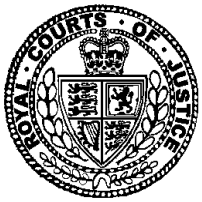

Neutral Citation Number: [2019] EWHC 1153 (QB)

Case No: HQ16X04384

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/05/2019

Before:

PETER MARQUAND
(sitting as a Deputy High Court Judge)

- -

Between:

ALISTAIR CRAIG INGLIS

Claimant

- and –

MINISTRY OF DEFENCE

Defendant

- -
- -

Harry Steinberg QC and Robert O'Leary (instructed by **Hugh James**) for the **Claimant**
Sam Healy (instructed by **Plexus Law**) for the **Defendant**

Hearing dates: 4th, 5th, 6th and 7th March 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Peter Marquand:

Introduction

1. The Claimant, Mr Inglis, is a former member of the Royal Marines and he claims damages against the Defendant, his former employer the Ministry of Defence, for hearing loss suffered during his service. This Judgment concerns the amount of damages the Defendant will pay to the Claimant, the parties having agreed to resolve liability on an 80:20 apportionment in the Claimant's favour. Harry Steinberg QC and Robert O'Leary represented the Claimant and Sam Healy, the Defendant.

The issues

2. The first issue to be determined is whether the Claimant left the Royal Marines because of his hearing loss or in order to take up more lucrative employment in the maritime security industry. The Claimant must prove on the balance of probabilities, that the hearing loss was his reason for leaving in order to establish a causal link to his claim for any future loss of earnings and any future loss of pension.

3. The second issue is the extent of the Claimant's hearing loss. The Defendant says that the evidence, in particular the expert evidence, indicates that the Claimant's hearing loss is not as extensive as he alleges. This issue goes to the size of the award of general damages and has an impact on the Claimant's future employment prospects and therefore the amount of any damages to compensate him for any diminution in his potential earnings.

4. The third issue is whether the Claimant is "disabled" within the meaning used in the Ogden Tables. The Ogden Tables contain data compiled by actuaries and are used in assessing future losses. In particular in this case, the relevant tables relate to factors to be applied to future loss of earnings calculations because statistics indicate that where a person is disabled a reduction factor should be applied, as those who are disabled spend longer periods out of work than those who are not disabled.

5. The fourth issue is related to the third issue. It is whether the Claimant's loss of earnings should be calculated on the basis of a lump sum for a handicap in the labour market (known as a *Smith v Manchester* award) or on the basis of the annual shortfall in his earnings (the multiplicand) multiplied by a statistically adjusted number reflecting the Claimant's future years in employment (the multiplier).

6. The Claimant invited me to decide a fifth issue, which was whether or not the damage to the Claimant's hearing stopped when exposure to excessive noise ceased or whether the damaging effect of that noise exposure continued.

7. The sixth issue is to determine the amount of damages to be awarded for those parts of the claim where a dispute remains between the parties.

Background

8. The Claimant is now aged 39 (date of birth 13 September 1979) and was aged 17 when he joined the Royal Marines in 1997. He left the Royal Marines at the age of 32 on 30 May 2012, having applied a year earlier for voluntary discharge. When he originally

signed up for the Royal Marines it was on an open engagement that would have come to an end after 22 years in September 2019.

9. Following his basic training, the Claimant joined 40 Commando and was deployed in the rifle troop. He undertook a sniper course. In 1999 the Claimant was sent on exercises in the Mediterranean on HMS Ocean. He was subsequently deployed in Northern Ireland and the Gulf. In 2004 the Claimant was drafted to 42 Commando and took part in an exercise involving HMS Ark Royal. In 2005 the Claimant was drafted as a recruit troop instructor and undertook the platoon weapons 2 course. During 2007 and 2008 the Claimant was drafted to 40 Commando and deployed on a tour of Afghanistan, being involved in a number of engagements. In 2009 the Claimant joined the Naval Military Training Wing and became a weapons instructor at HMS Raleigh. On 9 October 2003 the Claimant was promoted to Lance Corporal and on 31 March 2005 to Corporal. In November 2010 the Claimant was selected for promotion to Sergeant, subject to his completion of the necessary courses, however, that promotion never took place because on 31 May 2011 the Claimant applied for "Premature Voluntary Release" (PVR). In 2012 the Claimant was selected to represent the Royal Marines in the Eastern Division Championship (a shooting competition) held in the United States.

10. During his service the Claimant was issued with a variety of SA 80 rifles, other rifles, sub-machine guns and handguns. He was exposed to noise from thousands of rounds of ammunition, thunder flash stun grenades, helicopters and other aircraft and explosive devices.

11. A deterioration in the Claimant's hearing was detected during 2006, 2008 and 2010 although he was medically fit for deployment. At the medical assessment prior to the Claimant's discharge from the Royal Marines in 2012 he was also graded as medically fit. I will deal with the detail of these assessments below.

12. Having left the Royal Marines, the Claimant secured employment in the maritime security industry. This involved being deployed on merchant ships in various parts of the world to provide on-board security against the threat of pirates. This work also involved the use of firearms. In 2016 the Claimant moved employment to work for a company called Petrofac, providing security during the commissioning of an oil rig and then providing health and safety advice. In May 2017 the Claimant moved to his current employer, Greenlight Safety Ltd ("Greenlight"), as a health and safety officer, which is a role that he continues to perform.

13. The Armed Forces use a classification of physical and mental capacity for deployment by assessing a number of capacities which are categorised as follows:

    i) physical capacity;

    ii) upper limbs;

    iii) locomotion;

    iv) hearing;

v) eyesight;

vi) mental capacity; and

vii) stability.

14. Those capacities are all known by the acronym "PULHHEEMS" with the "H" representing "hearing" and the first H represents the right ear and the second H the left one. The capacity of a person to hear is given a numerical reference as well: 1, 2, 3, 4 and 8. H1 being the best hearing and H8 being the worst. Hearing which is "H2" is described as "acceptable hearing" but a grading of "H3" is referred to as "impaired hearing." By way of example, in this Judgment a reference to "H2 H2" means: hearing in the right ear is graded as "2" and in the left as "2".

15. The level of sound is measured in decibels, abbreviated in this Judgment to dB. In addition to a loss of hearing, an impact of noise damage can be "tinnitus." Tinnitus is a ringing or buzzing noise heard by a person in the absence of any external noise.

Issue 1 - why did the Claimant leave the Royal Marines?

The Claimant's evidence

16. The Claimant has provided three witness statements and was cross-examined by Mr Healy.

17. In his first statement, the Claimant said that he had to leave the Royal Marines in 2012 due to problems he had experienced with his hearing. It was not something that he planned to do or particularly wanted to do but his hearing problems at the time were becoming such that he did not think he had any choice. He was concerned that he would fail a medical with the Royal Marines and be discharged at short notice. When the opportunity of taking up maritime security work arose, he felt he had to take the opportunity to leave the Royal Marines whilst that alternative work was available and this was the only reason he left the Royal Marines at that time.

18. The Claimant said that he used the opportunity provided by maritime security to leave the Royal Marines and transition into civilian life. He said it was not all about the pay but it was to be able to leave at his own choosing rather than as a result of a medical discharge. He explained that taking a position in maritime security resulted in him spending less time with his family than as a marine, because as a Royal Marine he could go home every day from his base. He denied Mr Healy's suggestion that he was attracted by the prospect of travel that working in maritime security provided.

19. In response to Mr Healy's cross examination the Claimant confirmed that he had spent 3 ½ years in maritime security and during that time had earned approximately £40,000 gross per annum, which was substantially higher than his salary in the Royal Marines. In addition, because of the length of time that he was overseas he did not have to pay tax on any of that income.

20. The Claimant said he had a former colleague who had been in the special forces and was well thought of in the maritime security industry and he told the Claimant that he could obtain a position for the Claimant on the basis of his recommendation. The

Claimant was aware of a handful of his former colleagues working in maritime security. The Claimant applied for a position approximately two months before making his PVR application there was, however, no firm offer of employment, but he believed he would a secure a position. After the recommendation he was asked to attend Marsec's (the maritime security company) headquarters for an interview and following that asked to contact them once he came close to his date for leaving the Royal Marines.

21. The Claimant confirmed that if he had not had hearing loss, he probably would have stayed in the Royal Marines for the full 22-year period. The Claimant confirmed that he had told the employment expert instructed on his behalf, Mr Sephton, that on leaving the Royal Marines without his hearing loss he might have considered seeking work as a maritime security consultant. However, he could not comment now whether he would have gone into maritime security, having reached his 40th birthday and because the maritime security industry had changed. The Claimant could not think of any of his former colleagues now who were thinking of entering maritime security.

22. The Claimant said that in maritime security the engagements were very flexible, however, he never knew how long the next engagement would last, it could have been for a number of months or years. The Claimant had worked on private yachts occasionally but predominantly he worked in cargo vessels carrying oil or freight. He could be deployed anywhere in international waters and he had undertaken trips on board ships around the waters in South Africa and Sri Lanka. On board the ship each team had an equipment box which contained ear defenders and the Claimant also had his own 'Surefire' hearing protection, which is specifically for weapons' noise. The Claimant would wear all the ear protection if drills were carried out. Otherwise he would not generally wear ear protection unless he was in the engine room, although this was very infrequent. He always carried his ear protection with him. Occasionally he needed to go into the engine room as this was a 'safe space' that was fortified and would be used by the crew in the event of an attack by pirates.

23. In 2016 the Claimant went to work for Petrofac because the colleague who had previously worked in maritime security was now working for that company and said he would get the Claimant a job. Initially that was to provide security advice concerning the construction of an oil rig in the Gdansk shipyard. However, the vast majority of the Claimant's time at the shipyard was whilst the oil rig was being tested and commissioned. No firearms were used during this period of work and he was provided with, and wore, ear defenders.

24. Mr Healy asked the Claimant to consider the noise that he would have been subject to if he had remained in the Royal Marines as a weapons instructor. The Claimant agreed that not all of his time would have been spent on the range, but he could not say how much time. He was able to say that from his experience whilst at HMS Raleigh all the sergeants were exposed to the same amount of noise as a Corporal. When he was at HMS Raleigh one week was spent in the classroom (without exposure to weapons' noise) and one week on the range. As a weapons instructor whilst on the range he would spend time dealing with health and safety issues and he would have always worn protection and double protection of his own for certain types of weapons exposure.

25. The Claimant confirmed to Mr Healy that before he left the Royal Marines, he had been told that he had been selected for promotion. This meant that he would be promoted if

he passed the necessary courses. Having made his application for PVR the Claimant recalled two interviews, one with his Commanding Officer and another with a 'PW Branch Sponsor' who is an individual who provides careers advice.

26. The Claimant said that consideration of his pension was not at the forefront of his mind but he was aware that after 12 years' service he qualified for half pension and he knew that he would need to do the full 22 years to obtain a full pension. He had not obtained any pension calculations but his father-in-law had been in the Royal Marines and he knew roughly what his pension was following his departure from the service as a Sergeant after 23 – 24 years of service. He knew that he would lose out and he had to weigh up the damage to his hearing or leave at the age of 40 with his pension but further hearing damage.

27. The Claimant did not recall any discussion of pension in either of the interviews that he had, nor did he recall asking any questions about it. He told his wife, Mrs Inglis, that he would undertake maritime security work for the short term as he could also see the trend in maritime security work plateauing and he thought that wages would not go up.

28. The Claimant was asked by Mr Healy about an undated record made of one of the interviews following his application for PVR. The text of the note is as follows:

> "career manager reasons – firm offer of civilian employment
>
> pay and allowances
>
> seeking fresh challenges
>
> …
>
> Career manager comments justification: Cpl Inglis has given his request for PVR careful consideration; he has served for 14 years and has a young family and a mortgage. He is applying for employment in maritime security in order to give his family financial security in the short to mid-term and he is then considering employment as an electrician. I am content that he has considered all aspects of his PVR application. He understands that in the current climate it is unlikely that he will be permitted to withdraw his PVR request. Application to PVR supported.
>
> Further info[mation]: Cpl Inglis' application for early termination has been approved with a new FED of 30th May 2012 (12 months minimum from original JPA application)."

29. The Claimant stated that this note reflected what he was going to do and not his reasons for leaving. He agreed that there was no reference in that note to his hearing problems. The Claimant said that there were no references to his health or hearing because the questions that he was asked were about what he was going to do once he left the Royal Marines. He did not say at the time he was leaving because of his hearing because he

was not asked the question. He was asked what he would do once he left and if he was happy with the decision. He explained that he did know what he would do after he left the service and after maritime security work, but a potential occupation was to retrain as an electrician.

30. The Claimant stated that the decision to leave was taken carefully, was not made "*on the hoof*" and was discussed with his wife. The way the Claimant looked at it, he said, was that it had been highlighted to him that he should stay away from noise. If he remained in the Royal Marines and his hearing became worse, he was concerned that he would be medically discharged. He had been referred on two occasions to specialists and his hearing loss was at the forefront of his mind. He knew he would not be discharged overnight and that there was a duty to resettle him, but a colleague had suffered an injury (albeit being shot in the leg), was medically downgraded, suddenly pulled from a course and the Claimant never saw him again. That person was given no opportunity to be retrained; "*he was terminated*." The Claimant's evidence was that his motivation for leaving was that he could protect his hearing, leave on his own terms, provide for his family and move into a well-paid job as a result.

31. The Claimant was asked whether there were other roles he could do within the Royal Marines that would not expose him to damaging noise. The Claimant explained that in the Royal Marines he was taught and it was always impressed on him, that he was a rifleman first and any other role was secondary. He explained that clerks and chefs were taken on patrols (i.e. exposed to potentially damaging noise) and he had never seen another marine put into a different area of work having been medically downgraded.

32. The Claimant was aware of colleagues who had been retired due to ill health. They had never said what they were entitled to but he knew a couple of individuals who were in dispute with the Ministry of Defence saying that they were entitled to more compensation than they had received. He explained that to a certain extent he had concerns about what he might have been entitled to but he did not know how much he would have been awarded if he had stayed and been medically retired.

33. The Claimant's last medical review on 5 March 2012 stated that he was fit for service. The Claimant said that the medical officer at that appointment advised him that he should pursue a claim for compensation through one of the available schemes, because of his hearing impairment.

