



EMPLOYMENT TRIBUNALS

Claimant: Ms. P Rogers

Respondent: Forward (Wales) Limited

Heard at: Cardiff, in person

On: 1, 2 and 3 June 2026

Before: Employment Judge Cawthray
Ms. R Hartwell
Ms. M Walters

Representation

Claimant: In person

Respondent: Mr. Ishaq, Litigation Consultant

JUDGMENT was sent to the parties on 5 June 2026, and full oral reasons were given at the hearing. . Written reasons were requested in accordance with Rule 60 of the Employment Tribunal Procedure Rules and the following written full reasons are therefore provided:

FULL REASONS

Background, evidence and procedure

1. The background to the claims is set out in the case management order of Employment Judge Shotter, who conducted a case management preliminary hearing on 28 October 2025.
2. At the start of the hearing, the Employment Judge discussed with the parties whether any adjustments were needed for the final hearing. The Claimant required regular breaks and for the process to be at steady pace to enable her to process and retain information The Claimant was supported by a friend throughout the three day hearing.

3. The Employment Judge explained the process of giving evidence and making submissions.
4. The parties had provided a bundle containing 142 pages. The Claimant had produced a written witness statement and on behalf of the Respondent Mr. Marc Evans and Ms. Suzanne Huxter had provided written witness statements. All witnesses affirmed or gave an oath and were asked questions by the other side and Tribunal as it considered necessary.
5. At the start of the hearing the Employment Judge had a detailed discussion with the parties regarding the issues for determination. Mr. Ishaq did not have a copy of the list of issues, and had to be provided time to locate and familiarise himself.
6. The base of the list of issues was as set out in Employment Judge Shotter's Record of Preliminary Hearing. However, after confirmation of the Respondent's position on the reason for dismissal the issues were, on agreement of the parties, amended slightly and were as set out below. The parties were directed to the issues throughout the hearing.
7. After hearing evidence and oral submissions from the parties the Tribunal deliberated and an oral decision was given.

Issues

8. The issues below, in italic text, use the numbering as set out in Employment Judge Shotter's Record of Hearing. However, as noted above, Mr. Ishaq confirmed that the reason for dismissal relied on by the Respondent was capability performance. The Employment Judge explained that the legal reason of capability includes capability related to performance and capability related to ill-health and that the legal tests as developed by case law are slightly different. The Employment Judge had noted that the list of issues used the heading "Capability (Performance) Dismissals" but the issues were those in the standard tribunal template for ill-health.
9. The Employment Judge explained to the parties that the reason for dismissal was a matter for the Tribunal to determine after hearing evidence and submissions and explained that the standard issues for a capability performance involve consideration of the matters set out below:
 - a. If the reason was capability, did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case.
It will usually decide, in particular, whether:

- i. The respondent adequately warned the claimant and gave the claimant a chance to improve;
- ii. Dismissal was within the range of reasonable responses.

10. The parties agreed to address the above issues during the hearing, in addition to those set out below. It was agreed with the parties that the Polkey and contributory fault would be considered at the liability stage.

1. Time limits – there are no time limit issues.

2.1 The claimant was dismissed and the effective date of termination is 6 December 2024.

Capability (performance) dismissals

2.2 What was the reason or principal reason for dismissal? The Respondent says the reason was capability (performance).

2.3 If the reason was capability, did the Respondent act reasonably or unreasonably in all the circumstances, including the Respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the Claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. It will usually decide whether:

2.3.1 The Respondent genuinely believed the Claimant was no longer capable of performing their duties and ACAS Code of conduct was complied with;

2.3.2 The Respondent adequately consulted the Claimant;

2.3.3 The Respondent carried out a reasonable investigation, including finding out about the up-to-date medical position; the respondent is relying on occupational health report.

2.3.4 Whether the Respondent could be expected to wait longer before dismissing the Claimant;

2.3.5 Whether the respondent had committed the acts of unlawful disability discrimination referred to below.

2.3.6 Dismissal was within the range of reasonable responses.

3. Remedy for unfair dismissal

3.1 Does the Claimant wish to be reinstated to their previous employment?

3.2 Does the Claimant wish to be re-engaged to comparable employment or other suitable employment?

3.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

3.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

3.5 What should the terms of the re-engagement order be?

3.6 If there is a compensatory award, how much should it be? The Tribunal will decide:

3.6.1 What financial losses has the dismissal caused the Claimant?

3.6.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

3.6.3 If not, for what period of loss should the Claimant be compensated?

3.6.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

3.6.5 If so, should the Claimant's compensation be reduced? By how much?

3.6.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

3.6.7 Did the Respondent or the Claimant unreasonably fail to comply with it by failing to warn the claimant she could be dismissed and/or discuss the alleged underperformance which the claimant now disputes and the claimant failing to appeal?

3.6.8 If so, is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?

3.6.9 If the Claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?

3.6.10 If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?

3.6.11 Does the statutory cap of fifty-two weeks' pay or [£105,404] apply?

3.7 What basic award is payable to the Claimant, if any?

3.8 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

4. Discrimination arising from disability (Equality Act 2010 section 15)

4.1 Did the Respondent treat the Claimant unfavourably on:

4.1.1 6 December 2024 the claimant was dismissed. The act for dismissal is unfavourable treatment conceded by the respondent today.

4.2 Did the following things arise in consequence of the Claimant's disability:

4.2.1 Because of tinnitus, which the claimant had over 30 years, if the claimant were subjected to loud continuous noise it would cause the claimant pain for a few days after.

4.3 Unfavourable treatment because the claimant had opted out of the fire safety drills due to the loud noise. [making it sound like didn't take part – if didn't have ear protection would cause pain – was the second member of staff supervising outside during fire safety drills and an incorrect assumption had been made about the Claimant's ability to get the users out in an emergency.

*4.4 Was the treatment a proportionate means of achieving a legitimate aim?
The Respondent says that its aims were:*

4.4.1 To ensure a safe working environment for all employees and

4.4.2 to maintain a stable workforce and the health and wellbeing for all individuals including vulnerable clients. Having the claimant not participating can cause risk and there were concerns regarding the claimant struggling with all elements of her role with regards to poor performance. The claimant was not on a performance review but certain items were highlighted, like the refusal to comply with health and safety tasks namely around the fire drill.

4.5 The Tribunal will decide in particular:

4.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

4.5.2 could something less discriminatory have been done instead;

4.5.3 how should the needs of the Claimant and the Respondent be balanced?

4.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date? This is not an issue.

5. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

5.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? The respondent accepts this that knowledge is not in issue in respect of the auxiliary aid.

5.2 Did the lack of an auxiliary aid, namely ear defenders, put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that using ear defenders enabled the claimant to take part in fire alarms tests and the lack of ear defenders would cause the Claimant pain for several days. They had been used on three occasions before dismissal, and had the claimant been allowed to use the ear defenders she would have been able to carry out the safety fire alarm.

5.3 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage if she was not allowed to use ear defenders. Occupational Health provided a report and ear defenders were being use by the claimant.

5.4 What steps could have been taken to avoid the disadvantage? The

Claimant suggests:

5.4.1 Being allowed to use ear defenders.

5.5 Was it reasonable for the Respondent to have to take those steps [and when]? The respondent's position is that long-term use was not practical and it was not fit for purpose. The claimant would not carry the ear defenders 24/7 and not always have them at hand, and if the claimant did not always have ear defenders, the claimant would leave service users unattended and cause a health and safety risk. Occupational health advised no adjustments were necessary. The claimant's case is that occupational health reported the claimant was fit for work, and in the event of a real fire after 23 years' experience as a support worker the claimant would get the service users out safely.

