that the Claimant could have sought and obtained employment outside the Fire Service in roles where he would earn similar pay and benefits (but with defined contribution pension benefits, rather than defined benefit pension benefits from the Firefighters Pension Scheme) to that he would have earned but for his discriminatory dismissal.

4. <u>Receipt of state benefits</u>

How much has the Claimant received in state benefits since the date of dismissal?

<u>Non-financial loss</u>

5. Injury to Feelings

What award should be made for injury to feelings, having regard to the bands for compensation in ***Vento v Chief Constable of West Yorkshire Police (No. 2)*** [2003] ICR 318, CA as updated? The Claimant asserts that the injury falls at the top end of the *Vento* upper band for compensation and hence claims the sum of £44,000 by reason of the following matters:

5.1. the vulnerability of the Claimant;

5.2. the degree of hurt, distress or upset caused;

5.3. the period over which the injury was inflicted;

5.4. how long that injury is likely to last;

5.5. factors such as the discriminatory treatment causing:

5.5.1. depression;

5.5.2. anxiety;

5.5.3. panic attacks;

5.5.4. feelings of helplessness;

5.5.5. loss of all hope for the future;

5.5.6. feelings of guilt, such as for letting others down;

5.5.7. catastrophising;

5.5.8. suicidal thoughts;

5.5.9. stress;

5.5.10. loss of confidence;

5.5.11. loss of amenity and enjoyment; and

5.5.12. interference with personal relationships.

5.6. the nature of the Claimant's job and the effect the discrimination has had on his career;

5.7. the degree of hurt caused to the Claimant by the loss of a career as a firefighter, or the prospect of that happening;

5.8. the manner in which the Respondent dealt with the grievance brought by the Claimant;

5.9. the manner in which the Respondent dealt with the dismissal and appeal processes;

5.10. the seniority of the person who caused, permitted, controlled or condoned the discriminatory behaviour; and

5.11. the overall seriousness of the treatment.

6. Aggravated damages

Should the Claimant be awarded aggravated damages? In particular:

6.1. has the Respondent conducted itself in a manner which justifies the making of an aggravated damages award, such as

6.1.1. by behaving in a high-handed, malicious, insulting or oppressive way towards the Claimant, per *Commissioner of the Police of the Metropolis v Shaw* UKEAT/0125/11/ZT; and/or

6.1.2. Conduct which was spiteful prejudice or animosity which is spiteful or vindictive or intended to wound and which is likely to cause more distress than if done without such a motive; and/or

6.1.3. Subsequent conduct, eg conducting the trial in an unnecessarily oppressive manner, failing to apologise, or failing to treat the claimant with the requisite seriousness, per B*ungay & Anor v Saini & Ors* UKEAT/0331/10 and *Zaiwalla & Co v Walia* [2002] UKEAT/451/00?

6.2. The Claimant says yes.

6.3. The Respondent says no.

6.4. If so, how much should be awarded, having regard to the amounts awarded for injury to feelings, ensuring there is no overlap or duplication of awards?

6.4.1. The Claimant says £20,000.00;

6.4.2. the Respondent says nil.

6.5. The specific matters relied upon by C are:

6.5.1. R being wilfully blind to the issue of whether C was disabled in light of the available evidence (paras 102, 203);

6.5.2. R seeking ‘acceptable’ OH advice (paras 65-68, 258, 240.5);

6.5.3. R refusing to consider reasonable adjustments because it claimed it had no evidence to support C’s claim of disability, when it had its own occupational health reports and other medical evidence which clearly pointed to C having a disability and that reasonable adjustments should have been made (paras 108, 109, 203);

6.5.4. R’s refusal to concede that C was a disabled person until 4 August 2020 (R’s solicitor’s letter to C’s solicitor of that date), 10 months after his

dismissal and 8 months after the finding of disability on 3 December 2019 in C's ET claim against HFRS (paras 127.2). The concession was only made 17 days before a 1 day hearing listed to decide the disability issue, causing C additional and unnecessary anxiety, worry and expense;

6.5.5. Selecting and continuing to use a disciplinary procedure instead of a more appropriate managing attendance policy or probationary procedure, at a time when the Respondent knew the disciplinary policy was about to change and where the Claimant was extremely vulnerable in that he was both disabled and a suicide risk (paras 104-105, 114, 115, 143, 228, 236.2-236.3);

6.5.6. Alleging that C had made false assertions on his job application form when a brief perusal of C's explanation given to BC Prasad on 2 May 2019 would have shown that he had not (paras 74-77);

6.5.7. Delaying sending C's consent to release his employment history to HFRS until late June 2019 and then failing to tell C when HFRS confirmed that C had not misled LFC on his job application, thus leaving the allegation of falsifying his application form (likely to be treated as gross misconduct) hanging over him unnecessarily for several months when the allegation had caused him to have suicidal thoughts and to become extremely distressed whilst fighting an intended dismissal (paras 74-77, 107, 236.4);

6.5.8. R ignoring C's grievance about the refusal to consider reasonable adjustments, causing him to conclude that he was likely to be dismissed under R's Stage 3 disciplinary process (paras 110, 116-117);

6.5.9. R describing C's attendance record as a "serious offence" (paras 114-115, 228, 236.4);

6.5.10. R refusing to consider vacancies in the south-west region on various grounds, including that C was on sick leave, that he was on development, when C's line manager and DAC Perez had both previously been happy to support his move to the south-west (paras 39, 52, 85, 94, 97);

6.5.11. R pretending that there were no transfer vacancies available in the south-west region of London (paras 97.1 & 215), whereas it is now known that there were 5 of them (it was only recently that the existence of 4 of those 5 were disclosed, although C suspected there were 2 vacancies at the time DAC Perez said there were none);