34. The Claimant confirmed that he knew that if he left after PVR it was unlikely that he would be able to re-join the Royal Marines or to withdraw his application. The Claimant said he would not have wanted to have re-joined because of his hearing. However, whether or not the Royal Marines would have taken an individual back would depend upon the level of service of that individual and the need within the Royal Marines.

35. It was put to the Claimant that his hearing had in fact stabilised and he was referred to the medical assessment undertaken on 1 June 2010, which is as follows:

> "problem: routine medical

> history: age 30 no complaints…
>
> He is H2 both ears. Occupational history of noise exposure as platoons weapons. Both eardrums are scarred.…
>
> Comment: he is H2 and borderline H3. He was reviewed at Derriford Hospital two years ago. I have told him he needs an annual audiogram and that his hearing will slowly deteriorate. I also advised him to consider a non-noisy environment when he leaves the Corps. I reminded him to declare his hearing loss at his release medical.
>
> Additional: Hr[right]2 Hl[left]2
>
> fit for full duties within current MES"

36. On 6 February 2006 the Claimant was reviewed at the medical centre and the relevant entries in the notes are as follows:

> "E: hearing loss
>
> D: fit for full duties within current MES
>
> S: as above. Asymptomatic hearing loss in left ear, discovered on routine audiogram. Patient is H3 left ear and H2 right ear with high tone loss.
>
> O: normal tympanic membranes bilaterally, mild retraction bilaterally, no excessive scarring.
>
> P: formal ENT assessment and probable annual audiograms thereafter. For R/V [review] after hospital appointment.
>
> R: referral for further care, ENT, Derriford, military, advice only, non-urgent"

37. Mr Healy said that the hearing test results in 2006 and 2010 indicated that the Claimant's hearing loss was stable. The Claimant explained that he had not been told the results. "You go in for a medical and you are told if you are fit or not." In any case he would not have known what H2 or H3 meant.

38. Mr Healy asked the Claimant to agree that in June 2011 there was no prospect of him being medically discharged from the Royal Marines. The Claimant said that he knew that his hearing was not great and that he had been referred twice to a specialist and if he was exposed to further noise his hearing would deteriorate. He agreed that nothing had been said about a medical discharge. He did not know of any colleague or Royal Marine who had been put into a different role as a result of a medical downgrading. He said he had never considered asking whether that was possible and he disagreed that if in 2011 he was concerned about his hearing he would have asked about that and raised his hearing problem.

39. The Claimant said that he was aware of the process of medical discharge which culminated in being reviewed by a medical board. The Claimant said that it was not his experience that a Marine would be reallocated, in particular as he came close to the end to his period of service: that was not something that he had seen.

40. The Claimant explained that between 2003 in 2011 he had spent more and more time on the ranges and the ringing in his ears (i.e. the tinnitus) was getting louder and the time for the ringing to stop was getting longer and longer. The Claimant said his hearing was getting worse before 2011.

41. The Claimant was asked why he therefore joined the shooting competition in 2012. The Claimant explained that if he had not done that, he would have been on the ranges anyway, but it was a privilege and an honour to represent the Navy and the Royal Marines and that he preferred to represent them.

42. The Claimant explained that his hospital appointments, the first one in 2006 or 2007 and the second one in 2008 after his return from Afghanistan did have a contributory effect on his decision to leave the Royal Marines.

43. In his second witness statement at paragraph 11 the Claimant stated:

> "It has been suggested to me that I left the Royal Marines voluntarily. This is true, to the extent I was not medically discharged. However, had the opportunity to work in maritime security on the earnings then available not presented itself, I would not have looked to leave the Royal Marines at that time. I was on course for promotion within the Royal Marines and was shortly due to undergo a promotion course. My only reason for leaving was due to concerns I had over my deteriorating levels of hearing, which I anticipated were likely to result in me being downgraded or even medical (sic) discharged at some point in the future, coupled with the offer of employment that was time sensitive and would not be held open for any length of time."

44. The Claimant explained that he would have stayed in the Royal Marines unless another job had presented itself. At the time maritime security offered more income and if he had left without that income he would not have been able to provide for his family. However, what prompted his decision to leave was his hearing loss and maritime security was the tool available to him to leave and to provide for his family. There were no particular financial pressures at the time although his wife was not working, so he was the main "*breadwinner*". The Claimant said that if it had all been "*about the money*" he would have left the Royal Marines at an earlier point. He agreed the maritime security job was too good to turn down. He had not been looking for any other jobs. He did not have a conversation with his commanding officers about this.

45. The Claimant said that at the time he left the Royal Marines he was not aware that he could bring a claim for his hearing loss. When he left the Royal Marines and the medical officer advised him on 5th March 2012 to apply to a compensation scheme that was the only avenue that he thought was available to him. The doctor did not write this down, but he was told to contact the British Legion for help.

Mrs Inglis' evidence

46. The Claimant's wife, Mrs Joanna Inglis, provided a witness statement and gave oral evidence. Mrs Inglis confirmed that she and her husband had bought a house in Plymouth in 2006 and at the time of the Claimant leaving the Royal Marines they had a mortgage and she was not working. Subsequently, Mrs Inglis worked as a courier. Mrs Inglis said that the Claimant's hearing problems had become more noticeable in the period leading up to his leaving the Royal Marines. She was not aware of the Claimant applying for other jobs before 2011. She said that the Claimant was worried about his hearing getting worse. They had discussed him working in maritime security and how the Claimant wanted to go about things. She said that she would support him as his wife, that she trusted him to provide for her and their family but, she did have input into the decision that he made to leave the Royal Marines. The decision was made more because of his hearing and as long as he could provide for his family. She was aware of how much the Claimant could earn in maritime security and said that it offered financial security to a certain extent, but she was also aware that in maritime security the Claimant would not know when the next job would be. Mrs Inglis did not recall when they first discussed the Claimant leaving the Royal Marines.

Major Sharland's evidence

47. Major Simon Sharland gave evidence for the Defendant. Major Sharland is a serving officer in the Royal Marines and is concerned with human resources issues, including manpower planning. Major Sharland had never met the Claimant and provided his evidence on the basis of a review of the Claimant's very brief service record. He confirmed that about twice a month he provided similar statements to the one he had provided in this case.

48. Major Sharland described the process for PVR and that an individual making such an application did so through the electronic Joint Personnel Administration System 'JPA'. This triggered a number of workflows that followed a predetermined path and included two interviews, one with the Company Commander and one with the Commanding Officer. He did not know who would have carried out the branch sponsor interview but they were careers managers who gave independent advice outside the chain of command. Those individuals knew in detail the effect of a marine leaving the service early.

49. Major Sharland was shown the record that I have referred to at paragraph 28. He explained that the three entries at "career manager reasons" came from a pre-completed drop-down menu, which had nine reasons to select. Major Sharland could not remember all nine pro forma reasons. They would have been chosen by the Claimant at the time his PVR was submitted.

50. Major Sharland in his statement said that around 2011, the Royal Marines had lost a significant number of corporals and sergeants to the maritime security industry. In order to try and encourage individuals to remain in the service a financial incentive of £15,000 gross was available to individuals who met particular criteria. However, once an individual had applied for PVR they were ineligible. This incentive scheme was set out in a Royal Naval Temporary Memo. He thought the scheme was available between 2012 and 2014. Major Sharland agreed that the Claimant was "*high calibre*" and that

he was in line for promotion to Sergeant, which would have occurred on 31 March 2012, however the PVR would have cancelled the promotion process.

51. Major Sharland explained that when the Royal Marines were short of manpower the chance of being able to re-join after PVR was higher than when there was full manning. As soon as an individual had made a PVR application there would be a selection process for someone to fill the impending vacancy. Major Sharland explained at the time of the Claimant's PVR application there was no retention problem in the Royal Marines per se but there was an issue amongst corporals and sergeants, but recruitment at the "*bottom end*" was healthy. If middle ranking Royal Marines were lost it created a "*black hole*". It might mean promoting people early, which was unfair on them as it did not lead to the development of their skills and knowledge. The Claimant, as a platoon weapons instructor was a valuable resource. At the time the Claimant put in his application for PVR maritime security was not waning but by the end of 2012 and 2013 it was on the way down. Major Sharland had not identified any record that the Claimant ever requested to re-join.

52. Major Sharland explained that he assumed the Claimant would know that maritime security was not a long-term career, which is why there was a reference in the quote from paragraph 28 to him retraining as an electrician. Major Sharland did not believe there was any career pathway in maritime security. In his statement Major Sharland stated that: "*It is therefore clear that the Claimant chose to leave the Royal Marines to pursue what, at the time, appeared to provide an opportunity of greater financial reward.*" He explained that all he could deduce was that the increase in income in maritime security was appealing to the Claimant and it had to be weighed up against job security and the pension if he had remained in the Royal Marines. However, he confirmed he did not know the Claimant personally and this decision would have been an individual choice. His suspicion was that the Claimant wanted to pursue financial reward. Major Sharland confirmed that he could not see a situation where the Claimant would be forced to leave the Royal Marines as that was not in the interest of the Corps and the Claimant had a good career.

Dr Clarke's evidence

53. Dr John Clarke gave evidence for the Defendant. At the time Dr Clarke provided his witness statement he was a Royal Navy Consultant in Occupational Medicine. At the time he gave his oral evidence he had left the Royal Navy and was working for the National Air Traffic Service in occupational health.

54. Dr Clarke did not know if he had met the Claimant in a professional capacity, but said that he might have done, but he had not seen the Claimant's full records. He accepted that as an occupational health consultant he would want as full a record as possible. Dr Clarke accepted that the records would record what an individual had been told and what they had not been told, but they were not perfect.

55. Dr Clarke's evidence was that at the time of the Claimant's PVR his hearing was assessed as H2 H2 and based on the audiogram at the time there would be no reason to refer him to a medical board. Sometimes the audiogram did not tell the full picture. Bad hearing was a common problem in the Royal Marines. If hearing was assessed as H3 then, in Dr Clarke's opinion, the person must be referred for further assessment.

That should be for an Ear Nose and Throat (ENT) assessment, an MRI to exclude a tumour and also to the Defence Audiology Department at the Royal Naval Institute of Medicine. All Royal Marines graded at H3 would be referred to a medical board, if that H3 level was confirmed following those further assessments.

56. Dr Clarke explained that medical fitness was assessed using the Joint Service Manual of Medical Fitness and in conjunction with the Joint Medical Employment Standards they were used to tell an employer how a member of the Armed Forces should be employed. The standards applied to new recruits and to those in service, although the pre-service assessment was more detailed. Once an individual was in the service different considerations applied because the service had already invested in that person. Dr Clarke agreed that H3, as set out in the Joint Service Manual of Medical Fitness represented impaired hearing.

57. Paragraph 4 of annex D of the Joint Service Manual of Medical Fitness states as follows:

> "During service any change in the H degree, other than a fall from H1 to H2, must be referred for an ENT opinion. Unilateral hearing loss also required specialist assessment, with investigation as necessary. Those with unilateral or bilateral hearing loss who are considered suitable for continued employment in the services must be subject to appropriate controls and education (both of the individual and their managers) to ensure appropriate protection from exposure to noise and to reduce the risk of any further deterioration in hearing."

58. In relation to that paragraph Dr Clarke said that the Joint Service Health and Safety Policy included hearing protection and that should be applied across all staff. Some individuals would be suitable for continued employment and some would not. Dr Clarke said that he had seen a few such individuals. The medical board's role was to set out limitations on employment that were made as recommendations to the employer (i.e. the Royal Navy). The medical aspect is split from the employment decision. Whether or not continued employment would be available depends upon the need of the service and the role of the person.

59. Dr Clarke was taken through the records of the Claimant's hearing assessments undertaken whilst he was serving in the Royal Marines. An audiogram performed on 6 February 2006 showed that the Claimant was H2 in the right ear and H3 in the left ear. The medical officer who reviewed the Claimant at that time, according to Dr Clarke, whilst noting H3 in the left ear did not change the Claimant's grading because he had asked for a further assessment at the ENT department of Derriford Hospital. The assessment on 3 May 2006 at Derriford Hospital showed an 80 dB threshold in the right ear and 110 dB in the left ear. Dr Clarke said that an audiogram is a subjective test. Noise is played and an individual is asked to say when they hear it. This response is subjective and it can vary from day-to-day, is dependent upon the operator and the conditions where the test is performed. The test at Derriford Hospital should be accurate, he explained.

60. An audiogram on 7 May 2008 showed 105 dB on the right ear and 135 dB in the left ear. Again, this was performed at Derriford Hospital and the assessing clinician recorded in a letter to the medical officer the following:

> "Many thanks for referring this young man to us, who has noticed hearing loss, particularly on the left side. He has had it for several years and it appears to be slowly worsening. He is exposed to noise at work, particularly guns. He is right-handed and this would mean that the noise from the muzzle would hit his left ear. He gets mild bilateral tinnitus but no other otological symptoms.
>
> On examination his ears are normal. His audiogram has shown bilateral noise induced hearing loss. He had an audiogram in this department two years ago almost to the date. This showed the same problem but today he is slightly worse. I have advised him that if he continues to expose his ears to noise his hearing will continue to worsen, otherwise it would be stable. A hearing aid would not help him in this situation at present. I have not arranged to see him back."

61. Dr Clarke said that based on these results the Claimant should have been classified as H3 in the left ear. He could not tell whether this examination at Derriford Hospital was as a result of a further referral. In any event, Dr Clarke said that if he had been the medical officer and received that letter the Claimant would have been followed up.

62. The next audiogram Dr Clarke was referred to was performed on 1 May 2010 and the record is 115 dB in the right ear 120 dB in the left ear. The Claimant was seen by Dr Ralph Curr at HMS Raleigh, who was at the time a civilian medical practitioner having left the Royal Navy. However, he left with the rank of Rear Admiral and had previously been Head of the Naval Medical Service. The records state:

> "The Claimant is H2 and borderline H3 in the left ear. He was reviewed at Derriford two years ago. I have told him he needs an annual audiogram and that his hearing will slowly deteriorate. I also advised him to consider a non-noisy environment when he leaves the Corps. I reminded him to declare his hearing loss at his release medical."