5.6 Did the Respondent fail to take those steps?

6. Remedy for discrimination

6.1 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

6.2 What financial losses has the discrimination caused the Claimant?

6.3 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

6.4 If not, for what period of loss should the Claimant be compensated?

6.5 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

6.6 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

6.7 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

6.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

6.9 Did the Respondent or the Claimant unreasonably fail to comply with it by [specify breach]?

6.10 If so is it just and equitable to increase or decrease any award payable to the Claimant?

6.11 By what proportion, up to 25%?

6.12 Should interest be awarded? How much?

Findings of Fact

11. The findings of fact are made on the balance of probabilities on the evidence presented during this final hearing as far as required to determine the issues.
12. The Claimant started employment at the Respondent on 1 March 2021 as a Support Worker. The Claimant worked for 40 hours per week, and this included working both day and night shifts. The Claimant worked night shifts on a regular basis.
13. The Claimant has several health issues, including tinnitus.
14. The Respondent operates a residential care home for adults with brain injuries and mental health issues. The home has up to 9 adult residents.
15. The typical staffing arrangements on a day shift were for there to be two support workers present, possibly a further one on occasion, and two members of management which included Ms. Huxter and Mr. Evans.
16. The Claimant's role involved undertaking a number of duties to support the residents. The relevant duty in this case relates to participation and management of fire evacuation processes.
17. The Claimant has tinnitus, which causes ringing in her ears. The Respondent now accepts that this amounts to a disability, and they were aware of the condition at the time the claim is about.
18. The Respondent runs fire drills every week, on a Wednesday. The usual process should be that a member of staff, a support worker, activates the alarm and support workers supervise the residents to evacuate them and move them to the assembly meeting point outside the building.
19. From shortly after starting her employment the Claimant supervised residents outside the building, on the lawn in front of the home. The Claimant knows how to activate the alarm, but she did not do so as the loud sound caused her pain and ringing in her ears for approximately two days after.
20. Ms. Huxter joined the Respondent in January 2023 and worked on Wednesdays when the fire drills took place. Ms. Huxter was aware and observed the Claimant being outside the building.
21. Mr. Evans says that the fire evacuation procedure, in the event of a real fire, is that all people in the home would meet in the main entrance, inside the building, and remain there until instructed otherwise by the fire service.
22. Ms. Huxter's evidence is that that assembly meeting point was outside the front of building.
23. The Respondent's witnesses gave inconsistent evidence on where the assembly point was, with Mr. Evans stating in an evacuation staff and residents should stay inside the building.
24. The Tribunal was not directed to any document setting out fire safety requirements or expectations for staff.

25. There are a number of typed supervision meeting notes in the bundle. The Claimant said these were postdated after Ms. Huxter joined the Respondent in January 2023. The Claimant's evidence on this matters was not clear, and she also said she signed the notes on the date in the document. The notes read as contemporaneous documents, and on balance, the Tribunal consider them to be contemporaneous notes of the discussions.

26. Where there has been a discussion regarding the Claimant's tinnitus and fire evacuation matters the text has been noted. In most meetings undertaken between the Claimant and management the Claimant's tinnitus and fire evacuation processes were not discussed.

27. On 25 May 2022 the Claimant attended a staff supervision meeting with Mr. Evans. The Claimant raised issues in relation to difficulty walking and the need to rest due to health issues but there is no record of any discussion about tinnitus or fire drills/evacuation matters.

28. On 20 July 2022 the Claimant attended a staff supervision meeting with Mr. Evans. She mentioned managing flare ups but also the Claimant raised a concern about her hearing and said:

"I do have a concern with regards to my hearing, i sometimes have difficulties understanding service users when they are not speaking clearly and also in a meeting scenario. I suffer with Tinnitus which can effect my hearing ability, I have previously had hearing tests in the hospital and was advised to have a hearing aid however i did not feel comfortable with this."

29. The note records Mr. Evans being supportive in relation to her other health condition flare ups. In relation to the hearing concern he stated:

"Paula has raised a concern with regards to her hearing however she has confirmed that this has been looked into by a consultant and she did not want to have a hearing aid as advised. Management has advised Paula that if she is in a situation where she cannot hear the service users due to mumbling then she is to ask the services users to repeat slowly and clearly. Paula has also been advised that if this occurs during a work place meeting then she is to ask the manager/colleagues to repeat what has been said to allow better understanding."

30. On 14 September 2022 the Claimant attended a staff supervision meeting with Mr. Evans and it is recorded she said:

"... I continue to follow recommendations from my manager with regards to my ongoing medical issues. I have put recommendations into practice asking services users to repeat themselves and speak clearly when i am finding it difficult to hear correctly, this has assisted me however I have found that i may have to ask them to repeat themselves numerous times due to mumbling."

31. Mr. Evan made the following comment in relation to health matters:

“Paula continues to work well during her shifts at Forward Wales and continues to follow management advice regards to taking regular breaks during the flare up of her ongoing medical condition. Paula has been advised to contact management should the condition worsen and extra support is required.”

32. On 9 November 2022 the Claimant attended a staff supervision meeting with Mr. Evans. At the meeting she reported pain management issues in relation to her other medical condition. There was no discussion about tinnitus or hearing matters.

33. On 4 January 2023 the Claimant attended a staff supervision meeting with Ms. Huxter, who had just joined the Respondent. The Claimant referred again to her pain management issues in relation to her other medical condition. There was no discussion about tinnitus or hearing matters.

34. On 8 March 2023 the Claimant attended an annual appraisal meeting with Mr. Evans. A typed form with comments from the Claimant and Mr. Evans was produced and signed. In the section headed “*What parts of the job could have been done better*” in relation to fire alarms, the note states:

“Within my role I am not confident with carrying out the Fire Alarm weekly check. I feel that I can become flustered due to having issues with my hearing.”

35. The next section states:

“Fire Alarm Check:- Due to Tinnitus the exercise can cause pain within my ears as the sounder is loud, the sound can then re-occur in my ears for 2 days following the test. When it is my responsibility to carry out the test I can become flustered due to the distraction.”

36. It then goes on to record:

“Fire Alarm Check:- I have spoken to the manager and I have been advised to wear an ear defender to protect my ears if I am on shift. He has also advised that I should ask my fellow colleagues on shift to take over the responsibility of the test on that day to overcome the loss of concentration.”

37. The closing comments by Mr. Evans are:

“We have discussed alternative methods of performing the fire alarm test and given Paula two options which she can use if further assistance is needed we will review in the future. Paula has been made aware that a updated fire system is pending and this will make operation easier for all users. Training will be given with regards to this alarm once installed.”

38. Based on the notes of the appraisal, the Tribunal find that Mr. Evans permitted the Claimant to utilise two options – ear defenders and/or a colleague taking over responsibility for the fire test.

39. The Claimant was not given any ear defenders at the time.

40. On 10 May 2023 the Claimant attended a staff supervision meeting with Ms. Huxter. In relation to fire drills/evacuation matters it states:

“I have recently completed my Fire Marshall Training via a 3 hours webinar.”

41. Ms. Huxter has stated:

“Paula has worked well towards her training and I would like to congratulate her on becoming a Fire Marshal...”

42. There is no record of any other discussion about the management of fire related matters or tinnitus.

43. **On 10 July 2023 the Claimant attended staff supervision meeting with Ms. Huxter. There is no record** of any other discussion about the management of fire related matters or tinnitus.

44. On 14 September 2023 the Claimant attended staff supervision meeting with Ms. Huxter. There is no record of any discussion about the management of fire related matters or tinnitus.

45. On 20 December 2023 the Claimant attended a staff supervision meeting with Ms. Huxter. There is no record of any discussion about the management of fire related matters or tinnitus.