6.5.12. R subsequently refusing to acknowledge that there was an available vacancy to which C could have been appointed at Feltham Fire Station, until R's solicitor's letter to S's solicitor of 9 February 2022;

6.5.13. R falsely representing to C that DAC Perez had not been involved in the decision-making regarding C's requests to facilitate a transfer or for reasonable adjustments (paras 120 & 121);

6.5.14. Having DAC Perez chair the Stage 3 disciplinary hearing when he had already decided not to facilitate a transfer and was therefore judging his own decision and hence biased (paras 120-122, 245, 246);

6.5.15. DAC Perez giving no real consideration to action short of dismissal (para 129);

6.5.16. DAC Perez falsely stating that OH had advised that C was not likely to return to work for the foreseeable future (para 127.1, 240.4 & 240.5);

6.5.17. DAC Perez unreasonably and without credibility concluding that a transfer to the south-west would not alleviate C's issue of travel time (paras 127.3, 209);

6.5.18. DAC Perez falsely claiming that C had been told "early on" that he was unlikely to be transferred to the south-west in the short or medium term (para 127.4);

6.5.19. DAC Perez falsely claiming that C had been advised not to drive (para 127.5);

6.5.20. Tim Powell failing to deal with C's grievance and reaching conclusions that were inappropriate and unwarranted on the material before him (paras 110, 132-134);

6.5.21. Failing to disclose unredacted documents to C until ordered to do so on the first day of final hearing on liability, the effect of which was to hide the involvement of some of R's very senior officers, including Assistant Commissioner (now Commissioner) Roe and DAC Perez (paras 4 & 73);

6.5.22. Causing C to lose his valuable career as a firefighter after extensive service, despite there being a real prospect that C would have been able to achieve an early return to work with R if a transfer to the south-west had been made (paras 220-225, 240.1, 242);

6.5.23. R's unreasonable conduct of the proceedings since dismissal, further particulars of which will be given in the grounds for the costs application (due to be provided by 9 June);

6.5.24. R's failure to apologise for its discriminatory conduct as found on 20 November 2020 until 9 February 2022, the sincerity of which C questions.

7. Previous claim against former employer

In relation to injury to feelings and other financial losses, what account should be taken of the Claimant's settlement of his claim for disability discrimination and unfair dismissal in Claim No: 1401282/2019?

7.1. The Claimant's case is that the said settlement compensation (£42,500.00) should not be taken into account as, although it was made without any admission of liability, the said sum was assigned as follows:

7.1.1. £9,144.00 in full and final settlement of the Claimant's claim of unfair dismissal;

7.1.2. £33,356.00 in full and final settlement of the Claimant's alleged injury to feelings suffered as a result of the events which occurred prior to the termination of his employment on 21 January 2019. The injury to feelings claim in these proceedings solely relates to the injury caused by the discriminatory actions of the Respondent, from and after 19 May 2019.

8. ACAS Code

Having regard to s207 of the Trade Union and Labour Relations (Consolidation) Act:

8.1. Did the ACAS Code of practice on disciplinary and grievance procedures apply to the Claimant's grievance and dismissal?

8.2. C says 'yes' and the paragraphs of the Code relied upon are:

8.2.1. Paragraph 33 – arranging a formal meeting to be held without unreasonable delay;

8.2.2. Paragraph 34 – Employees should be allowed to explain their grievance and how they think it should be resolved;

8.2.3. Paragraph 40 – informing employee of the outcome of the grievance; set out action employer intends to take to resolve the grievance; and notifying of right to appeal;

8.2.4. Paragraph 43 – dealing with appeal impartially and wherever possible by a manager who has not previously been involved in the case;

8.2.5. Paragraph 46 – temporary suspension of disciplinary process to deal with a grievance.

8.3. Did the Respondent or the Claimant unreasonably fail to comply with it?

8.4. Is it just and equitable to increase or decrease any award payable to the Claimant?

8.5. If so, what percentage is appropriate?

9. Interest

Should interest be awarded and if so for what period and what rate?

C asserts that interest at 8% per annum should be awarded on all compensation relating to discrimination and injury to feelings, including past losses (as from the mid-point between the date of the act of discrimination and the date the Tribunal calculates the award).

Interest on an injury to feelings (included aggravated damages) award will be from the date of the act of discrimination to the date of the Tribunal's calculation of the award.

The Respondent will be given credit for the interim payment on account of compensation in the sum of £19,474.96 made on 7 March 2022, both against the substantive award of compensation and in respect of interest for the period after that date.

10. Discount for Accelerated Receipt

What discount should be made for accelerated receipt?

10.1 The Respondent contends that any award of future losses should be discounted to take account of accelerated receipt.

10.2 C acknowledges that there should be an adjustment for accelerated receipt of compensation in relation to future losses, where there is a substantial period of future losses. The extent of any adjustment will need to be determined according to the period for which future loss is compensated and hence the period of advance receipt.

11. COSTS

Should an award of costs be made in favour of the Claimant?

11.1. What is the basis of any such claim for costs under Rule 76, Schedule 1, Employment Tribunal Constitution and Rules of Procedure Regulations 2013?

11.1.1. The Claimant asserts that the Respondent has acted unreasonably in the way in which the proceedings have been conducted and that its Response had no reasonable prospect of success, given the information known or available to it. The Claimant asserts that such conduct is continuing and will provide full particulars following the conclusion of the remedy hearing;

11.2. What was the nature, gravity and effect of any such conduct relied upon? The Claimant asserts that the full particulars of his costs application will explain the nature, gravity and effect of the Respondent's conduct.