63. The Claimant remained classified as H2 H2 and as fit for full duties on that assessment. Dr Clarke explained that in relation to this entry the Claimant was H2 and advice was given about the annual audiogram i.e. there was increased surveillance. The Claimant had previously been just above the H2/H3 threshold and on this assessment, he was just below the threshold. In Dr Clarke's view nothing had changed and on his "*scores*" the Claimant was not worsening. Dr Clarke said it was difficult to tell if the Claimant should have been sent for a further referral. He said that a medical board would often recommend avoiding noise and the wearing of ear defenders together with annual audiology. Dr Clarke said this should have been happening in the Claimant's case anyway.

64. Dr Clarke said he did not know the reasons why the Claimant decided to leave the Royal Marines. However, on the "*snap shot*" of the assessment of 1 May 2010 the Claimant was assessed as fit. The medical officer performed that assessment as a matter of routine not because the Claimant attended due to a problem. If the Claimant had been H3 he would have been referred to a medical board to make recommendations. He would have been limited from land deployment and therefore he would not go to the front line.

65. The Claimant had a medical examination before leaving the Royal Marines. This took place on 5 March 2012 and was conducted by Surgeon Lieutenant Commander Wilde, who Dr Clarke said worked for the Royal Marines and was an experienced medical officer. Dr Clarke explained that the assessment on that day was that the Claimant was H2 H2 and fit to fly, to be deployed on land, to be deployed at sea and deployed anywhere in the world.

66. Dr Clarke was asked about the content of a referral letter written by the Claimant's general practitioner on 3 December 2012, after the Claimant had left the Royal Marines. This referral letter states:

> "This very pleasant 33-year-old has noticed gradual deterioration of his hearing – particularly in the left ear. He finds it difficult in conversation and needs to lip-read in noisy environments and at other times…"

67. Dr Clarke explained that lip reading in a noisy environment related to the ability to discriminate sounds and the intelligibility of speech in noise. It was a problem in any environment and depended on an individual's tiredness as well. It was not detected by an audiogram, which was very subjective and varied from person to person. Dr Clarke also explained that this ability deteriorated with age.

68. On 12 February 2013 a further audiogram was performed and showed thresholds of 125 dB in the right ear and 135 dB in the left ear. Dr Clarke said that if the Claimant had been in the Royal Marines at this point (which he was not) he should have been sent for full assessment that would have triggered a medical board. They would have looked at permanent restrictions. For a Royal Marine that would have career implications. If a Marine cannot be exposed to loud noise and cannot go to the frontline, he cannot do his job. However, the medical board would look at the individual, their rank, their skills and their wishes, for example considering a change of branch. All this would have been born in mind before considering the individual's employability. Dr Clarke's view was that if he had been in the Royal Marines the Claimant was potentially employable. He would not have been retained if he was a general duty marine but as a Sergeant with skills there was a higher chance of him being retained, which he described as "*possible*".

69. The President of the Medical Board of Survey would have recommended limitations and the President would have gone to the medical employability meeting. There all of the recommendations would be looked at and the employer would determine whether or not an individual could be retained. This would be done with the branch manager depending upon the numbers in the branch, the structure of the team, the scope of further promotion and whether the individual had completed all the training courses.

Based on a host of factors, it would be determined whether an individual could be retained. If changing branch had been recommended it would be for the individual to agree. For example, away from weapons instructor to another branch such as a clerk, mechanic or driver. Dr Clarke explained that he had only really seen this happen to individuals in a more senior position. An individual with 6 or 7 years of service left could be deployed in a training establishment. There are places where individuals could be employed if they have the skills, even at lower ranks.

The expert evidence

70. The parties had instructed employment experts to provide evidence. The Claimant had instructed Mr John Sephton, of John Sephton Consulting Ltd and the Defendant, Mr Gary Craggs of DJ Fox and Associates Limited. Prior to being a consultant in workplace systems and employment issues Mr Sephton had been in the Royal Navy retiring at the rank of Commander and in his final appointment had been an assistant to the Director of Naval Personnel Strategy. Mr Craggs also had a background in the Armed Forces having retired from the Army in 2010 after over 34 years' service, the last 19 of which as a commissioned officer in the Education and Training Services Branch. Mr Craggs had also served as an exchange officer with the Royal Navy, including four years in the headquarters of the Principal Personnel Officer. Unfortunately, Mr Sephton was unable to give oral evidence due to an urgent and unforeseen family circumstance. The Defendant raised no objections to this. The experts made a joint statement on the employment issues signed on 22 February 2019, although they did not agree all of the matters they had to discuss.

71. There was no disagreement on the fact that in 2011 it was a popular choice for non-commissioned officers in the Royal Marines to move into maritime security for financial reasons. As relevant to this issue, in the joint statement the experts' agreement may be summarised as follows. Not all Royal Marines are subject to the same level of noise exposure, for example individuals in support specialisation such as driver, clerk, stores accountant and combat intelligence would have reduced noise exposure. The Naval Service implements a hearing conservation program and "*it is entirely possible*" that a person would be offered employment where there was less noise exposure, if an individual's hearing was deteriorating. That would depend upon existing vacancies, the suitability of the individual and their willingness to transfer. Automatic discharge does not follow. Someone such as the Claimant, having achieved approximately 14 years of service and having been selected for promotion to Sergeant may have had the opportunity to continue serving in a role outside of his current specialisation, depending upon the prevailing needs of the Royal Marines. The nearer a person was to the end of their engagement the more likely they were to be retained, despite a reduced medical grading and the less likely they were to be medically discharged. This applied in particular during the last 2 to 3 years of their engagement.

72. In cross examination Mr Craggs accepted that all Royal Marines were trained for general duty and that as a general proposition it was correct that a Royal Marine was a rifleman first and they needed to be capable of being deployed at any time. He also accepted that whether or not an alternative role would be available would depend upon whether there was a vacancy. Mr Craggs explained that a medical discharge can take over 2 years and he agreed that in 2011/2012 the Claimant was not close to the end of his period of service i.e. in the last 2 – 3 years.

73. The statistical data for the whole of the Naval Service (i.e. the Royal Navy and the Royal Marines) demonstrate that in 2011/2012 3% of discharges were due to noise induced hearing loss, 4% in 2012/13, 3% in 2013/2014, 2% in 2014/15 and less than 1% in each of the three years 2015/16, 2016/17 and 2017/18.

74. Mr Craggs in the joint statement, noted that the level and frequency of noise exposure in maritime security was almost certain to have been less than working in the Royal Marines as a weapons instructor. However, those in maritime security did have some exposure to weapons and he felt it was likely that the Claimant could have achieved a similar level of hearing protection had he remained within the Royal Marines.

75. Mr Craggs was asked about the Strategic Defence Review of 2010 and the program to reduce manpower in the Naval Service. He confirmed that there was no plan for including Royal Marines, such as the Claimant, in the redundancy programme. He did not believe that the Claimant would have been at risk of redundancy. Mr Craggs explained that in the event that the Claimant had been classified as H3 there was a strong chance that restrictions would have been imposed. The level of restriction would have been a matter for the medical officer grading him. A temporary grading can be assigned for 18 months, which then may result in the individual going to the medical board when a permanent medical grading is applied. A possible outcome of that is a discharge from the service, but other roles were available depending upon an individual's abilities, what the service requires and upon the individual's own choice.

76. Mr Craggs' evidence on pension provision was that the full pension available to a member of the Armed Services, in the event they complete their full engagement, is considered by some to be a significant incentive to remain in service. However, only a very small percentage reach the point of their full engagement and the majority choose to leave early. Mr Craggs also gave evidence that in his opinion, despite the Claimant's highly valued trade with good prospects in the Royal Marines, there were few technical skills directly transferable to civilian employment. Aspects of working in maritime security are similar to the skills of Royal Marines. Fundamentally, a Royal Marine provides security for the Royal Navy and therefore it is a logical progression. When asked about whether there would be equivalent camaraderie to the Royal Marines, Mr Craggs said that there would be colleagues. Mr Craggs disagreed that there was no career path in maritime security, however, in the Royal Marines where there was a very clear career path. Mr Craggs said the Claimant told him that if he completed his engagement in the Royal Marines he would have then gone into maritime security.

77. When asked whether hearing loss provided fewer opportunities for work, Mr Craggs responded that for those occupations with hearing standards there would be limitations. He explained that he knew of (although not personally) two former Royal Marines who went into maritime security with hearing problems. There is a hearing standard for seafarers (ENG 1) and one individual had scraped through and another individual had left the Royal Marines before a permanent medical discharge, having been temporarily downgraded. Mr Craggs explained that not all private security was operational and there were positions in management, logistics and recruitment. He explained that people who start within the operational side do move through to management positions in the maritime security and private security industries.

78. In his report, Mr Craggs discussed the impact of hearing problems for individuals at work and stated:

> "As well as the difficulty in hearing properly, research indicates people with hearing difficulties report the following additional problems in the workplace:
>
> loss of confidence;
>
> embarrassment of asking other people to speak up or repeat what they said;
>
> job security fears;
>
> unsupportive and possibly discriminatory attitudes from management, colleagues and prospective employers;
>
> forced early retirement;"

79. When asked about this part of his report and in particular the "*job security fears*" referred to, he replied that these would all be factors that could be relevant to the Claimant's case.

Conclusion on the first issue

80. It is for the Claimant to prove, on the balance of probabilities, that he left the Royal Marines as a result of the hearing loss he had sustained during his service.

81. Mr Healy made a number of submissions on the evidence that he said undermined the Claimant's case. These were as follows:

i) If the Claimant was concerned about his hearing, he would have looked for alternative jobs or roles that had no noise exposure, but that was not what the Claimant had done;

ii) The Claimant's hearing loss was stable between 2006 and 2011;

iii) The Claimant, as a weapons instructor, would be able to control his exposure to noise including wearing double ear protection – he was not in the field where he would be less able to do so;

iv) The significant financial incentive provided by maritime security was the primary reason for leaving. Joining maritime security was not just a short-term expedient that lead nowhere and was not being used as a vehicle to leave the Royal Marines;

v) He was not at risk of a medical discharge and even if he was, alternative employment could have been found for him in the Royal Marines;

vi) The Claimant did not mention concerns about his hearing at the interview referred to at paragraph 28. If he was concerned, he would have been looking for other jobs;

vii) The evidence the Claimant gave has to be seen in the context of this litigation.

82. I find that the Claimant's evidence was consistent, straightforward and honest. I accept his evidence that he left the Royal Marines because of his hearing loss. I accept the evidence of Mrs Inglis, the Claimant's wife, that they had discussed the Claimant leaving the Corps and that the reason for this was the deterioration in the Claimant's hearing. Mrs Inglis was a convincing and honest witness.

83. I accept the evidence of Dr Clarke and Major Sharland. They were both honest and giving the best evidence they could. However, they did not have any personal knowledge of the Claimant and so their assistance is limited and I do not accept their opinions of why the Claimant left the Royal Marines.

84. The Claimant accepted in his evidence that he had not looked for any jobs other than a job in maritime security. He explained that this job provided financial security and in fact at the time that he applied for PVR he did not have an offer of employment. This is an example of the Claimant's honesty in giving evidence as he could have embellished this aspect of the case by stating that he been looking for numerous jobs in order to exit the Royal Marines but he did not do so. It is understandable and believable that he took the opportunity presented by employment in maritime security as his means of leaving the Royal Marines whilst providing financial security in the short term for his family and I accept his evidence on this.

85. Although Dr Clarke gave evidence that the audiograms represented a stable position, he also gave evidence that an audiogram does not necessarily reflect the level of hearing loss appreciated by the individual. This is consistent with the Claimant's evidence, which I accept, that his perception of his hearing and tinnitus was that they were deteriorating in 2011.

86. Furthermore, the records demonstrate on two occasions the Claimant had been referred to hospital for further assessments and that the Claimant was told:

i) On 7 May 2008 that his hearing was slightly worse than two years previously and advised that his hearing will continue to worsen if he remains exposed to noise; and

ii) On 1 May 2010 that his hearing will slowly deteriorate and to consider a non-noisy environment when he leaves the Corps.

87. The Claimant will act upon what he perceives and what he is told: he is not an expert able to interpret the audiograms and I accept his evidence that he was never informed of his hearing grading and that if he had been, he would not have known what that meant. The entries in the records support the Claimant's evidence that he was concerned about continuing in the Royal Marines because of the impact it was having on his hearing, as this is what he had been told on more than one occasion.

88. I do not take anything from the point that was made that if the Claimant had been concerned about his hearing, he would have taken jobs that had no exposure to noise. The Claimant's exposure to weapons noise in maritime security was limited, as was his job at Petrofac and I accept the Claimant's evidence on this and the Claimant's evidence that he wore double hearing protection. Although as a weapons instructor the Claimant would have been able to make sure that he wore double ear protection a significant amount of time would have been required on the ranges with exposure to many rounds of ammunition. His decision to avoid that exposure is entirely logical. Nothing can be made of the fact that in the year prior to his final discharge the Claimant represented the Royal Marines in a shooting competition. It was said by doing so this was evidence that he was not seeking to avoid exposure to noise undermining his case that that was what he was trying to achieve by leaving the Marines. I accept the Claimant's evidence that if he had not done so he would have remained on the ranges and there was less noise exposure in the shooting competitions. Again, this is a logical explanation, which I accept.

89. As a Royal Marine he was earning £26,000 per annum net but in maritime security he earned in the region of £40,000 a year net at a time with his wife was not working. Whilst the popularity of moving from the Royal Marines to maritime security at the time may raise a suspicion that an individual's motives were financial, on the basis of the Claimant's evidence, which I have already said I accept, it was not the primary motivation or reason in the case of this Claimant. It is correct that the Claimant had a good career ahead of him in the Royal Marines, if his hearing did not deteriorate to H3, but as I have stated above the Claimant was concerned that his hearing would deteriorate, given what had been told and experienced. The Claimant would have had to weigh up the loss of clear career progression within the Royal Marines, the loss of his potential pension, which I accept he was aware of in general terms and the potential of continued hearing damage by continued noise exposure and the possibility of a medical discharge. Whilst I accept that Mr Craggs indicated that there was career progression within maritime security, I do not accept this is in any way comparable to the career progression within the Royal Marines. There is no evidence that the Claimant was in an immediately precarious financial position and therefore needed to leave the Royal Marines in order to obtain an immediately increased income. The fact that the Claimant chose to go to a more precarious employment supports the conclusion that his primary motivation was to avoid continued damage to his hearing.