46. On 20 March 2024 the Claimant attended an annual appraisal with Mr. Evans. In the appraisal in relation to fire matters it states:

“Health & Safety Checks – I struggle to complete the Fire Alarm health and safety check as highlighted in my previous supervisions due to Tinnitus. I do rely on colleagues to let me know when they are completing the task to allow me to step out of the building in ample time before the sounders sounds to protect my hearing. If I am caught within the sounder range, I will suffer pain in my ears for 3 days following. I do however know how to set the fire alarm off and that the instructions are in the allocation sheets.”

“I will continue to rely on my colleagues to complete the Fire Drill and I will support them to complete it when they are unsure, however, I will need a full warning before the sounder sounds to remove myself from the

building. I will contact the manager on the day if the Health & Safety check cannot be completed to that he is aware and can action accordingly. I have been offered ear defenders to protect my ears however I do not feel that these drown out the sound enough."

47. Mr. Evans commented:

"Concerning no completion of the fire Health & Safety check it has been noted that you state that you have Tinnitus, there is no record of this in your medical questionnaire and you have been offered ear protection which you have declined therefore it would be useful if we had medical confirmation of this so we can take legal advice on to your status of this matter."

48. This is the first mention that Mr. Evans made on taking legal advice. There is no record of Mr. Evans advising the Claimant to do anything different to that suggested in the March 2023 appraisal.

49. The Respondent's management team had already been aware that the Claimant did not sound the alarm and went outside with residents from their own observations on drill days, and the discussion at the March 2023 appraisal.

50. There is no record that the Respondent discussed the management of emergency fire situations with the Claimant at this time. Generally, all the supervision notes and appraisal are positive about the Claimant and her work.

51. On 27 June 2024 the Claimant attended a staff supervision meeting with Ms. Huxter. This is the first supervision meeting in which a criticism was made about the Claimant. The note records Ms. Huxter stating that she considered the Claimant lacked attention and referred to a mistake being made about medication. There is no record of any other discussion about the management of fire related matters or tinnitus.

52. The Claimant was provided with a set of ear defenders in October 2024. It is not clear why these were not given to the Claimant sooner. The Claimant used the ear defenders during the fire drills.

53. On 23 October 2024 the Claimant attended staff supervision meeting with Ms. Huxter. The note records that the Claimant had recently experienced a family bereavement and some health issues and that she had requested to change to night shifts permanently as she considered these would help her manage her health issues and pain. The note records she had been working night shifts for the last few weeks, and that she was aware she needed to put the request in writing.

54. In relation to tinnitus, the Claimant stated:

“I am also aware that I require a doctors note for record for my Tinitus, this will be kept on file and reported to Penninsula due to Health and Safety checks.”

55. Ms. Huxter’s written comments, in relation to the fire drills/evacuation and tinnitus state:

“I have also reminded Paula that she needs to provide a doctors certificate with regards to her Tinnitus and non completion of the Fire Drill, we are required to take legal advice on this status to ensure Health & Safety is upheld alongside the wellbeing of our staff member.”

56. On 4 November 2024 a “Lone Working Checklist” was completed by the Claimant and Ms. Huxter. The Claimant ticked that she felt she was fit for lone working. Ms. Huxter said that the Claimant was not fit for lone working and noted “No – tinnitus”. In relation to the question about PPE she stated “Yes – ear defenders supplied.” At the bottom of the form Ms. Huxter wrote:

“Paula has been refusing to carry out fire drills in the workplace due to tinnitus. We have requested a medical certificate from her during supervisions, this has not been provided. Paula requested to work nights however she would hold sole responsibility for fire action in an emergency, which we feel she could not undertake.”

57. There is no evidence that the Respondent had at any time previously informed the Claimant that it considered she had been refusing to carry out drills. The Tribunal find that the Respondent’s management team were aware, from at least March 2023, likely much earlier, that the Claimant was locating herself outside in fire drills and that Mr. Evans had given an option of a colleague taking responsibility for the fire drill.

58. It is noted that the Claimant had told Mr. Evans in March 2023 about tinnitus and the pain in ears after a fire alarm but that she had been working night shifts, alone, since that time.

59. It is not clear what prompted the change in position on 4 November 2024. The Claimant, via Ms. Huxter, also completed a Night Workers Health Questionnaire and a Personal Emergency Evacuation Information Checklist on 4 November 2024. In relation to fire alarms the Claimant ticked that she was able to hear fire alarms and was able to raise the alarm if she discovered the fire.

60. At the end of the Personal Emergency Evacuation Information Checklist Ms. Huxter wrote:

*“I have Tinnutis which causes me pain on loud high pitched noises. I would manage the fire alarm and I would put my service users first however I would be in pain for a few days after.
I am willing to try ear defenders to help reduce the noise.
Occupational Health assessment required.”*

Management have been advised by Penninsula that I will need to be removed from nights with immediate effect due to risk associated with long working.”

61. During this final hearing, reference was made to risk assessments having been undertaken. There is no generic fire associated risk assessment in the bundle. The only documents are those listed above. There is no written document setting out the process of managing fire drills or emergency situations. There is no document setting out staffing ratios, however, on the evidence provided it is clear that at night only one member of staff worked at the Respondent, and therefore in the case of an emergency there would only be one member of staff available to manage an emergency evacuation.

62. On 4 November 2024 the Respondent determined that the Claimant could no longer work night shifts.

63. Ms. Huxter completed an Occupational Health Referral Form around 6 November 2024. Within the section reason for referral Ms. Huxter wrote:

“Employee is opting out of the fire drill health and safety check due to tinnitus. Also unable to take responsibility and action fire plan in a emergency due to this.”

64. Further relevant extracts state:

“Employee has opted out of fire drills weekly despite full training due to Tinnitus complication. Employee confirmed during supervisions that the alarm is too loud and hurts her ears for days after.

Employee requested to go on nights due to health reasons as the night shift are not as busy however she confirmed that in the event of a fire and the alarm sounding that she would probably not be able to take action due to the pain in her ears. She confirmed she would need to cover them. Following supervision she has been removed from nights due to Health and Safety risk and not being able to fulfil her duties – advice sought.

Employee has been offered support and guidance during supervision and appraisals.

Employee has been given the self referral pack for Health assured benefit scheme.

Employee has been supported by other staff during drills.

Employee has been offered PPE for drills only.

Employee offered occupational health screening.

Lone worker risk assessment completed.

Individual PEEPS completed.”

65. There has been no explanation provided from the Respondent as to why the Claimant was not referred to Occupational Health before this date. On 22 November 2024 the Claimant attended Occupational Health. Within the report it set out that the purpose of the referral was: *“Other – employee is opting out of the fire drill health and safety check Tinnitus. Also unable to take responsibility and action fire plan in an emergency, due to this.”*

66. The Occupational Health report was considered in full, and only key extracts are repeated here.

“We discussed her health in detail. Paula reported that she is suffering from tinnitus first ever diagnosed 25-30 years ago. This continues to an ongoing and lifelong condition.

She states her tinnitus has been affecting her with high-pitched sounds more recently and has made her whooshing sounds even worse in her right ear.

She suffers with residual ringing all the time. The high noise fire alarm triggers her pain even more and she is affected for the following 3 days. She is also experiencing, pulsative Tinnitus. I have discussed with her that if she is made aware of the fire drills, she can apply her earmuffs as well as being provided with earplugs for the inner ear using the earmuffs over her ears. This should cover any noise up to 84. DB of sound, but this should not affect her tinnitus any worse, with these in place.

She should still be able to operate and complete her role with this in place. She can also suffer with headache and stress, and she feels that these do tend to heighten her tinnitus. She feels that she is experiencing heightened stressors/triggers within her place of work due to her ongoing symptoms and disabilities.”