90. I accept the evidence that there was a possibility of the Claimant being redeployed within the Royal Marines in a job that would have had less exposure to damaging noise. However, the Royal Marines were fully staffed at that time and it is unlikely that such a job would have been available for the Claimant, although on the evidence it was a possibility. However, what is relevant is the Claimant's perception of his own position. It is of particular relevance that despite being told to reduce his exposure to noise by medical officers or by that information being sent to his medical officers, there is no evidence that steps were taken to discuss this with the Claimant or to reduce his exposure to noise, as would have been expected if paragraph 4 of annex D of the Joint Service Manual of Medical Fitness was being applied. At one point on Dr Clarke's evidence he ought to have been classified as H3 in the left ear. Although the Claimant's grading was not changed, the evidence from the records is that the clinicians at the time considered that he was suffering continuing hearing loss. The Claimant was aware of

others who had suffered injury, albeit of a different nature and degree, who had not been redeployed. I accept that the Claimant had real fears that he was at risk of a medical discharge. I also accept the Claimant's evidence that he sought to leave the Royal Marines before he failed the hearing test as that would have had adverse implications for him for the future.

91. The Claimant explained that at the interview at paragraph 28 above he did not mention his concern about his hearing as a reason for leaving. The evidence of Major Sharland was that the Claimant would have selected the three reasons recorded from a completed drop-down menu. There is no evidence whether one of those drop-down items referred to medical issues or hearing loss specifically. I accept the Claimant's evidence that he was not asked about this issue but rather about what he was going to do in the future. This does not undermine the Claimant's evidence.

92. It was not put to the Claimant specifically that he was lying in his evidence, but rather it was put that I should consider that in the context of this litigation the Claimant would be passing up what he considered he was entitled to and that the claim was for a lot of money. As in any claim, I am sure that the Claimant hoped to present his evidence in the best light. However, I reject any suggestion that the Claimant was being anything other than straightforward and honest in his evidence, as I have already stated.

Issue 2 - the extent of the Claimant's hearing loss

The Claimant's evidence

93. The Claimant's difficulties with hearing and tinnitus are set out in his witness statement which he repeated in oral evidence. In the past when his children were younger, without hearing aids, he had difficulty hearing them through a baby monitor at night, although his wife would not. It takes him longer to get to sleep because of the tinnitus. The tinnitus impairs his concentration. Using the oven at home he cannot hear the timer going off, although his wife can. He has to have the volume setting turned up on the television and telephones. Any loud sounds, such as cutting the grass, especially if it suddenly stops makes his tinnitus particularly noticeable. If the Claimant goes out to a bar, he has difficulty hearing conversation because of the background noise. The Claimant cannot hear a person talking in another room and he has difficulty hearing public announcements. The Claimant cannot hear properly without looking at an individual, for example when with his wife in the car if he is driving and watching the road and cannot see her, he cannot hear her talking. He has the same issue in an office environment where more than one person is talking at once and he struggles when attending noisy sites as part of his work.

94. As part of the litigation, the Claimant underwent a trial of hearing aids recommended by the Defendant's expert, Mr Byrom. The Claimant's evidence was that those hearing aids had been beneficial in a number of respects, but mainly relating to his hearing at home rather than at work. With the hearing aids the Claimant could follow a conversation with his wife without having to ask her to repeat herself, the television has been turned down and he could follow conversations more easily when travelling in a car.

95. However, the Claimant explained that in other areas of his life there was limited or no improvement. One-to-one conversations at work had improved but if there was background noise there was no real improvement: he explained there was almost always background noise in his office. When making phone calls at work the Claimant had to go somewhere quiet to make out speech. In group meetings he must position himself so that he can watch what people are saying in order to try and follow the discussions and his ability to take part in discussions remained a serious problem. When outside, hearing aids did not help where there was background noise and in fact, they amplified the background noise, such as rustling leaves in the wind. The hearing aids were also not waterproof and therefore had to be taken out in the rain.

96. With regard to the effect on the tinnitus, the Claimant said that the hearing aids had helped him and reduced the symptoms by about 25%. However, it meant that when he took the hearing aids out at night the tinnitus became very noticeable and he now struggled to deal with this and to get off to sleep. The Claimant said in his statement: "*on balance, however, the hearing aids have had a positive effect. It has definitely been worth having them as they have made an improvement to me, particularly in a family setting.*"

97. The Claimant confirmed that after about a month of using the hearing aids he had a telephone conversation with the Defendant's expert, Mr Byrom: the hearing aids were not doing what he had hoped for. Subsequently, the Claimant saw Mr Byrom who reset the hearing aids.

98. The Claimant said that the adjustment made an improvement in his hearing, but not a dramatic one. The Claimant was asked about further testing conducted by Mr Byrom. The Claimant said there was a clear difference between reality and the tests. The Claimant was referred to an extract in Mr Byrom's report where he states:

> "[the Claimant] may hear almost as well as people with normal hearing in noise [with the initial setting of the hearing aid] and may hear better than people with normal hearing in noise with a final hearing aid settings…"

99. The Claimant said that that had never been said to his face and that the reality was completely different and he disagreed with the statement. The Claimant denied that he was underplaying the positive effect of the hearing aids and that he would "*love it*" if his hearing was back to the level it was at when he was aged 17.

Mrs Inglis' evidence

100. Mrs Inglis confirmed an improvement in the Claimant's hearing at home with the hearing aids and said that the Claimant had reported a slight improvement at work. She explained that at home there was background noise when their children were excited, but that this was not the case all of the time. Their children had reported the Claimant's problems with hearing, as had she. In social situations without hearing aids if she was not opposite the Claimant, he would not hear her. She had noticed a difference following the use of the hearing aids in social situations, but said she still needed to be opposite him for him to pick up her voice.

The expert evidence

101. The Claimant relied upon the report of Mr Hisham Zeitoun otolaryngologist, head and neck surgeon and this report was agreed by the Defendant. The Claimant also relied upon a report from Prof Brian Moore, Emeritus Professor of Auditory Perception at the Department of Experimental Psychology, University of Cambridge. The Defendant relied upon a report from Mr Peter Byrom, Audiologist and Registered Hearing Aid Dispenser, who worked as an audiologist in the National Health Service between 1994 and 2017 finishing his employment with seven years as the Adult Audiology Clinical Lead at Rotherham NHS Foundation Trust. Prof Moore gave oral evidence by way of a video link and Mr Byrom gave oral evidence at court. Prof Moore and Mr Byrom produced a joint statement setting out their areas of agreement and disagreement.

102. Mr Zeitoun's report concluded that the Claimant had developed noise induced hearing loss and a moderate degree of tinnitus. His hearing loss was in the frequencies above 4 kHz and he assessed the loss at 11.8 dB. He recommended a report was obtained from Prof Moore, which it was and to whom Mr Zeitoun deferred on the questions of prognosis, the impact of hearing loss and the need for hearing aids.

103. Prof Moore said that the Claimant's problem was associated with high-frequency hearing although a normal audiogram does not mean that there is no damage in the hearing processes up to 3 kHz. The Claimant had no difficulty in detecting frequencies in the lower ranges but it was possible that he had difficulty discriminating sounds even at 3 kHz or below, although it was possible that his hearing was also normal in that range. Hearing aids have improved somewhat in the last 10 years, although that improvement is not very substantial, apart from the advent of digital hearing aids. Hearing aids now have features that can be fine-tuned to the individual and a directional microphone can be effective if the person wearing the hearing aids looks at the person that they want to hear. They do not work so well in rooms that are reverberant and they make it worse when the person wearing the aids looks away from the person who is speaking.

104. Prof Moore explained that an open plan office can be a fairly reverberant environment as the sound reflects from walls, the floor and ceiling but it depends upon the size of the room and also the properties of the surfaces, stone for example being more reverberant than carpet. An open plan office would be less reverberant than a shop floor. However, in an office there are more problems because of other people talking, making background noise.

105. Another feature of digital hearing aids is "frequency compression" (also known by the trade name "SoundRecover"). This is a process by which high frequency sounds are compressed to make them lower frequency and therefore with in the audible range for the Claimant. However, Prof Moore explained that the scientific evidence of the benefits were small and the practical effect was not clear. The ability of frequency compression to help with the perception of speech was rather limited. Prof Moore explained that in the laboratory it was rare to see more than a 5 to 7% improvement.

106. Prof Moore agreed that the hearing aids that the Claimant trialled were "*top of the range*" with a lot of features. However, the extent to which they were beneficial was questionable. All manufacturers compete to add features but, there is limited evidence

of the benefit they provide. However, Prof Moore explained that one advantage was that the two hearing aids could communicate with each other and this helped the directional microphone. This could be of benefit when a user looked directly at the person they wanted to hear. The hearing aids do have good flexibility on frequency amplification and they benefit from a large number of channels (in other words there are a large number of frequencies that can be adjusted independently).

107. Prof Moore had not met the Claimant but he felt able to make a judgement on the basis of Mr Byrom's tests. Prof Moore explained that he did not treat patients or routinely fit hearing aids to patients. However, he did fit experimental hearing aids for the research that he was involved in and the last time he did that was six months prior to his giving evidence.

108. Prof Moore said that on the basis of Mr Byrom's tests it was clear that the hearing aids provided did help the Claimant to hear soft speech and that corresponded, in his opinion, to the statement made by the Claimant and his wife. Where they said the benefit was limited was when there was speech in background sounds and that is what Prof Moore would expect. The only way to improve the underlying hearing in noise was for a directional microphone and that only worked when the wearer looked at the person speaking. Looking away made it harder to hear and it was not always possible to look at the person that you want to hear. Prof Moore's experience was that patients say the hearing aids are not helping much when they are listening in noise. Some do notice if they look directly at a person that it will help and he has had patients say that. Usually formal measures are obtained or comparison between settings, but Prof Moore also received subjective reports from patients. Prof Moore said that they try and carry out objective testing using a free field audiogram (such as the one undertaken on the Claimant by Mr Byrom) and a test called QuickSIN, although Prof Moore does not use that particular method but he uses a similar test. Prof Moore agreed that there was nothing unusual in Mr Byrom's tests and they were standard methodology.

109. Prof Moore's assessment of the average estimated noise induced hearing loss for the right ear at 1, 2 and 4 kHz was 16 dB and for the left ear 17.7 dB, which are higher (i.e. worse) than Mr Zeitoun's figures. Prof Moore went on to explain that there is a difference between being able to detect a sound (measured by an audiogram) and speech intelligibility. Prof Moore used a standard method for predicting speech intelligibility the "Speech Intelligibility Index (SII)". A value of zero indicated that speech was completely inaudible and the value of 1 indicated that all of the important information was audible. A value of 0.7 was just adequate for normal conversation and a value of 0.5 indicated there would be some difficulty in understanding speech with significant errors made. A value of 0.3 indicated considerable difficulty in understanding speech with many errors of understanding. When carrying out the calculation for the Claimant on the basis of typical speech without any background noise the extra effect of the noise induced hearing loss was a decrease of 20% in the right ear to a value of 0.82. Prof Moore's evidence was this was consistent with the Claimant's witness statements and would lead to some difficulty for a talker who did not speak clearly, had a foreign accent or was heard in a reverberant room; it would require more effort in listening. When Prof Moore calculated the SII with the addition of background noise representing a moderately noisy situation the extra effect of the noise induced hearing loss was a decrease of 24% giving an absolute value of 0.31. This would lead to a marked and

clearly noticeable increase in difficulty in understanding speech in noisy situations and again Prof Moore's evidence was that this was consistent with the Claimant's evidence.

110. A more sophisticated analysis of the effects of noise induced hearing loss on the ability to understand speech in noise is the average of the audiometric thresholds at 2 and 4 kHz (denoted $PTA_{2,4}$). For the Claimant, the value for the right ear was increased by 24 dB and so the decrease in correctly understood sentences for him is estimated at 41% (this test and the percentage reduction was agreed by Mr Byrom). Prof Moore's opinion was that the noise induced hearing loss in the Claimant's right ear would lead to greatly increased difficulty in understanding speech in noisy situations and that again this was consistent with his witness statements.

111. Prof Moore's evidence was that the high-frequency loss was consistent with the Claimant's difficulty in hearing his children and warning sounds. It also was likely to have reduced the Claimant's ability to judge where sounds were coming from.

112. Prof Moore in his report explained that there was evidence that noise exposure can lead to loss of neurones in the auditory nerve, even where the audiogram remains normal or near normal. Furthermore, noise exposure was associated with greater self-reported hearing difficulties, even where the audiogram remained within normal limits. Mr Byrom accepted these phenomena. The effects of loss of neurones were not taken into account in the SII calculations and therefore Prof Moore's opinion was that they probably underestimated the degree of difficulty experienced by the Claimant as a result of his noise induced hearing loss.

113. Tinnitus would impede the Claimant's ability to sleep and in Prof Moore's opinion can have an effect on health leading to increased anxiety and feelings of stress. Again, Prof Moore's opinion was that this was consistent with the Claimant's witness statements. The Claimant's problems at work with his hearing were also consistent with the expected effects of his noise induced hearing, according to Prof Moore. In his report he stated: "*It is very likely that [the Claimant's] hearing problems will worsen as he gets older, and that much of this difficulty will be attributable to his exposure to noise at work. This will adversely affect his ability to work and take part in social gatherings.*" Prof Moore explained that when he wrote this statement, he was reflecting that the age-related hearing loss will progress, resulting in a deterioration as the Claimant gets older.

114. Prof Moore's opinion was that although the Claimant's hearing loss was sufficient to require the use of hearing aids, they were likely to be of limited benefit. Prof Moore agreed that the type of hearing aid that had been trialled by the Claimant was an appropriate one and that it met Prof Moore's requirements, namely: that it was with an open fitting, had many frequency channels and directional characteristics. However, in his report Prof Moore stated:

> "Although I am of the opinion that appropriately fitted premium hearing aids with the features described above would be of benefit to [the Claimant], I do not anticipate the benefit to be very large. Much of his hearing difficulty can be ascribed to a reduced ability to discriminate sounds, even when the sounds are audible (above the detection threshold). Hearing aids will not solve this basic problem. Hearing aids can help by making weak

> sounds audible, and directional microphone systems can help the user to discriminate speech when background sounds are present. However, even the best hearing aids do not restore hearing to normal. In addition, [the Claimant] may have difficulty getting used to hearing aids; initially the hearing aids may make sounds seem too harsh or too loud."

115. Prof Moore explained that getting used to hearing aids is important as is correct fitting. However, that did not overcome the problem of the ability to discriminate sounds even when they were amplified. Amplification did not improve discrimination. Furthermore, sound frequency compression did not help because it can change the character of the sound, although this may depend on the individual. Prof Moore was not aware of any trials that showed the benefit of frequency compression.

116. Prof Moore was asked about Mr Byrom's opinion, that the Claimant was in a better position than he reported. Prof Moore said that he and Mr Byrom both used the same data, although Mr Byrom did not look at the benefits of the hearing aid with and without frequency compression. However, as he had already explained research showed that the benefits were small. Mr Byrom was also of the view that the difference between the Claimant's improvements at home and at work were inconsistent. Prof Moore said that his opinion was that the types of noise and sound levels are different at work and at home. Prof Moore said that he broadly accepted that if benefits occur, they should occur in a variety of situations. However, given the small benefit for the Claimant it may be difficult for him to detect a clear difference in some situations and that was consistent with what the Claimant reported. He agreed that there should be benefits in both situations but, not necessarily to the same degree.

117. On the issue of tinnitus and the impact of hearing aids, Prof Moore's opinion was that the results of questionnaires prepared by Mr Byrom showed a modest improvement and were consistent with the Claimant's statement. Prof Moore explained that some improvement may be from advice or counselling. However, overall Prof Moore's opinion was that hearing aids had reduced the severity of tinnitus, but that it remained a significant problem for the Claimant, adversely affecting his concentration and ability to sleep.

118. As to improvement in the Claimant's hearing with the hearing aids, Prof Moore's position was that hearing aids can improve the audibility of sounds but they do not restore hearing to normal. Directional microphones do not help when the speaker is not directly in front of a person or they are in reverberant conditions and therefore the benefits in everyday life are modest. The free field audiometry performed by Mr Byrom improved audibility in 4 kHz by a modest amount and for higher frequencies there was improvement but the improvement in audibility was very small. Audibility at 6 and 8 kHz was improved with frequency compression but this distorted the signal and there is no convincing evidence for the benefit of frequency compression. Overall the results of the free field audiometry led him to expect only small benefits of the hearing aids, especially for listening in noise.

119. Unlike Mr Byrom, he did not think the results of the free field audiometry were inconsistent. Prof Moore was also of the opinion that the QuickSIN test showed a 2 dB signal-to-noise ratio loss. That meant that under difficult listening conditions this was

equivalent to a reduction in sentences completely understood by 25 to 35% and as a result Prof Moore was of the opinion that those results indicated that even with hearing aids the Claimant would still have difficulty understanding speech in background sounds. In the joint statement, the experts agreed that the test does not assess the ability to understand speech in the presence of spatially distributed interfering sounds, as occurs in everyday life, because the stimuli are delivered from the same direction and that hearing aids may or may not help in restoring this ability. In the joint statement, following their analysis of the QuickSIN test, the experts agreed that with the use of the hearing aids the Claimant's ability to understand speech in noise was: "*slightly poorer than normal*". Prof Moore's conclusion was that the Claimant was being honest when he stated that the hearing aids were of limited benefit and that benefit was not as great in his workplace as in his home.

120. The experts agreed in the joint statement that an improvement delivered by frequency compression may be offset by distortion. However, the distortion in this case would be very low "*and possibly not noticeable*". They also agreed that it was not clearly established how much benefit frequency compression can provide and that "*For people with mild hearing loss, as is the case for [the Claimant] the evidence is mixed*." In oral evidence Prof Moore explained that in the Claimant's case the setting on the hearing aid was mild and so the frequency compression would not provide obvious distortion, in other words the Claimant would not say the sound was "*terrible"*. But he remained of the view it would not increase intelligibility.

121. The experts had agreed in the joint statement that in an open plan office the Claimant would not be able to hear a conversation across the room. However, in small face-to-face groups in close proximity he should not experience much difficulty when using the hearing aids. Prof Moore said the Claimant would be in a worse position than a person with normal hearing. However, he would be able to hear a person if he looked at each person when they talked.

122. The experts had agreed in the joint statement that a remote microphone linked to the hearing aid would be useful where one or two talkers were involved. Prof Moore said that this works well on a one-to-one basis and 2 microphones can be linked to the hearing aids and it is a solution that can work well in specific situations. The Claimant had been tested with "the Abbreviated Profile of Hearing Aid Benefit" which is a subjective questionnaire widely used to evaluate the effectiveness of hearing aids. The experts had agreed that it indicated a reduction in the percentage of problems with background noise of 37% compared with the position prior to hearing aid fitting. It was agreed this was consistent with Mr Byrom's opinion that the hearing aids provide some benefit in background noise.

123. Mr Byrom was cross-examined by Mr Steinberg. Mr Byrom explained that he was a clinician rather than an academic working in research. He agreed Prof Moore was an expert, though he did not agree that he was a "*world expert,"* as Mr Steinberg put to him. He said that Prof Moore was involved in the design of hearing aids but that things had moved on "*since then*". Mr Byrom agreed Prof Moore had published on relevant subjects and said he had read some, but not all of the publications. Mr Byrom said that Prof Moore had written a lot on intelligibility of speech, but that he was not an expert in that area he was an expert in hearing aids and getting the best out of them. His opinion was that research on hearing loss was carried out on those who had a greater

degree of hearing loss than the Claimant and it was necessary to compare "*apples with apples*."

124. Mr Byrom accepted that there were a couple of typographical errors in his report relating to dates of a report from Prof Moore and responded "*I am not a robot*" when the second of those was pointed out to him.

125. Mr Byrom had been initially instructed to advise on whether the Claimant would benefit from hearing aids. Mr Byrom explained that in his opinion they would help the Claimant to work but they would not be perfect, not a cure. He believed that they would help the Claimant with meetings and conversation.

126. Mr Byrom accepted what the Claimant told him, which he had recorded in his first report (prior to the Claimant's trial of hearing aids) and at paragraph 11.6 he concluded:

> "[the Claimant] indicates in his statement that his hearing loss has a significant effect on his personal life and employment. I would expect that this would be the case judging from his audiogram; it also matches his description of hearing difficulties given during my conversation with him."

127. Mr Byrom agreed that the detrimental effect on the Claimant was significant and that there was moderate to severe high-frequency loss and he did not agree with Mr Zeitoun that the Claimant was coping with his hearing loss. However, he had not asked for how long he had been unable to cope and he recommended sophisticated hearing aids. These provided more features that would help with combating background noise and give better control over a range of frequencies having 20 or 21 different channels. They also had directionality with 4 microphones that helped the wearer to determine where the sound was coming from and cut out background noise. There were settings that cut out feedback and dealt with reverberation. The more there was to adjust, then generally the better the results, Mr Byrom said.

128. Mr Byrom was unable to say the date from which the Claimant needed hearing aids. However, he agreed that the records from 12 February 2013 and the audiogram performed on that date at Derriford Hospital showed that there would be problems with speech intelligibility. When shown the audiogram from 18 January 2006 Mr Byrom said that this was equivalent to the 2013 audiogram, there was a 5 dB margin of error either way in the examination and that the audiograms were "*more or less the same over those years*." However, he accepted what the Claimant had said in his statement that in 2013 he was told his hearing was sufficiently bad to qualify for hearing aids in both ears. Mr Byrom explained that it was not unusual for someone of the Claimant's age at that time to be embarrassed about wearing hearing aids and not wear them, as the Claimant had also stated.

129. Mr Byrom said that people are advised to avoid noises in excess of 80 dB. He said that the maximum protection available was in the range of 30 to 40 dB. He stated that protection can be increased to a greater degree and that "*if you are protected you are protected.*" Mr Byrom said he was not a sound engineer and not able to give evidence about the degree of noise protection that could be provided. However, Mr Byrom accepted that the literature showed that the maximum noise attenuation was 37 dB. Mr

Byrom was shown a document called "Hearing Protection – Individual Guide" produced by the Army which on page 4 has a table demonstrating the noise in dB produced by various pieces of military equipment and day-to-day situations. The noise produced by firing an SA 80 (A2) rifle was 156 dB which Mr Byrom agreed, even using the noise attenuation available, was "*way above*" the 80 dB threshold at which permanent damage can occur to hearing. However, again he emphasised he was not an expert in this field.

130. Mr Byrom was of the opinion that the Claimant would have difficulty locating quiet noises and agreed that he had lost some directionality. He also agreed that hearing loss may not be detectable on an audiogram and that needed to be taken into account. Mr Byrom said he did not disagree with Prof Moore that hearing aids would provide a benefit to the Claimant and if the signal-to-noise ratio was good then the improvement in hearing should be good as well. If the background noise was removed that would help.

131. Mr Byrom was asked whether the Claimant needed hearing aids to enable him to work. Mr Byrom was somewhat reluctant to answer this question but did state that the Claimant was struggling at work. In his first report Mr Byrom, when considering the trial of hearing aids, said that the reported difficulties were situational and it was impossible without trialling them to get a "*true measure of efficacy.*" He agreed in cross examination that it was not possible to predict the benefits for a particular person and there was natural variation, the possibility of neuronal damage that may not be detected on the audiogram (which may or may not be there) and that aids work better for some rather than others. Mr Byrom said that hearing aids would enable the Claimant to hear in the office situation, but it was down to an occupational health physician to say if the Claimant could continue in a particular role.

132. The Claimant underwent the trial of hearing aids and Mr Byrom produced a supplementary report dated 6 December 2018. He followed up the Claimant by way of a telephone call to assess progress and various tests were performed by Mr Byrom to assess that progress. He concluded at paragraph 3.3:

> "It was at this point, due to the reluctance to see much benefit from the hearing aids, that I became concerned that the Claimant might be biased in his assessment of the benefit of the hearing aids"

133. In oral evidence Mr Byrom explained that the fact that the was Claimant doing well at home but not well in the office raised a question in his mind. In Mr Byrom's view things should be better in the office as well and it was not usual. His opinion was there was a lack of congruence between the Claimant's reports. Mr Byrom said he had not been asked to assess the Claimant's credibility but, in his clinical judgement following the telephone review "*something was not quite right.*"

134. Mr Byrom was asked to see the Claimant and he did so on 23 October 2018. I note that Mr Byrom's instructing solicitors asked him to cover the following: "*Do you consider that the Claimant's evidence regarding his ongoing difficulties when wearing the aids, is credible?*" Mr Byrom agreed that he had been instructed to assess the Claimant's credibility and again following his assessment concluded: "*The Claimant may be biased*

by the prospect of financial reward, and as such may not have reported the full benefit of the trial hearing aids." Mr Byrom said in oral evidence that he stood by that statement, but accepted he was not a psychologist. Mr Byrom's evidence was that his concerns arose out of the discrepancy between the reported improvements at home and in the office and a discrepancy between the responses in the questionnaires that he had administered to determine improvement. When asked about Prof Moore's evidence that the Claimant's statements were believable and consistent Mr Byrom responded "*I agree some of it but not all of it*." Mr Byrom agreed that the only reason he knew the Claimant had improved was because the Claimant had told him, nevertheless Mr Byrom still had areas of concern.

135. Mr Byrom accepted that he had not reflected a range of opinion in his report and he accepted in oral evidence that some individuals do well with hearing aids but some do not get a benefit. However, in his experience you did not get people who did well in one area and not in another. Mr Byrom still considered his opinion to be correct, notwithstanding that he could have written more about variation between individuals.

136. At paragraph 7.3 of his report Mr Byrom had recorded for hearing aid "NAL – NL1 with SoundRecover frequency compression" that the graph he produced "*indicates near normal hearing*." Mr Byrom said this was an important factor in reaching the conclusion that he did.

137. At paragraph 8.3 of his report Mr Byrom stated:

> "The results indicate that the Claimant would be at a level where he may hear almost as well as people with normal hearing in noise with the initial NAL–NL2 setting, and may hear better than people with normal hearing in noise with the final hearing aid settings (NAL–NL1 with SoundRecover frequency compression)."

138. In cross examination Mr Byrom accepted that hearing aids were not perfect and the benefit can be limited where there was background noise. Referring to the literature in Prof Moore's report, he commented that a lot of it was very early and that things had changed. Mr Byrom's opinion was that the sound thresholds were pretty good with the hearing aids and he thought the audibility was very good. His view was that the frequency compression would help to give improvement and that distortion would be insignificant. However, he confirmed that in the joint statement he had agreed with Prof Moore that for those with mild hearing loss the evidence of benefit of frequency compression is "*mixed*." Mr Byrom accepted that he had made a mistake by saying that the Claimant's hearing would be "*better than normal*" with the hearing aid and in fact it was slightly worse.

139. In relation to the QuickSIN test Mr Byrom's evidence was that it was a measure of speech in background noise and he accepted that this was not a diffuse sound, which is more likely in a real-life environment, as he recorded in the joint statement question 13. Mr Byrom stated that a directional microphone does not help unless the wearer is facing the person speaking and if it is very noisy the microphone has a focus point and if it is less noisy there is a broader microphone spread. Some of the literature that Mr Byrom had relied on was produced by manufacturers and he accepted that it did not have

independence but they were reasonable studies, although not peer-reviewed and were designed for specialist customers, such as him. Mr Byrom's point was that it was not just about research but about clinical opinion and although improvement with frequency compression was unquantifiable it did provide a benefit.

140. The Claimant finds the noise of wind when he is out walking very loud with hearing aids and Mr Byrom said that this could be adjusted. The clear lack of congruity between the home and office environment remained a significant issue and he would not expect such a difference. At the conclusion of his evidence Mr Byrom's opinion was that the Claimant was biased "*a little*."

Conclusion on the second issue

141. The Claimant's submissions were that the Claimant's evidence should be accepted and that although there were some benefits in the home his hearing aids were not as effective at his work. Mr Steinberg in particular criticised Mr Byrom as not having comparable expertise to Prof Moore, who should be preferred. In addition, it was submitted that Mr Byrom made unjustified criticisms of bias against the Claimant shaped by misinterpretation of data, lack of expertise and inadequate literature. The Defendant's submissions were that the Claimant was underplaying the benefit of the hearing aids at work. Mr Byrom, Mr Healy submitted, was entitled to express surprise at the Claimant's results following the trial of the hearing aid and in particular pointed out that the Claimant was in a relatively small office rather than a large call centre. The objective evidence showed that the effect on the Claimant should be considerably greater than he reported. I was invited to find the Claimant had overstated the difference between his hearing at home and in his office. The hearing aids will be a significant benefit and the impact on his life of his reduced hearing will be minimal.