67. The report then sets out details of the Claimant having osteoarthritis and the impact this has on her and that she has fibromyalgia and the impacts this has. The reports sets out recommendations in relation to these conditions. It states her *“conditions are likely to become progressively worse, without reasonable adjustments in place ... Paula is fit for her normal hours and duties required by her post, but with reasonable adjustments in place to further support her in her work.”*

68. The report did not address emergency fire situations, this was understood by Mr. Evans, as his witness statement states:

“They did not resolve the concern regarding unplanned emergencies, where staff must respond immediately and remain able to communicate and assist residents.”

69. In a letter dated 25 November 2024 the Claimant was invited to a “medical capability meeting”. The letter sets out the purpose and arrangements for the meeting is to discuss the Occupational Health report and *“ability to*

safely conduct Health & Safety workplace responsibilities, i.e., fire evacuation."

70. The Claimant attended a meeting with Mr. Evans on 29 November 2024. Ms. Huxter attended as note taker. A number of matters were discussed, including the Claimant's other health conditions and potential adjustments for the Claimant's other health conditions at length.

71. The notes of the meeting were considered in full, but only the key extracts in relation to tinnitus and fire evacuation have been set out here. Speaker 1 is Mr. Evans and Speaker 2 is the Claimant.

"Speaker 1

I'll discuss the various parts and then see where we are from there. So, the reason that we asked for the report is it was noted that you were often opting out of the fire drills and we are concerned whether or not you were able to safely action the fire plan, for your safety, the client's safety, and other people's welfare, and that was the question that we asked the Occupational health specialist.

(Reading from the report) The current situation is that she mentioned that you had tinnitus for 25 - 30 years.

Speaker 2
About that yes

Speaker 1
Okay, and she confirmed it was an ongoing lifelong condition, and she did mention that the effects of it lasted roughly 3 days.

Obviously in a real fire, that won't be a piece of equipment that you could use unfortunately, because you'd have to be able then to communicate with everybody and acknowledge the sound. So that was my concern really that her suggestion was for the drill, I agree there will be no problem with it for the drill, and that that's fine. As a result of this, she's highlighted, then there are other medical issues that you've got that appeared to be long periods of standing um, which were not,

Speaker 2
It has never stopped me from doing my job I have been here for nearly three and a half years now.

.....

Speaker 1
She also mentioned the ear muff situation and whether or not that helped with a

drill.

Speaker 1

She didn't say whether you felt it was effective or not, so that was my first question.

Speaker 2

I tried it last time it seemed fine.

Speaker 1

That was for a drill, wasn't it? Could you communicate, and could you hear anybody when you had them on?

Speaker 2

Yeah

Speaker 1

Was it clear enough for you to be able to communicate?

Speaker 2

I think so, Yeah,

Speaker 1

Obviously in a real fire, that won't be a piece of equipment that you could use unfortunately, because you'd have to be able then to communicate with everybody and acknowledge the sound. So that was my concern really that her suggestion was for the drill, I agree there will be no problem with it for the drill, and that that's fine. As a result of this, she's highlighted, then there are other medical issues that you've got that appeared to be long periods of standing um, which were not,

Speaker 2

It has never stopped me from doing my job I have been here for nearly three and a half years now.

Speaker 1

These were not clear to us, but now they've been highlighted, one of my concerns, was that you were stating that your pain level is around 7.

.....

Speaker 1

Yes, there's never been an issue, the issue is your health and safety well-being and you're ability to do that safely, that was the concern. Because if you can't do the health and safety then we're all at risk, including yourself, it then states about your mental health again.

.....

Speaker 1

But we still really haven't answered the issue about sounders and the alarm system.

Speaker 2

You got me ear defenders now.

Speaker 1

Yeah, but you're not allowed to use that in the event of an actual fire. That's the advice from Peninsula Health and Safety, you could do it for drills, and I've got no problem with that because it's a drill.

Speaker 2

Right, so it is the communication part of it?

Speaker 1

If a fire broke out and you got your defenders on and you've got to initiate the procedure, can you communicate and can you listen to communication with the defenders on and that they're stating that you can't use ears defenders during a real fire.

Speaker 2

Look I'm not going to run across the road and leave the residents in, so they're not going to burn to death. Yeah, I would in an emergency, I will have to, put up with it and suffer the pain after.

Speaker 1

But is that an acceptable risk? I mean, this is what it all boils down to your health and well-being.

Speaker 2

Yeah, it would have to have to be, wouldn't it?

Speaker 1

it's not my decision.

Speaker 2

No way would I leave them in the house if there is a fire, No I wouldn't just simple as I would take the risk on my hearing. Wouldn't I like a lot of people as well?

.....

Speaker 1

So we both agree that excessive manual handling would be an issue and again, I wouldn't expect anybody to do that. I still have to mention that the hearing Tinnitus issue is of concern.

The next question then, is what reasonable adjustments do you think you would need to carry out your duties, including all health and safety Responsibilities? so this is the one, I'm struggling to answer, and anything that you can think of as an employee, that an employer can help you with to make sure that you are safe. The clients are safe and your well-being is safe.

Speaker 2

No nothing.

Speaker 1

I'm saying I'm quite happy for you to use your defenders during a drill but during a fire evacuation, it's a no.

Speaker 2

I understand that.

Speaker 1

It still leaves me with you know, the the quandary, whether or not it is safe for you to conduct a fire evacuation, I mean, you have stated that you are happy to do it in an emergency and suffer the consequences.

Speaker 2

No way we I just run across the road and just leave them in.

Speaker 1

Again, I mean that that is the base concern.

Speaker 2

I know.

Speaker 1

And health and safety, it is still my worry, so where we go from here now is that we will compile this report and will give you a copy and you can have a copy of the recording as well. Then we will send it to our legal Team for further advice.

And take it from there. Is that fair? Have I covered everything?"

72. There was no discussion about any previous comments made by the Claimant at her appraisals. The Claimant was clear she would manage an emergency.

73. The Respondent did not make any further enquires with Occupational Health.

74. The Respondent did not send any further documents or reports to the Claimant.

75. The Claimant was informed that her employment was being terminated in a letter dated 6 December 2024. Within it the letter, again which was considered in full, it states that no reasonable adjustments that could be made and *"Due to the Health and Safety risks associated with your Tinnutus, the fire alarms would sound, and residents required assistance to evacuate, resulting in you being affected and creating a safeguarding concern for the residents and staff who would have to consider your condition as well as the emergency at hand. We have also been making reasonable adjustments for the condition that you are unable to sit and stand for long periods of time which in the care industry we have tried to accommodate however, we are unable to further accommodate due to the Health and Safety risks associated with being unable to respond in an emergency to a resident.*

Under these circumstances and taking account the facts, I have been regretfully left with no alternative other than to terminate your employment on the grounds of ill health and capability."

76. The letter clearly states that the decision to end employment is on the grounds of ill health and capability and refers to the fire evacuation procedure.

77. In response to cross examination asking about the reason for dismissal Mr. Evans said that he was concerned that the [fire] procedure would not be completed because of the Claimant's health and wellbeing and the Claimant protecting her own health.

78. The dismissal letter was handed to the Claimant whilst she was mid way through her shift, and she left shortly after.

79. In his witness statement Mr. Evans states that redeployment was considered but there were no alternative roles that avoided lone working and emergency responses. This evidence was not challenged by the Claimant. However, there is no evidence that such possibilities were discussed at the capability meeting and there is no reference in the dismissal letter.

80. There is reference to the Respondent having received health and safety advice from Peninsula. This has not been disclosed, or summarised.

81. The Claimant was notified of her right to appeal. She did not appeal as she considered there would be little point in a small family run business. The dismissal letter directed any appeal by sent to Mrs. Susan Evans, a family member.

Law

82. A summary of the law in relation to unfair dismissal is set out below.

Unfair Dismissal

83. The relevant law is set out at sections 94 and 98 of the Employment Rights Act 1996 as set out below.

94 The right.

(1) An employee has the right not to be unfairly dismissed by his employer.

(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3)In subsection (2)(a)—

(a)“capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b)“qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

(6) Subsection (4) is subject to—

(a)sections 98A to 107 of this Act, and

(b)sections 152, 153, 238 and 238A] of the Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal on ground of trade union membership or activities or in connection with industrial action).

84. In considering ill-health capability dismissals firstly, where an employee has been absent from work due to sickness for some time, it is essential to consider whether the employer can be expected to wait any longer for the employee to return — *Spencer v Paragon Wallpapers Ltd* 1977 ICR 301, EAT. The Court of Session in *S v Dundee City Council* 2014 IRLR 131, Ct Sess (Inner House), said the tribunal must expressly address this question, and must balance the relevant factors in all the circumstances of each individual case. Such factors include:

- a. whether other staff are available to carry out the absent employee’s work
- b. the nature of the employee’s illness
- c. the likely length of his or her absence
- d. the cost of continuing to employ the employee
- e. the size of the employing organisation; and
- f. (balanced against those considerations), the unsatisfactory situation of having an employee on very lengthy sick leave.

85. These factors are essentially the same as those affecting the reasonableness of ill-health dismissals in general.

86. Secondly, a fair procedure is essential. This requires, in particular:

- consultation with the employee

- a thorough medical investigation (to establish the nature of the illness or injury and its prognosis), and
- consideration of other options; in particular, alternative employment within the employer's business.

87. An employee's entitlement, if any, to enhanced ill-health benefit will also be relevant.

88. The 'range of reasonable responses' test of fairness applies to both the decision to dismiss and the procedure that was followed in reaching that decision. The EAT, *Pinnington v City and County of Swansea and anor* EAT 0561/03, said that the test should apply to the way employers inform themselves of the true medical position, applying the Court of Appeal's decision in *J Sainsbury plc v Hitt* 2003 ICR 111, CA.

89. As regards disabled employees more generally, in *Dyer v London Ambulance NHS Trust* EAT 0500/13 the EAT observed that, although it will be rare for there to be circumstances in which no reasonable adjustment can be made, the facts of that case — where the claimant suffered a severe, life-threatening reaction to aerosols and perfume and so could not work in an office where such products were used — were an example of such exceptional circumstances. However, the EAT warned tribunals to think 'long and hard' before reaching a similar conclusion, or before concluding that a dismissal for reasons of capability was fair where there were adjustments that could have been made.

90. What the tribunal has to decide is whether there was material in front of the employer that satisfied the employer of the employee's inadequacy or unsuitability and on which it was reasonable to dismiss. In the absence of clear evidence of poor performance, an employer is likely to struggle to demonstrate that it has a sufficient reason for dismissing on the ground of capability.

Section 15 – discrimination arising from disability

91. The legislation regarding complaints of discrimination arising from disability is set out at section 15 of the Equality Act 2010, set out below.

15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

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

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

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

92. The approach to determining Section 15 claims was summarised by the Employment Appeal Tribunal in *Pnaiser v NHS England and Another* [2016] IRLR 170. This includes:

- In determining what caused the treatment complained about or what was the reason for it, the focus is on the reason in the mind of A. This is likely to require an examination of the conscious or unconscious thought process of A;
- The “something” that causes the unfavorable treatment need not be the main or sole reason, but must at least have a significant (or more than trivial) influence on the unfavorable treatment, and so amount to an effective reason for or cause of it;
- Motives are not relevant;
- The tribunal must determine whether the reason or the cause is “something arising in consequence of B’s disability”;
- The expression “arising in consequence of” can describe a range of causal links. The causal link between the something that causes unfavorable treatment and the disability may include more than one link;
- Knowledge is only required of the disability. Knowledge is not required that the “something” leading to the unfavorable treatment is a consequence of the disability.

93. The respondent will successfully defend the claim if it can prove that the unfavorable treatment was a proportionate means of achieving a legitimate aim. Legitimate aims are not limited to what was in the mind of the employer at the time it carried out the unfavorable treatment. Considering the justification defence requires an objective assessment which the tribunal must make for itself following a critical evaluation of the position. It is not simply a question of asking whether the employer’s actions fell within the band of reasonable responses.

94. The Equality and Human Rights Commission Code of Practice suggests the question should be approached in two stages:

- Is the aim legal and non-discriminatory and one that represents a real, objective consideration?
- If so, is the means of achieving it proportionate – that is appropriate and necessary in all the circumstances?

95. The Code goes on to say that this involves a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts. “Necessary” here does not mean that the treatment is the only possible way of achieving a legitimate aim; it is sufficient that the same aim could not be achieved by

less discriminatory means (see *Hampson v Department of Education and Science* [1989 ICR 179 and *Hardys & Hansons plc v Lax* [2005] ICR 1565.)

96. Justification therefore requires there to be an objective balance between the discriminatory effect and the reasonable needs of the employer (*Hensman v Ministry of Defence* UKEAT/0067/14). The Tribunal has to take into account the reasonable needs of the employer, but it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the treatment is reasonably necessary.

97. The Equality and Human Rights Commission Code of Practice in paragraph 5.2.1 suggests that if a respondent has failed to make a reasonable adjustment it will be very difficult for it to show that its unfavourable treatment of a claimant is justified.

Sections 20 and 21 – Failure to Make Reasonable Adjustments

98. The legislation regarding complaints of a failure to make reasonable adjustments is contained within sections 20 and 21 of the Equality Act 2010.

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

99. The duty to make reasonable adjustments appears in Section 20 as having three requirements. In this case we are concerned with the third requirement in Section 20(5).

100. Under section 21 a failure to comply with that requirement is a failure to comply with a duty to make reasonable adjustments and will amount to discrimination. Under Schedule 8 to the Equality Act an employer is not subject to the duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know that the claimant has a disability or that the claimant is likely to be placed at a substantial disadvantage.

101. Substantial disadvantage is such disadvantage as is more than minor or trivial;

102. In *County Durham and Darlington NHS Trust v Dr E Jackson and Health Education England EAT/0068/17/DA* the Employment Appeal Tribunal summarised the following additional propositions:

- It is for the disabled person to identify the “provision, criterion or practice” of the respondent on which s/he relies and to demonstrate the substantial disadvantage to which s/he was put by it;
- It is also for the disabled person to identify at least in broad terms the nature of the adjustment that would have avoided the disadvantage; s/he need not necessarily in every case identify the step(s) in detail, but the respondent must be able to understand the broad nature of the adjustment proposed to enable it to engage with the question whether it was reasonable;
- The disabled person does not have to show the proposed step(s) would necessarily have succeeded but the step(s) must have had some prospect of avoiding the disadvantage;
- Once a potential reasonable adjustment is identified the onus is cast on the respondent to show that it would not been reasonable in the circumstances to have to take the step(s);
- The question whether it was reasonable for the respondent to have to take the step(s) depends on all relevant circumstances, which will include:

- The extent to which taking the step would prevent the effect in relation to which the duty is imposed;
- The extent to which it is practicable to take the step;
- The financial and other costs which would be incurred in taking the step and the extent to which taking it would disrupt any of its activities;
- The extent of its financial and other resources;
- The availability to it of financial or other assistance with respect to taking the step;
- The nature of its activities and size of its undertaking;
- If the tribunal finds that there has been a breach of the duty; it should identify clearly the “provision, criterion, or practice” the disadvantage suffered as a consequence of the “provision, criterion or practice” and the step(s) the respondent should have taken.