142. I did not find Mr Byrom a satisfactory expert. He was reluctant to accept the expertise of Prof Moore and had not apparently considered all of the relevant literature referred to by Prof Moore. His answers in cross examination were at times defensive and on occasion flippant, for example the reference he made to "*not being a robot*." Furthermore, he reached a conclusion that the Claimant was biased, and although to some extent he rode back from that position, he still maintained it. Mr Healy said Mr Byrom was entitled to conclude that he was "*surprised*" at the apparent inconsistent benefit from the hearing aids and I agree that an expert is entitled to point out and raise inconsistency in the results of tests or investigations but Mr Byrom went further by reaching a conclusion of bias. Mr Byrom was led down that path by his instructing solicitors, but as I have said he did not depart from it. This was notwithstanding his acceptance that he had made a mistake in interpretation of data that led to his comment that with hearing aids the Claimant's hearing was better than normal. I find that an extraordinary comment to make and it was inconsistent with his own evidence and the evidence of Prof Moore that hearing aids were not perfect and do not lead to recovery of hearing.

143. In total contrast, I found Prof Moore a convincing and authoritative witness. His expertise was evident not just from his curriculum vitae but also from the way he gave evidence. His area of expertise falls squarely within the issues to be decided in this case. There is a distinction to be drawn between whether a sound is audible and whether it is intelligible as speech. Prof Moore's area of expertise in particular is in the

intelligibility of speech and the design and efficacy of hearing aids, which are central issues arising in this case.

144. I have already stated that the Claimant was an honest and credible witness and I accept his evidence on the extent of his hearing loss both with and without hearing aids. That evidence is supported by the evidence of Prof Moore and this supports my conclusions about the Claimant's credibility. I reject the evidence of Mr Byrom where it conflicts with the evidence of Prof Moore for the reasons that I have given above. The objective investigations are only part of the evidence in establishing the extent of the Claimant's hearing loss. An audiogram has a degree of variability, it may not detect neuronal damage and it does not give a measure of speech intelligibility. The QuickSIN test attempts to replicate background noise but it does not does not reflect the reality of life where sounds are dissipated. Hearing aids have made significant advances, the use of directional microphones can help eliminate background noise and programs can be used to compress the frequency of sound to bring it within a potentially audible range. Nevertheless, that may distort the sound and make it less intelligible. The limits of the investigations and of the hearing aids were all predicted by Prof Moore and are consistent, according to him, with the Claimant's evidence and I accept those conclusions.

145. There are no tests to measure objectively tinnitus or its effect upon an individual. The Claimant accepted that his tinnitus had improved but had not been eliminated and again Prof Moore stated that this evidence was credible. I accept the Claimant's evidence on his level of tinnitus, both with and without hearing aids.

146. Ultimately, taking the results of the investigations and tests into account and bearing in mind their limitations, the question is whether the Claimant was a credible witness reporting his symptoms accurately to the court. I conclude that the Claimant was such a witness.

Issue 3 - is the Claimant "disabled" within the meaning in the Ogden Tables.

The evidence

147. I have already set out in paragraphs 93 to 99 the effect of the Claimant's hearing loss on his personal and professional life. When considering whether or not the Claimant meets the definition of disabled for the purposes of the Ogden Tables, Mr Craggs, the Defendant's employment expert, set out at paragraph 5.10 in his report that in his experience and opinion the Claimant's hearing loss "*affects the kind of paid work he can do*."

148. In the joint statement of the employment experts at paragraph 7.8 when also considering the implications of the Equality Act, they state:

> "… It is not so much a question of the level of the job [the Claimant] can do with his hearing difficulty (advisor or manager) but the environment in which he may find himself working or choose to work. Accordingly, he would be unsuited to any health and safety role in environments with high levels of

> noise or background noise (e.g. engineering or manufacturing plants, some parts of construction sites) …"

149. In his oral evidence Mr Craggs accepted that the Claimant's hearing would be classified at such a level that it would be unlikely for him to be employed in the fire service. With regard to the police service, from 1 January 2019 a degree is required and the Claimant would not therefore be eligible.

The Ogden Tables

150. When assessing a future loss to be awarded as a lump sum it is necessary to establish the annual amount of that loss ("the multiplicand") and the factor to be applied to the multiplicand representing the number of years of the loss, the rate of return on any investment and the impact of any other contingencies. This factor is referred to as the "multiplier."

151. The Ogden Tables are used by the courts to derive the multiplier in different situations. One of those situations concerns calculations of future loss of earnings. The current edition (7th) of the Ogden Tables includes tables that apply contingencies to the multiplier based on the research of Prof Verrall and Dr Wass "*demonstrating that the key issues affecting a person's future working life are employment status, disability status and educational attainment*."

152. The definition of whether a person is disabled for the purposes of the Ogden Tables is as follows:

> "A person is classified as being disabled if all 3 of the following conditions in relation to the ill health or disability are met:
>
> (i) the person has an illness or disability which has lasted or is expected to last for over a year or is a progressive illness,
>
> (ii) the person satisfies the Equality Act 2010 definition that the impact of the disability substantially limits the person's ability to carry out normal day-to-day activities, and
>
> (ii) their condition affects either the kind **or** the amount of paid work they can do.
>
> Not disabled All others."

153. Section 6 of the Equality Act defines disability as:

> "(1) A person (P) has a disability if—
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

154. The "Equality Act 2010 – Guidance – Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability" ("the Equality Act Guidance") is issued by the Secretary of State under section 6(5) of the Equality Act 2010. It is a requirement of the Act that the Guidance is taken into account where relevant in determining whether a person is disabled. It has 4 sections A – D all of which must be taken into account in determining whether a person is disabled. Section B gives guidance on "substantial". Of particular relevance at paragraph:

    i) B4 guidance is given on considering the cumulative effect of an impairment;

    ii) B3 it is indicated that in considering whether the effect of an impairment is substantial the way in which the person carries out normal day-to-day activity should be considered;

    iii) B7 it states that account should be taken of how far a person can reasonably be expected to modify his or her behaviour to reduce the effect of an impairment on normal day-to-day activities;

    iv) B11 it refers to the effects of environment that may exacerbate or lessen the effect of an impairment.

155. Section D covers guidance on "normal day-to-day activities" and in particular paragraph:

    i) D3 includes domestic activities such as shopping but also general work-related activities as normal day-to-day activities;

    ii) D 20 states that environmental conditions may have an impact on a person's ability to carry out normal day-to-day activities. A specific example of background noise interfering with a person's ability to hold a conversation when most people would not suffer this adverse effect is provided.

156. The appendix to the Equality Act Guidance contains 2 lists of illustrative and non-exhaustive factors, the first of which contains examples where it would be reasonable to regard them as having a substantial adverse effect on normal day-to-day activities. The second list has examples where it would <u>not</u> be reasonable to regard them as having a substantial adverse effect. An example in the first list is:

> "difficulty hearing and understanding another person speaking clearly over the voice telephone (where the telephone is not affected by bad reception)"

157. In the second list one of the examples is:

> "inability to hold a conversation in a very noisy place, such as a factory floor, a pop concert, sporting event or alongside a busy main road"

158. The Equality Act Guidance makes it clear that in those examples the effect described should be thought of as if it were the only effect of the impairment and they are indicators and not tests. The Equality Act Guidance states:

> "They do not mean that if a person can do an activity listed then he or she does not experience any substantial adverse effects: the person may be affected in relation to other activities, and this instead may indicate a substantial effect. Alternatively, the person may be affected in a minor way in a number of different activities, and the cumulative effect could amount to a substantial adverse effect."

159. It is agreed between the parties that in applying section 6(1) of the Equality Act, the court has to focus on not what the Claimant can do but what he cannot do as a result of his impairment (*Aderemi v London and South Eastern Railway Ltd* [2013] ICR 591, EAT) and then consider if the effect is "substantial" which, means "more than minor or trivial" as per section 212(1). The court assessment of the impairment must be made without taking into account the use of, in this case, hearing aids (section B 12 – 14 of the Equality Act Guidance).

Conclusion on the third issue

160. Mr Steinberg's submissions were that the Claimant clearly met the definition of disability. The Defendant disputed this on the basis that the Claimant's hearing loss could not be said to be substantial. Furthermore, there was no impact on the kind of work that he could do as roles in the police service or fire service would not have been open to him in any event.

161. There is no dispute that the Claimant meets the first limb of the test for disability as his hearing loss is permanent. I have already set out above in paragraph 93 the effects of the hearing loss on the Claimant without his hearing aids. Even with his hearing aids he has difficulty in his work environment hearing conversations in meetings, speaking on the telephone and in meetings outside including when working on-site. Without his hearing aids those effects would be worse, although not by much as there is not a significant improvement according to the evidence, which I have already accepted. Those are adverse effects which impact on his ability to carry out his normal day-to-day activities, especially in his work place. Some impacts may be trivial on their own, such as not hearing the oven timer or a person speaking from another room at home, however, taking all of the effects together, as per the Equality Act Guidance, I am satisfied the impact of the Claimant's disability is more than trivial and substantially limits his ability to carry out normal day-to-day activities.

162. The issue in the third limb of the test is not the amount of work that the Claimant can undertake but the "kind of work". On the basis of the agreed expert evidence there is a limitation on the Claimant in the kind of work that he can undertake by virtue of needing to minimise background noise. The Claimant is also excluded from working in the fire service and Mr Craggs accepted the injury affects the kind of work the Claimant can do, as I set out above. Mr Healy's submissions were not consistent with the evidence and I do not need to decide the position with regard to the Claimant's potential employment with the police force.

163. Accordingly, my conclusion is that the Claimant's hearing loss and the effect of that on him means that he meets the definition of disability within the Ogden Tables.

Issue 4 – how should the Claimant's loss of earnings be calculated?

164. There are 4 methods by which the court may compensate a claimant for a future loss of earnings. First, the net annual loss is established to provide the multiplicand and it is multiplied by the multiplier to provide a lump sum award covering the loss of earnings over the claimant's working life. Secondly, a lump sum may be awarded for a handicap in the labour market and therefore a claimant may take longer to obtain employment in the event that they become unemployed (called a *Smith v Manchester* award after the case of that name citation: (1974) 17 KIR 1). Thirdly, where the matter is so uncertain that a broad-brush approach is adopted and a lump sum is awarded (known as a *Blamire* award after the case *Blamire v South Cumbria Health Authority* [1993] PI QR 1). Fourthly, if the annual loss is established it may be paid by way of annual payments rather than a lump sum (a periodical payment). The third and fourth methods are not relevant to this case and I will return to the detail of the first and second methods below.

165. It is necessary to consider what the Claimant's future earnings may be on both an uninjured basis and injured basis.

The Claimant's evidence

166. If he had remained in the Royal Marines until the end of his 22-year service it was the Claimant's intention on leaving to work as a health and safety adviser and progress through to management level. However, because of his hearing difficulties he did not believe it would be possible to progress beyond his current role. This was because of the difficulties that he had in hearing in the office environment, which I have outlined in paragraph 95 above. In particular, he would struggle if he had to attend noisy sites to deal with particular issues or problems, which he said as a health and safety manager would be a vital part of the work.

167. The Claimant is currently undertaking what are referred to as "NEBOSH" courses and in particular a level 6 NVQ diploma in Occupational Health & Safety Practice, which is equivalent to a degree qualification. This would enable him to work at a management level, if he was able to do so. The Claimant's employers have pushed him to undertake this qualification as the majority of health and safety advisers who work for Greenlight's main competitors have the same qualification.

168. The Claimant in his statement maintained his belief that he would not be able to undertake a management position and at his current office there was no one who had their own room, which might reduce background noise.

169. The Claimant completed the necessary training qualifications to work as a health and safety adviser and used his resettlement package from the Royal Marines to do so. He chose home study as the method to acquire the NEBOSH qualification to avoid a noisy classroom. The Claimant cannot hear well on a loud construction site and he has to note down his findings and discuss them with the client at the end of the inspection which he said was "*not ideal*". He believes that limits his progress to become a manager as the managers he works with have to attend sites to deal with problems and discuss them with the client on-site. How quickly he will achieve the level 6 NVQ depends upon how much time he puts into it. However, achieving the NVQ will not automatically mean he becomes a manager, but it will help to achieve that goal.

170. The Claimant explained that he had never been turned down for a job (he had had 3 or 4 offers). Greenlight had increased his salary from £25,000 to £30,000 per annum and he explained that he has a positive work ethic and that his employer was happy with him and he was happy with them. He had no immediate plans to move away from Greenlight.

171. In addition to working as a health and safety adviser the Claimant trained others to become NVQ assessors. This was a service provided by Greenlight so that clients can authorise their own subordinates. The Claimant spends approximately 40% of his time on-site or with clients and 40% on paperwork i.e. policies and risk assessments. The training element is approximately 20% of this time, although the time spent on each of the activities does fluctuate. He agreed that 60% of the time he was not on-site and predominantly in the office based in Plymouth. However, 40% of this time was mainly outdoor work or internal refurbishments and it was all construction related. He spent the majority of this time on-site rather than at the clients' offices. The Claimant did not know whether a managerial role would reduce the number of site visits as he had no personal experience of health and safety management nor did he know of colleagues who were health and safety managers. At Greenlight the directors did spend time on-site but he did not know whether it was as much time as he did.

172. The Claimant had not applied for a job outside Greenlight. As an employer, they were sympathetic to his hearing problems and have made efforts to accommodate them. However, the Claimant did not see himself as a health and safety manager because of struggling on-site with hearing background noise as well as struggling on the phone. The manager would have more responsibility and he did not think he would have the ability to perform to the level required. The Claimant was not aware that the employment experts were of the opinion that there was nothing stopping him from becoming a health and safety manager. He disagreed with their view as he could not control who spoke at meetings, he cannot take a call in the office as he needed to go somewhere quiet. For example, into the corridor, which makes it difficult to take notes. If he has to attend a meeting, he tries to get in early so that he can sit in a place to see the people who are to speak in order to be able to hear them. On a site visit he can only talk to the client as they go around the site if the work stops or it is not noisy. The Claimant felt this was the position notwithstanding the trial of hearing aids.

173. Greenlight's clients are located throughout the South-West of England and the Claimant has been to Portsmouth and to a client in Bristol, when he travelled by car. He does not like working away from Plymouth but it is feasible and the Claimant said he would not rule anything out. However, his family and in particular his wife's family are located in Plymouth, which would go against the family relocating although the Claimant accepted that it could be feasible for him to commute further distances.

The expert evidence

174. In the employment experts' joint report dated 22nd February 2019, they agreed that uninjured, a career in health and safety would have been appropriate, but to secure a senior advisor or management post would have required the NEBOSH diploma level or NVQ level 6 (those being equivalent qualifications). However, they disagreed about the potential level of earnings that could be achieved on an "uninjured basis" and this is set out in the table below:

	Mr Sephton ('000)	**Mr Craggs ('000)**
Advisor entry level	£23 to £31	£27 to £30
Senior advisor	£37.5 to £52.5 after 3 to 5 years	£30 to £33 after 2-3 years rising to £35 to £36 after 5-8 years
Manager	£55 to £60 after 10 years	£35 to £36 after 2 to 3 years rising to £40 after 5-8 years and up to £50, depending on opportunities.

175. Mr Sephton stated that to reach the level of £55-£60,000 per year a person would have to be "*highly mobile*" by commuting away from his home. If he remained within the South-West of England then the salaries would be in the region of £37,500-£45,000. Mr Craggs agreed that to achieve the higher salaries the NVQ level 6 would be required but to achieve the higher level posts the Claimant would be constrained by limited opportunities in the Plymouth area. His comment was that earnings of £55-£60,000 were difficult to achieve nationally and were very unlikely within the Plymouth area.

176. In cross examination, Mr Craggs was asked about the Atwood Burton pay survey of 2014. He agreed that it was likely that the data was collected in 2013 and that salaries would have risen, although inflation had outstripped salary increases. The survey showed that the remuneration in the health and safety sector for an adviser was between £30,000 to £34,999 gross per annum but he did not agree that that pointed towards a salary of £40,000 gross per annum at today's "*prices*." Mr Craggs also in his report referred to an Occupational Safety and Health 2017 Pay Survey where the average salary for health and safety practitioners was £40,000 with an interquartile range for a health and safety officer of £31,000-£49,000 and for a consultant £30,000-£53,000. He did not accept he was close to Mr Sephton's figures on the basis that it was an interquartile range and it was necessary to assess the Claimant's potential earnings based upon the prevailing market in the Plymouth area.

177. As he is now, Mr Craggs was of the opinion that the Claimant was not yet a strong candidate as he was not fully established in the health and safety market having been at entry-level for 2 years. The experts agreed it would be important for the Claimant to be able to control his working environment. Mr Sephton was of the view that the Claimant could control his work environment more as a health and safety adviser rather than in a management role with potentially more frequent meetings. Mr Craggs was of the opinion that a management position would enable him greater opportunity to control his environment, perhaps by having his own office or having greater influence over reasonable adjustments within the work environment.

178. The experts agreed that the Claimant would be unsuited to any role where there were high levels of noise or background noise but if he achieved the NVQ level 6 he would

be able to undertake a management role in a suitable environment. The experts agreed that the opportunities in the South-West were more limited than in many other parts of the country and tended to be focused on the cities of Plymouth and Exeter. The job market would be a constraint upon the Claimant's ability to progress to a management position. The salaries the experts agreed on an "injured basis" are in the table below:

	From 2020 to 2024 ('000)	**From 2024 and beyond ('000)**	**Location**
Advisor	£33	£35 to £36	South West
Senior advisor	£35 to £36	£36 to £37	South West
Manager	-	£40 to £45	South West
Manager	-	£45 to £50	Bristol, Midlands, South East

179. In the joint statement, Mr Craggs recorded his opinion that the Claimant's actual earning potential was virtually identical to what it would have been had he been uninjured, remained within the Royal Marines and then commenced a career in health and safety.

180. In cross examination, Mr Craggs accepted that because of the Claimant's hearing problems it would be hard for him to reach a management role and there would be environments that the Claimant would not be able to work in. There was a distinct possibility that it would take him longer to reach a management position. He confirmed the joint statement, which was that if the Claimant were to seek management roles it would be vital that he was fully aware of the working environment and any future employer would need to be aware of any reasonable adjustments they might need to make. Mr Craggs accepted that most of Greenlight's clients were in construction. However, when asked to accept that the Claimant would be working either in a noisy environment or outside, Mr Craggs said it would depend upon the stage of construction.

181. Mr Craggs accepted that the Claimant might need to move to the open market in order to obtain a job as a manager, although he was not able to comment on whether he might stay where he was. If the Claimant remained in his current role then Mr Craggs explained he would be limited to an earnings "ceiling". How much he could earn would depend upon what Greenlight felt was a fair salary for the role the Claimant was performing. Mr Craggs accepted that it was a distinct possibility that if the Claimant had limited ability to move he would earn less. He accepted that unemployment was higher in the South-West than in the rest United Kingdom and that the Claimant was "*slightly more at risk*" and that there was a distinct possibility that he would be more vulnerable in the event of an economic downturn.

The law relevant to the potential earnings uninjured and injured

182. In determining whether a particular event did or did not happen the court makes a decision based upon the evidence "on the balance of probability". However, when deciding future events, the court has to evaluate the chance of its occurrence and reflect that in the amount of damages which are awarded (*Davies v Taylor* [1974) AC 207).

183. In *Herring v Ministry of Defence* [2002] EWCA Civ 528 at first instance the judge had assessed the Claimant's reasonable career model as a police officer but when considering various possible chances of intervening future events, such as being made redundant, a discount was applied to the multiplier to reflect those uncertainties. In the Court of Appeal, Potter LJ addressed the appropriate way to assess future loss of earnings and stated at paragraph 23:

> "In any claim for injury to earning capacity based on long-term disability, the task of the court in assessing a fair figure for future earnings loss can only be affected by forming a view as to the most likely future working career ('the career model') of the Claimant had he not been injured.… If a move of job or change of career at some stage is probable, it need only be allowed for so far as it is likely to increase or decrease the level of the Claimant's earnings at the stage of his career which it is regarded as likely to happen. If such a move or change is unlikely significantly to affect the future level of earnings, it may be ignored in the multiplicand/multiplier exercise…"

184. At paragraph 25 Potter LJ continued:

> "Similarly, it is a truism that the assessment of future loss in this field is in a broad sense the assessment of the chance or, more accurately, a series of chances as to the likely future progress of the Claimant in obtaining, retaining or changing his employment, obtaining promotion, or otherwise increasing his remuneration."

185. The Court of Appeal rejected the approach of the judge at first instance in applying a percentage reduction for a "loss of a chance."

186. The decision in *Herring* was considered in *Brown v Ministry of Defence* [2006] EWCA Civ 546, an appeal concerning an award for loss of pension. Moore-Bick LJ at paragraph 22 referred to the career model being established to fairly reflect a Claimant's earning capability. In considering whether *Herring* was inconsistent with *Davies v Taylor* his Lordship said at paragraph 24:

> "Provided a fair career model is chosen as the basis for the assessment of loss of future earnings and pension entitlement, the prospects of enhanced or reduced earnings resulting from the ordinary chance of life can be allowed for by adjustments to the multiplicand and multiplier as appropriate. It is only when the court has to consider the possible effects of an unusual turn of

> events that would have a significant effect on earnings or pension rights that it is necessary to assess the chances of such events occurring and to assess the financial consequences."

187. Moore-Bick LJ went on to explain at paragraph 27 there was an "unusual factor" as the Claimant would have become entitled to an immediate pension had she served a full term of 22 years in the Armed Forces rather than having to wait to a normal retirement age. This would have had a significant effect and therefore the chances of her competing 22 years' service called for an assessment in accordance with *Davies v Taylor*.

Conclusion on potential earnings - uninjured

188. The Claimant's Schedule is based upon him remaining in the Royal Marines for 22 years and he confirmed, absent his hearing problems, that was his intention. I accept the Claimant's evidence on this point. It is accepted by the parties that had he remained in the Royal Marines the Claimant would have reached the rank of Colour Sergeant and left the service on 12 September 2019. The parties' calculations for the net loss for this period differ by £403 with the Defendant's figure being higher than the Claimant's. I n the circumstances I adopt the figure put forward by the Defendant of £16,525.04 on the basis that they could have agreed the Claimant's figure but have chosen not to do so, presumably as the former employer they are satisfied as to the correctness of their calculation.

189. It is agreed that following the Royal Marines the Claimant would have worked in health and safety for 30 years. The table below sets out the parties' positions on gross salary and likely career progression:

	Claimant	**Defendant**
14-9-2019 to 13-9-2021	£27,000 as adviser	£28,500 as adviser
14-9-2021 to 13-9-2024	£41,250 as senior adviser	£33,000 as adviser/manager
14-9-2024 to 13-9-2029	£48,500 as senior adviser	£40,000 as manager
14-9-2029 to 13-9-2049	£57,500 as manager	£40,000 as manager

190. Applying the law as I set it out above, I find the Claimant's career model as follows. The Claimant would have remained within the South-West, as his wife's family are located in Plymouth and he expressed some reluctance to commute. For the avoidance of doubt, there is no evidence that the fact that his hearing is impaired is the reason for his reluctance to commute. I also conclude that the Claimant would have been likely to have achieved the necessary diploma to give him the potential to be promoted to a manager.

191. I did not hear oral evidence from Mr Sephton, but in the joint report there is not much difference between the experts on the point that in order to achieve the maximum earnings proposed by Mr Sephton the Claimant is likely to have to be prepared to leave the South-West. I find he would have been unlikely to have done so. Considering the table at paragraph 174 above, the entry-level adviser earnings would have been £28,000 per annum gross. The earnings of a senior adviser are likely to have been £33,000 rising to a figure of £37,500. Bearing in mind what I said above about Mr Sephton's acceptance that earnings in the South-West are limited and Mr Cragg's evidence of the difficulty of the job market in the South West, I conclude the likely earnings of a manager to be £45,000. It is likely the Claimant would have been an adviser with a salary of £28,000 for 2 years, a senior adviser with a salary of £33,000 for 3 years, a senior adviser with a salary of £37,500 for 5 years and a manager for the remaining 20 years of his employment.

Conclusion on potential earnings injured

192. The parties' positions in the Schedule and Counter Schedule are set out in the table below:

Claimant		**Defendant**	
To 31-5-2022	£30,000	To 13-9-2019	£30,000
1-6-2022 to retires	£34,750	14-9-2019 to 13-9-2021	£33,000
		14-9-2021 to 13-9-2025	34,500
		14-9-2025 to 13-9-2047	£40,000

193. The Claimant is working for his NVQ level 6 and it is likely that he will achieve that qualification. I accept the evidence of Mr Craggs that the Claimant is not yet a strong candidate and I accept that the Claimant is going to be restricted in his ability to obtain a management role by virtue of the need to ensure that he has an environment that is suitable for him with his hearing difficulties and because he will not leave the South-West area. I understand the Claimant's reluctance at this time to accept that he will be able to perform a management role but given that he has 30 years of working life left, it is likely that he will obtain that management role, albeit at a later stage than he would have done otherwise. However, I also take into consideration the Claimant's evidence that he is hard worker and that his current employer values the work that he does and therefore it is likely that any new employer, if he has to change jobs, will similarly value his work ethic and remunerate him accordingly.

194. I reject Mr Craggs' opinion that the Claimant's earnings uninjured are likely to be the same as his earnings with his injury. It is unlikely that the Claimant's salary will increase significantly until 2021 and therefore I conclude until 13 September 2021 the

Claimant's salary will be £30,000 per annum gross. Thereafter, as an adviser his salary will increase to £33,000 per annum until 13 September 2024 (the salary agreed by the experts in the joint statement). From 14 September 2024 it is likely that the Claimant salary will increase to £36,000 per annum (again as per the joint statement) whether as an adviser or senior adviser. The Claimant salary is likely to increase to £40,000 per annum from 14 September 2029 and increase to £45,000 per annum as a manager on 14 September 2039 to retirement on 13 September 2049. There is no unusual factor to consider in this career model.

Should the award be on the basis of Smith v Manchester?

195. In *Bullock v Atlas Ward Structures Ltd* [2008] EWCA Civ 194 the claimant lost his work as a paint sprayer because he developed a skin reaction to the paint. The issue in the appeal was whether the claimant's future loss of earnings should have been awarded on the *Blamire* method, which had been used in the court below, or the multiplier/multiplicand method. Ward LJ identified that the multiplicand was discernible and referred to the multiplier/multiplicand method as being 'the conventional approach'. Keene LJ at paragraph 19 stated:

> "All assessments of future loss of earnings in personal injury cases necessarily involve some degree of uncertainty. As far as possible, the task of the court is to seek to arrive at the best forecast it can make of the scale of such loss, normally on the well-established basis of multiplying an anticipated annual loss by an appropriate multiplier.
>
> Merely because there are uncertainties about the future does not of itself justify a departure from that well-established method."