103. Consulting an employee or arranging for an occupational health or other assessment of his or her needs is not normally in itself a reasonable adjustment. This is because such steps alone do not normally remove any disadvantage; *Tarbuck v Sainsbury's Supermarkets Ltd* [2006] IRLR 663; *Project Management Institute v Latif* [2007] IRLR 579.

104. What adjustments are reasonable will depend on the individual facts of a particular case. The Tribunal is obliged to take into account, where relevant, the statutory Code of Practice on Employment published by the Equality and Human Rights Commission. Paragraphs 6.23 to 6.29 give guidance on what is meant by reasonable steps. Paragraph 6.28 identifies some of the factors which might be taken into account when deciding whether a step is reasonable. They include the size of the employer; the practicality of the proposed step; the cost of making the adjustment; the extent of the employer's resources; and whether the steps would be effective in preventing the substantial disadvantage.

105. An important consideration is the extent to which the step will prevent the disadvantage. Although the Equality Act 2010 uses the term “avoid”, this is not an absolute test. The position is different in auxiliary aid cases where the employer has to take such steps as it is reasonable to take to have to provide the auxiliary aid.

106. A failure to consider whether a particular adjustment would or could have removed the disadvantage amounts to an error of law: *Romec Ltd v Rudham* [2007] All ER(D) (206) (Jul), EAT. The Court of Appeal put the matter this way in *Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160:

“So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness.”

107. Broadly speaking, and all other things being equal, the more effective the adjustment is likely to be the more likely it is to be a reasonable adjustment; the less effective it is likely to be, the less likely it is to be reasonable. Effectiveness must be assessed in the light of

information available at the time, not subsequently: *Brightman v TIAA Ltd* UKEAT/0318/19 2 July 2021 (paragraph 42).

Conclusions

- 108. The Tribunal applied the law to the findings of fact as necessary to reach conclusions on the allegations as clarified and recorded in the list of issues at the start of the hearing.
- 109. The Tribunal considered the parties submissions and relevant case law.
- 110. It was appropriate to deal with discrimination complaints first.
- 111. The conclusions are unanimous.

Failure to make reasonable adjustments

- 112. The Respondent accepts that the Claimant was disabled at the material times and also that knowledge is not in issue in respect of this complaint.
- 113. The first issue is - did the lack of an auxiliary aid, namely ear defenders, put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that using ear defenders enabled the claimant to take part in fire alarms tests and the lack of ear defenders would cause the Claimant pain for several days? They had been used on three occasions before dismissal, and had the claimant been allowed to use the ear defenders she would have been able to carry out the safety fire alarm.
- 114. The way the allegation is framed is important.
- 115. As set out in the findings of facts, the Claimant was provided ear defenders in around October 2024 and was permitted to use them in relation to fire alarm tests. Therefore, there was no failure to provide an auxiliary aid in relation to fire alarm testing from this date.
- 116. However, the evidence also shows that Mr. Evans informed the Claimant that ear defenders could not be used in a real fire situation. In the hearing the Claimant accepted that it would not be appropriate to use ear defenders in an emergency. However, it was not entirely clear on the Claimant's part whether she considered this concession to be confirmation that she did not consider the lack of ear defenders in an emergency was a failure, and therefore we considered the remaining tests.
- 117. The next question in adopting a methodical approach to determining is - Did the Respondent know or could it reasonably have

been expected to know that the Claimant was likely to be placed at the disadvantage if she was not allowed to use ear defenders?

118. The Tribunal found that the Respondent was aware that the Claimant would be put at the disadvantage of pain for several days if not permitted to use ear defenders when the fire alarm sounded, whether that be in a drill or during an emergency. The Claimant had reported this to the Respondent as set out in the findings of fact above.
119. The next matter for consideration is what steps could have been taken to avoid the disadvantage and whether such steps were reasonable? The Claimant suggests that she should be allowed to use ear defenders.
120. As has been explained, the Claimant was provided with ear defenders and permitted to use ear defenders in relation to drills from October 2024. It is noted that there was some discussion about ear defenders being offered earlier, but the option of a colleague assisting was also put forward at that time and that appears to have been the practice put in place.
121. However, the Respondent informed the Claimant, at the medical capability meeting that she would not be allowed to use ear defenders in an emergency situation. There had not been an actual emergency situation.
122. The Tribunal therefore had to determine whether provision of the ear defenders in an emergency was reasonable.
123. There was no clear information about where the ear defenders were located. However, it was agreed that the Claimant was unlikely to have ear defenders on her at all times when carrying out her daily duties.
124. The Tribunal did not consider that providing ear defenders to avoid the disadvantage (the ear pain) in an emergency fire situation would be a reasonable step for the Respondent to take. As noted, the Claimant would not have the ear defenders with her and the priority action in a fire would be time critical evacuation and it would not be reasonable to first locate defenders.
125. The complaint of failure to make reasonable adjustments fails and is dismissed.

Discrimination arising from disability (Equality Act 2010 section 15)

126. The Respondent accepts that dismissing the Claimant on 6 December 2024 was unfavourable treatment.

127. The Claimant says the following things arise in consequence of her disability:

- Because of tinnitus, which the claimant had over 30 years, if the claimant were subjected to loud continuous noise it would cause the claimant pain for a few days after.

- Unfavourable treatment because the claimant was the second member of staff supervising outside during fire safety drills and an incorrect assumption had been made about the Claimant's ability to get the users out in an emergency.

128. Having discussed the allegation at the start of the hearing the Tribunal adopted sensible reading of the things said to be arising in consequence and understood it to be that the tinnitus caused ear pain that would last for a few days after a loud noise (fire alarm) and therefore in drills the Claimant supervised the residents outside the building and this resulted in an incorrect assumption being made about what the Claimant would do in the event of a real fire.

129. The Respondent's submissions were not entirely clear on whether it accepted the things said to arise in consequence of the Claimant's tinnitus as the focus of submissions was on proportionality.

130. For completeness, the Tribunal conclude that the Claimant would have pain for a few days after a loud noise and this was something that arose in consequence of her disability, tinnitus, and that her standing outside during fire drills and the incorrect assumption that flowed from that was something in consequence of her disability as she did this to avoid the pain.

131. Again, the submissions are not clear, and therefore we considered if the dismissal, the unfavourable treatment, was because of those things.

132. The Tribunal must determine what caused the unfavorable treatment, in other words what was the reason for it. The focus at this stage is on the reason in the mind of the decision maker, Mr. Evans.

133. There may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

134. The Tribunal kept in mind that motives are irrelevant, and the focus is on the cause.

135. The Tribunal found Mr. Evan's oral evidence to be clear, and together with the dismissal letter concluded that the Respondent, namely Mr. Evans as dismissing officer, formed the view that the Claimant would

not undertake emergency fire procedures due to the pain she would experience following a loud noise and his perception on how her pain would result in her not managing the fire evacuation properly.

136. It is noted that in the notes of the medical capability meeting Mr. Evans states it was not his decision. The evidence, as set out in the dismissal letter, is that he made the decision to dismiss the Claimant.

137. In the Tribunal's mind the evidence demonstrates that the reason for the dismissal was the things arising in consequence of the Claimant's disability, as set out above.

138. As the Tribunal concluded that the unfavourable treatment was because of the things arising in consequence of the Claimant's disability it next considered whether the treatment was a proportionate means of achieving a legitimate aim.

139. The Respondent must prove that the dismissal was a proportionate means of achieving a legitimate aim.

140. The Respondent says that its aims were:

To ensure a safe working environment for all employees and

- to maintain a stable workforce and the health and wellbeing for all individuals including vulnerable clients. Having the claimant not participating can cause risk and there were concerns regarding the claimant struggling with all elements of her role with regards to poor performance. The claimant was not on a performance review but certain items were highlighted, like the refusal to comply with health and safety tasks namely around the fire drill.

141. The Tribunal considered that the underlined text were legitimate aims, and are things that a reasonable employer would seek to achieve.

142. The text – [Having the claimant not participating can cause risk and there were concerns regarding the claimant struggling with all elements of her role with regards to poor performance. The claimant was not on a performance review but certain items were highlighted, like the refusal to comply with health and safety tasks namely around the fire drill.] Is not understood to be a legitimate aim but rather is additional information as was noted at the Case Management Preliminary Hearing.

143. The Tribunal went on to determine if the treatment, the dismissal, was an appropriate and reasonably necessary way to achieve those aims. This involves consideration of whether something less discriminatory have

been done instead and balancing the needs of the Claimant and the Respondent.

144. As a general proposition the Tribunal considered ensuring a safe working environment and maintaining a stable workforce and health and wellbeing for all to be desirable things.

145. However, it had to consider if dismissal was an appropriate and reasonably necessary way to achieve that aim. In the particular circumstances of this case the Tribunal did not consider the dismissal was an appropriate and reasonably necessary way to achieve the aims.

146. The Tribunal considered that something less discriminatory could have been done.

147. As set out in the findings of fact, the Respondent has a practice whereby only one member of staff works at night. Although the Tribunal has not seen any fire risk assessment or documented evacuation procedure it therefore follows as a matter of logic that the Respondent has deemed it safe for one employee to evacuate residents.

148. It permitted the Claimant to be a lone working member of staff for a very long time after she raised concerns about the pain caused by her tinnitus following loud noise and how this led to adaptations of the fire drills. The natural conclusion that flows from this is that, in view of the information from as early as March 2023, if not before, the Respondent did not consider it too risky, for the Claimant to be the sole member of night staff.

149. There is no evidence that the Respondent had any real concerns from March 2023, until around October/November 2024, and no evidence of any real or significant attempts to make any changes.

150. It is understood that latterly the Respondent appears to have received some form of health and safety advice, the exact nature of the advice is unknown but from the contemporary documents appears to focus on the fact the Claimant should not be permitted to be a lone worker and should not use ear defenders in an emergency.

151. The Claimant said she could manage an emergency. The Respondent does not appear to accept this, but has not clearly explained why the Claimant's direct comments made at the capability meeting have been not been accepted and instead sought to refer to historical and brief comments about how she sought to manage the impact of the drills by standing outside and asking a colleague to sound the alarm.

152. The Respondent did not have clear medical evidence that she cannot manage in an emergency situation.
153. In the Tribunal's view, even if there was some genuine concern about her ability to manage in an emergency and the risks this could pose to users, it considered a less discriminatory step that could have been taken was for the Claimant to have only been permitted to work day shifts.
154. The Respondent appears to deem one lone worker safe for evacuation at night. During the day, four members of staff, including management are on site. Only permitting the Claimant to work during the day would have, on the evidence available as presented during this hearing, provided additional staff members than available at night to manage an emergency.
155. In reaching its conclusions the Tribunal was careful to balance the needs of the Claimant and the Respondent. It understands that health and safety and minimising risk to vulnerable residents is of paramount importance. However, weighing this against the Claimant's needs, at the point of dismissal and all the facts as set out above, in particular the fact she had been working for 3.5 years, undertook lone working and that the issue was well known to the Respondent for a long time. The Claimant was trained to manage a fire emergency and understood ear defenders were not permitted for emergencies. The Tribunal consider this would have been the best way for the Respondent to have met its aims because it would have resulted in the Claimant, who appeared to have been a stable and well-regarding employee for most of her tenure, remaining employed and not being dismissed which is a serious action.
156. The complaint of unfavourable treatment because of something arising in consequence of disability is well-founded and succeeds.

Unfair dismissal

Reason for dismissal

157. The first matter for determination in relation to the unfair dismissal complaint was to determine what the principal reason for dismissal was.
158. It is not disputed that the Claimant was dismissed, and the effective date of determination was 6 December 2024.
159. Dealing firstly with the principal reason for dismissal, the Respondent says the reason was capability – performance. The list of issues that were prepared at the Case Management Preliminary Hearing on 21 October 2025 confirms that the Respondent's position was that it was performance related capability that was relied on as the reason for dismissal.

160. As set out above, at the start of the final hearing, and again during submissions, Employment Judge Cawthray sought to clarify the position and noted and explained that the legal reason of capability can comprise dismissals for performance or ill-health related reasons. It was explained that the type of capability being argued was important to be clarified as the case law in relation to a fair process is different if dealing with a performance or ill-health capability dismissal, and it was noted that the list of issues appeared to contain the standard questions relating to ill-health dismissal.

161. The Respondent's representative confirmed that the Respondent's position was that the Claimant was dismissed due to performance.

162. The Claimant suggested that she may have been dismissed to make way for a family member. There was no documentary evidence in relation to this.

163. The Tribunal find that the Claimant was dismissed because of her ill-health, specifically, tinnitus, which had resulted in her not undertaking all aspects of the fire evacuation drill procedure and led to the Respondent forming a view that because the Claimant suffered with tinnitus and would experience pain after loud noises she would not properly manage fire alarm emergencies and that posed a health and safety risk.

164. In reaching this conclusion it had particular regard to the contemporaneous documents and in particular the invitation to the meeting which had been described as a medical capability meeting and the contents of the dismissal letter.

165. As the determined that the reason was capability, albeit ill-health related capability, and this is a potentially fair legal reason under section 98(2)(b) of the Employment Rights Act 1996 and the Tribunal went on to consider whether the Respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant.

166. As the Respondent has shown a potentially fair reason for dismissing the Claimant, the next legal issue for consideration is that set out in section 98(4) of the Employment Rights Act 1996. This provision always bears repeating:

“(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

a. depended on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted

reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and
b. *shall be determined in accordance with the equity and the substantial merits of the case.”*

167. The test of fairness is tied into the reason for dismissal, which we have found to be capability (ill-health). It also considers the size and resources of the Respondent, in this case the Respondent is a small family run employer. A further key point is that the test looks at whether the employer acted reasonably or unreasonably. This effectively imports a “band of reasonable responses” test. The question is whether this employer acted reasonably given the reason for dismissal. It is not for the Tribunal to substitute its view on what the Respondent should or should not have done.

Did the Respondent genuinely believe the Claimant was no longer capable of performing their duties?

168. There is overlap with the conclusions in relation to the section 15 complaint.

169. The Tribunal concluded that the Respondent, via Mr. Evans as the dismissing officer, could not have had a genuine belief that the Claimant was no longer of performing her duties.

170. It is worth noting again that the Claimant was not subject to any poor performance procedure and the duties that the Respondent considered she could not fulfil were only those relating to emergency fire evacuations. This is only one element of the Claimant’s duties, although the Tribunal do of course appreciate and understand the importance of fire safety in any setting and in particular a residential care home.

171. As set out in the findings of fact the Respondent had known that the Claimant had stood outside of the building during the weekly fire drills soon after she started employment in 2021. In March 2023 she specifically told Mr. Evans in her appraisal about the difficulties she experienced with the fire alarm drill due to her tinnitus as set out in the findings of fact.

172. The Respondent permitted the adaptation of the fire drill by her standing outside for a very long time.

173. The Respondent does not appear to have taken any steps at all to address any concerns it has about any risk to the residents, the Claimant or any staff until late 2024.

174. The Respondent permitted the Claimant to carry on working, indeed she undertook night shifts on her own, for almost all her employment and significantly for approximately 19 months between March 2023 and October 2024, after she had disclosed the issues that she had issues with the fire alarm.

175. There is no explanation at all for why the Respondent did not take any action earlier.

176. The Tribunal considered that if the Respondent had a genuine belief that the Claimant was not capable of managing emergency fire situations, in view of the potential serious risks, it would not have permitted her to have worked alone for such an extensive period.

177. For completeness, the Tribunal does not consider the Claimant refused to participate in fire drills. It considers that to be the Respondent's incorrectly seeking to reframe events.

Did the Respondent adequately consult the Claimant?

178. The Respondent submitted there has been extensive consultation over a period of time.

179. The Tribunal do not consider this to be the case. This is not evidenced in the documents.

180. The Tribunal kept in mind that in the context of ill-health situations, consultation has a number of purposes, and that includes establishing the true medical position and the parties should keep each other updated, which is particularly important where an employer is considering dismissal, and the Tribunal considered this to be relevant in this case despite the fact the Claimant was not on long term sickness absence. A proper and meaningful consultation with the employee should typically include the following:

- regular discussions
- informing the employee if it is approaching the stage when dismissal may be considered
- personal contact with the employee
- consideration of the medical evidence
- consideration of the employee's opinion on his or her condition
- consideration of offering alternative employment.

181. Some of these elements overlap with other factors for consideration, and some are more relevant to long term absence cases.

182. On the face of it there was only one medical capability meeting and one assessment and report by Occupational Health, both in late November 2024.

183. The two appraisals and the supervision discussion in October 2024 appear to be the only discussion about fire drills. The recorded discussions on that matter were very brief.

184. The Tribunal considered there to be a significant lack of meaningful

dialogue about the Claimant's ability to undertake emergency fire evacuation procedures. The matter was discussed, amongst a large number of different health related concerns, at the medical capability meeting and the Claimant's clear view was that she could undertake the evacuation. It is evident that the Claimant may experience pain after any fire alarm if inside the building but she understood her duties and was prepared and felt capable of performing them without ear defenders in an emergency. It is noted that the Claimant completed her fire marshal training around May 2023 after raising concerns in March 2023.

185. There is no evidence at all that Mr. Evans considered the Claimant's position that she capable of, and willing to, undertake the fire evacuation procedure.

186. A potential outcome of dismissal was set in the invitation letter, but this was not discussed at the capability meeting.

187. The Tribunal has commented in relation to consultation and consideration of up-to-date medical evidence below.

188. The Tribunal conclude that the Respondent did not adequately consult with the Claimant.

Did the Respondent carried out a reasonable investigation, including finding out about the up-to-date medical position?

189. The Respondent referred the Claimant to Occupational Health on 6 November 2024. The key extracts of the referral, as completed by Ms. Huxter, are set out above but are not repeated here.

190. The Respondent is required, by the principles laid down in case law, to establish the true medical position before deciding to dismiss an employee for health-related reasons. This requires a reasonable investigation. The Tribunal kept in mind that the onus to take reasonable steps to obtain up-to-date medical advice about an employee's condition and prognosis falls on the employer, not the employee.

191. In this case an Occupational Health report was produced on 22 November 2024. The report deals with a number of health conditions and potential adjustments separate to tinnitus. Although the report deals with the use of ear defenders in relation to drills the Tribunal does not consider the report deals with emergency fire situations.

192. Importantly the report states the Claimant is fit for work, with adjustments.

193. The Tribunal understands that given the nature of the Claimant's different conditions and the content of the Occupational Health report that

there may have been some confusion. However, the Respondent could have easily asked for clarification from Occupational Health in this respect. It did not.

194. There is reference in the documents and the Respondent's witness statements that the Respondent has received advice about health and safety matters. That advice has not been disclosed, but it is reasonable to conclude from the facts that the advice appeared to focus on lone working and not using ear defenders in an emergency.

195. As noted in relation to the conclusions on consultation above, there does not appear to have been any consideration of the Claimant's assertions that she could manage an emergency fire situation.

196. In the Tribunal's view, the Respondent did not take any adequate steps at the point of dismissal to obtain up to date clear information about the medical position in relation to the Claimant's ability to manage an emergency fire evacuation.

197. For the reasons set out above, the Respondent did not carry out a reasonable investigation.

Could the Respondent could be expected to wait longer before dismissing the Claimant?

198. The Tribunal understands that health and safety of residents is critical. However, the Claimant's pain flowing from her tinnitus was not a new situation. The concerns about her pain and managing fire alarm situations were not new. They had been known from early in employment, and specifically from March 2023.

199. The Respondent has not addressed why no action was taken before November 2024. The trigger at that stage was not clear.

200. In view of the many months and years that the Respondent, in knowledge of the situation, permitted the Claimant to work – particularly at night alone – the Tribunal considered the Respondent could have waited before dismissing the Claimant. In particular, the Respondent could have waited until it had clear medical information in relation to emergency situations.

Did the respondent committ the acts of unlawful disability discrimination?

201. The conclusions in relation to the discrimination complaints are set out above.

Was dismissal was within the range of reasonable responses?

202. For completeness, the Tribunal did note that an employer has a duty to consider redeploying or transferring employees who are not able to carry out some or all of their former duties due to ill health where alternative work

exists that the employee may be able to do. The Tribunal understands that the Respondent is a small business.

203. At the point of dismissal there was no documented evidence that Mr. Evans had considered any alternative to dismissal such as changing work patterns or varying roles.

204. The reasonableness test under section 98(4) of the Employment Rights Act 1996 is based on the facts or beliefs known to the employer at the time the dismissal takes effect.

205. In this case, the Tribunal did not consider the Respondent conducted a fair procedure. The Tribunal was careful not to substitute its own view, and reached its conclusions based on the evidence and not considered the benefit of hindsight. The Tribunal considered whether dismissal was within the range of reasonable responses available to a reasonable employer.

206. There are a number of documents that were completed on 4 November 2024 and the Respondent's representative has made generic reference to risk assessments having been undertaken. The Tribunal have noted the contents of those documents but do not consider there to be any comprehensive or clear risk assessment setting out risk to the residents or the Claimant in relation to managing emergency fire procedures.

207. The Tribunal considered all of the conclusions above, and on balance, determined that that dismissal was not within the range of reasonable responses. In reaching this conclusion it kept in mind that the Respondent had not followed a fair procedure, and in particular there was not a genuine belief given the non-urgent action and the fact the Claimant had been permitted to work at night alone for a long period, had not obtained or considered up to date medical information, had not considered the Claimant's assertion that she could manage an emergency and that it could have waited longer in view of the particular circumstances.

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208. The question for consideration is whether the Claimant would have been dismissed in any event, had a fair procedure been followed. The Tribunal kept in mind that in relation to medical investigation, it will rarely be the case that provision of up to date medical information would be utterly useless or futile.

209. However, the Tribunal considered that it did not have enough evidence before it to make any decision about whether any different process, including any appeal. Would have changed the outcome. The outcome may have been the same, it may not, it simply cannot reach any conclusion on the evidence and therefore no deduction will be made.

Contributory fault

210. The Tribunal may reduce the basic or compensatory awards for culpable conduct as set out in sections 122 and 123 of the Employment Rights Act 1996 as set out above.
211. The Tribunal does not consider there to be any evidence of the Claimant committing any blameworthy conduct that caused or contributed to dismissal.
212. The Claimant's complaint of unfair dismissal is successful and is upheld.

Approved by:

Employment Judge Cawthray

2 July 2026

SENT TO THE PARTIES ON

01 September 2026

Adam Holborn
FOR THE TRIBUNAL OFFICE

Notes

All judgments (apart from judgments under Rule 51) and any written full reasons for the judgments are published, in full, online at <https://www.gov.uk/employment-tribunal-decisions> shortly after a copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings and accompanying Guidance, which can be found here:

www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/