196. The issue of whether an award should be on the basis of *Smith v Manchester* or the multiplier/multiplicand method was considered in the case of *Billett v Ministry of Defence* [2005] EWCA Civ 773. At first instance the judge, Andrew Edis QC (as he then was), sitting as a Judge of the High Court, had found that Mr Billett was disabled within the meaning of the Ogden Tables although qualifying that with the phrase "*only just*" and applied a multiplier/multiplicand approach to future loss of earnings. The claimant had suffered "*non-freezing cold injury*" which the judge found affected his feet but did not affect his hands. The only problem he encountered at work was on occasion difficulty pulling down the shutters of his lorry in cold weather, which was related to the condition of his hands. In the Court of Appeal, Jackson LJ gave the leading judgment and at paragraph 55 cited *Moeliker v A Reyrolle & Co Ltd* [1977] 1 WLR 132 stating that the first question to consider was whether there was a real or substantial risk that the claimant would lose his current job before the end of his working life. A quote from the judgement of Browne LJ in *Moeliker* is at paragraph 56 as follows:

> "Clearly no mathematical calculation is possible. Edmund Davies LJ and Scarman LJ said in *Smith v Manchester Corporation*, 17 KIR 1, 6, 8, that the multiplier/multiplicand approach was impossible or 'inappropriate', but I do not think that they meant that the court should have no regard to the

> amount of earnings which a Plaintiff may lose in the future, nor to the period during which he may lose them. What I think they meant was that the multiplier/multiplicand method cannot provide a complete answer to this problem because of the many uncertainties involved. The court must start somewhere, and I think the starting point should be the amount which a Plaintiff is earning at the time of the trial and an estimate of the length of the rest of his working life. This stage of the assessment will not have been reached unless the court has already decided that there is a 'substantial' or 'real' risk that the Plaintiff will lose his present job at some time before the end of his working life, but it will now be necessary to go on and consider – (a) how great this risk is; and (b) when it may materialise – remembering that he may lose a job and be thrown on the labour market more than once (for example, if he takes a job then finds he cannot manage it because of his disabilities). The next stage is to consider how far he would be handicapped by his disability if he was thrown on the labour market – that is, what would be his chances of getting a job, and an equally well-paid job. Again, all sorts of variable factors will, or may, be relevant in particular cases – for example, a Plaintiff's age; his skills; the nature of his disability; whether he is only capable of one type of work, or whether he is, or could become, capable of others; whether he is tied to working in one particular area; the general employment situation in his trade or his area, or both. The court will have to make the usual discounts for the immediate receipt of a lump sum and for the general chances of life."

197. Jackson LJ also reviewed the history of the Ogden Tables (paragraph 58 to 78) and referred to Tables A, B, C and D ("Tables A – D"). These tables set out a number of reduction factors (RF) to be applied to the multiplier for loss of earnings to take account of contingencies, other than mortality. Those contingencies are: the claimant's age at the date of trial; whether the claimant is male or female; whether the claimant is employed or unemployed at the date of trial; the claimant's educational attainment; and whether or not the claimant is disabled. At paragraph 74 Jackson LJ referred to two factors, the claimant's educational attainment and whether or not the claimant is disabled and stated:

> "[Those factors] involve considering broad bands of educational attainment and broad bands of disability. Therefore, the user may need to adjust the RF in order to reflect were a particular individual falls within those bands."

198. At paragraph 78 of the judgment reference is made to paragraph 45 of the Explanatory Notes to the Ogden Tables which refer to the application of Tables A-D providing one way of assessing future loss of earnings and go on to state that there may still be cases where a conventional *Smith v Manchester* award is appropriate.

199. The judge's finding that the claimant was disabled "*but only just*" was upheld by the Court of Appeal. However, Jackson LJ found that the bands used in Tables A – D were

wide and that disability as defined in paragraph 35 of the Explanatory Notes covered a very broad spectrum. Reference is made to the article *Ogden Reduction Factor adjustments since Connor v Bradman: part 1* [2013] Journal of Personal Injury Law, pages 219 – 230 which states that the Disability Survey 1996 – 7, the statistics upon which Tables A – D are based, measure the severity of disablement on a scale of 1 to 10 where 10 denotes the greatest severity. Jackson LJ records that 42.9% of those classified as disabled fall within categories 1 to 3. 43.9% of those disabled fall within categories 4 to 7. 13.2% of the disabled population fall within categories 8 to 10. Jackson LJ stated the inference from the judge's findings of fact is that the claimant would fall toward the bottom of category 1.

200. Jackson LJ at paragraph 96 stated that the application of Tables A and B, without any adjustment, would result in award of £200,000 for the future loss of earning capacity and stated that that is "*hopelessly unrealistic for the claimant*". There is reference to the claimant pursuing his chosen career "*with virtually no hindrance from his disability*" and:

> "In order to bring a sense of reality to the present exercise, it is necessary to make a swingeing increase to the RF shown in Table B (.54). But what should that increase be? Determining an appropriate adjustment to the RF is a matter of broad judgement. In the present case that exercise is no more scientific than the broad-brush judgement which the court makes when carrying out a *Smith v Manchester* assessment."

201. Jackson LJ found in *Billett* that it was a "*classic example*" for the application of the approach in *Smith v Manchester*.

202. *Billett* was followed by HHJ Coe (sitting as a Judge of the High Court) in *Murphy v Ministry of Defence* [2016] EWHC 003 (QB). The claimant had been struck on the head whilst moving large heavy rolls of fabric. He developed fibromyalgia and was discharged from the Army. At paragraph 207 the claimant's disability is referred to as "*modest*" and the impact of his disability "*has lessened to an extent*". It was also said that he may improve when the litigation ended. At paragraphs 208 and 209 the judge concluded that a figure of £164,310 for 15 years' worth of loss would be "*disproportionately high*" in the context of the case and given the limited extent of the claimant's disability. The judge concluded at paragraph 211 that making an adjustment to the RF would be "*too contrived an exercise*."

203. *Connor v Bradman & Co Ltd* [2007] EWHC 2789 (QB), a judgment of HHJ Peter Coulson QC (sitting as a judge of the High Court), as he then was, considered a future loss of earnings claim made by a claimant following a road traffic accident. The judge found the multiplier/multiplicand method was applicable and that the claimant was "disabled" within the meaning of the Ogden Tables (under previous disability discrimination legislation but no point turns on that). At paragraph 64 the judge quoted paragraphs 31 and 32 of the Explanatory Notes to the 6th edition of the Ogden Tables (they remain the same in the 7th edition). These refer to the application of Tables A – D and the RF and state the methodology:

> "…[is] one method for dealing with contingencies other than mortality…;
>
> …in many cases it will be appropriate to increase or reduce the discount in the Tables to take account of the nature of the particular claimant's disability….;
>
> …[is] a 'ready reckoner which provides an initial adjustment to the multiplier's…';
>
> …cannot take into account all circumstances and it may be appropriate to argue for higher or lower adjustments in particular cases…"

204. At paragraph 72 of the judgment the judge considers whether or not the RF derived from the Ogden Tables should be adjusted and stated:

> "On the one hand I am sympathetic to Mr Hamill's point that the Ogden Tables are based on detailed actuarial evidence and should not be the subject of impressionistic 'tinkering' by the judge. On the other hand, the introduction to the Tables themselves [the judge refers back to paragraph 64] makes plain that they are not to be taken as inviolable where, on the facts of a particular case, the evidence demonstrates the need for an adjustment."

205. The judge considered that the RF should be adjusted and a midpoint was taken between the figures derived from the Ogden Tables for a disabled claimant and a claimant who was not disabled.

Submissions on whether a Smith v Manchester award is appropriate

206. Mr Healy on behalf the Defendant submitted that a sense of reality was required in assessing the future loss of earnings. The Claimant had never been out of employment since leaving the Royal Marines, he had had 3 employers the last one of which had increased his salary. He said the real difficulty for the Claimant was that even if I was satisfied that he was "disabled" (as I have already found that I am) then *Billett* should be followed and an award of 2 years net earnings made in the sum of £47,562. The impact of applying a RF to the multiplier would imply that the Claimant would be out of work for an unrealistically long period of time.

207. Mr Steinberg's submissions were that the multiplier/multiplicand method should be used as per *Bullock*. Although this method was not appropriate in every case, as per paragraph 31 of the Explanatory Notes to the Ogden Tables, the old-fashioned "*finger in the air*" approach should be rejected for a more scientific one. The test for using a *Smith v Manchester* award was not whether the figure produced by a multiplier/multiplicand was too high. In *Billett* the claimant was only just disabled and there was no evidence of any ongoing impact on his work: that is why a *Smith v Manchester* award was made. The Claimant's case was very different with the effect of his hearing loss on his employment.

208. Mr Steinberg pointed to paragraph 18 of the Introduction of the 7th edition of the Ogden Tables which refers to *Connor v Bradman* and an article by Dr Wass entitled *Discretion in the Application of the new Ogden 6 multipliers: the case of Connor v Bradman and Company* (Journal of Personal Injury Law 2008, 2, 154-163). In that article ("the First Article") Dr Wass is critical of the extent of the adjustment carried out to the RF by the judge. Mr Steinberg also referred to three other articles from the Journal of Personal Injury Law first, *Ask the expert: William Latimer-Sayer asks Victoria Wass some questions about the practical application of the Ogden reduction factors* (2013, 1, 36-45) ("the Second Article"), secondly, *Fair Compensation needs actuaries (2009, 1, 48-65)* by Chris Daykin ("the Third Article") and thirdly, *Billett v MOD and the meaning of disability in the Ogden Tables* (2015, 1, 37-41) ("the Fourth Article").

209. I will consider these articles and the points Mr Steinberg made, but I consider them as part of his submissions, which is when he deployed them and not as evidence. In the First Article Dr Wass makes the point that the reduction factors are an average for the population and that "*they are very likely to be imprecise for any individual*." To the extent that the definition of disability is wide its impact would be to move the RF upwards because a wider definition of disability dilutes the impact on employment. Where there is a good fit of characteristics to the average then the order of magnitude of any adjustment is likely to be modest. Consideration should be given to the RF with a variety of different characteristics. Dr Wass comments that considering the direction of adjustment "*it is the severity of the impact of disability on employment rather than the severity of impairment per se which is relevant. Of all the different types of impairment, impaired mobility (along with mental health problems) has the greatest [negative] impact on employment*" and is particularly disadvantageous for manual workers. She continues that there is no measure of severity of disability and the impact of severity of disability on employment risks. Dr Wass is critical of the magnitude of the adjustment implemented in *Connor*, especially when compared to the magnitude of the difference in RF when compared to changing the level of education and seeing its impact upon the RF. Dr Wass concludes that the intention is the courts should use their discretion to minimise the likely imprecision which arises from using the average RF but the Tables provide a starting point. However, the imprecision is likely to be relatively low for most people and there is no current measure of severity of disability so it cannot be accounted for in the RF. It is possible to provide the courts with guidelines on appropriate boundaries but the work has not been carried out.

210. In the Second Article Chris Daykin comments upon Tables A–D. Mr Steinberg referred in particular to the comments that users should not weaken the factors arbitrarily and that the factors for those who graduated from university with a degree indicate an effective upper limit on the RF that could be reasonable. This is because disabled people in this category have the best opportunity of keeping up employment to retirement age. Mr Daykin also criticised the size of the adjustment undertaken in *Connor* because it took the adjustment factor above that appropriate for a disabled man with a degree. In other words, the Claimant in that case, who did not have a degree, as a result of the increase in the RF was put in a better position than the average Claimant who was disabled but with a degree.

211. In the Third Article Dr Wass comments that the default position should be a strict application of the RF, although she says she has advised in some cases an adjustment. The purpose of these Tables, she states, is to provide a degree of certainty and

predictability to damages calculation and to avoid the need for expert evidence. The effect of judges making adjustments is to make it difficult to predict the outcome in a given case. If an adjustment is to be made her advice is to stick with the disabled RF but make a comparison between those with a higher education qualification, younger age or a better employment status. For a reduction in the RF she advised looking at the disabled RF for those of neighbouring subgroups with more disadvantageous employment characteristics. She comments that the reason for this is that disability trumps every other employment characteristic in its adverse effect on employment "*by a big margin*." When reviewing the distribution of disability severity scores, Dr Wass states that the concentration is towards the mild end of the spectrum and as a result the RFs are dominated by those with relatively mild level of impairment. In addition, the most disabled tend not to be employed.

212. The Fourth Article is Dr Wass' commentary on the first instance decision in *Billett*. I was referred to her conclusions in that article where, contrary to the judge's conclusion, Dr Wass believed the Claimant's limitations were insufficient for him to be included within the disabled group.

Conclusion on whether a Smith v Manchester award is appropriate

213. I derive the following principle from the authorities. The multiplier/multiplicand method is the conventional method of calculating future loss of earnings and should normally be used. However, where a claimant has a handicap in the labour market a *Smith v Manchester* award will be appropriate where there are many uncertainties which mean the multiplier/multiplicand method cannot be used and the matter is one for a broad judgement. Such a circumstance will be where the claimant has a disability within the meaning in the Ogden Tables, but it is one with a minimal impact on the claimant's ability to carry out his employment. In such a case, any adjustment to the RF would be a matter of broad judgement.

214. The RF may be adjusted where evidence is available and a broad judgment is not required. The RFs are averages based on population data and may adjusted upwards or downwards from the starting point derived from Tables A – D, if there is evidence to point to such changes for the particular claimant.

215. The evidence of the employment experts supports that the Claimant has a substantial risk of a handicap in the labour market. However, I have determined on the evidence the multiplicands for the Claimant's annual earnings both on an uninjured and an injured basis. I have determined that the Claimant is disabled within the meaning in the Ogden Tables. I have also determined that the Claimant's disability has a particular impact on his ability to carry out his day-to-day work. There is evidence to support that the Claimant is likely to be above the average RF namely, he has successfully applied for 3 jobs since leaving the Royal Marines, he is hard-working, his current employer commended him for his work ethic, his disability does not affect his mobility and although it has a substantial impact on his day-to-day work it is accepted by Professor Moore in the joint statement that the Claimant has "*mild hearing loss*." Furthermore, the Claimant is undertaking an NVQ level 6, which I already said is likely to achieve. This means he should be considered in the parts of the Tables A – D relating to "degree or equivalent". Evidence that points to a reduction in the RF is the presence of tinnitus

and its impact upon his concentration, that he is on the cusp of the next age bracket of 40-44 and he does not yet have his higher qualification.

216. Based on these conclusions this is not a case that is appropriate for a *Smith v Manchester* award (the Claimant does not seek one in addition to the multiplier/multiplicand method). The uncertainties are not so many as to preclude the multiplier/multiplicand method. The Claimant's injury has a more than minimal impact on his work and the evidence is available to determine an adjustment to the RF without making a broad judgment. Future loss of earnings can be calculated on the conventional multiplier/multiplicand method.

217. The RF for a non-disabled man with a degree in the Claimant's age range is 0.9. For a disabled man with a degree it is 0.58. This would mean that he would, statistically on average, be out of employment for 12.6 years in the next 30 years compared to 3 years if not disabled. Taking the RF for a disabled man in the age range 20-24 produces a RF of 0.61, that would be 11.7 years out of employment in the next 30 years. A person of the Claimant's age who is not disabled but without any qualifications has a RF of 0.8 indicating they will be out of work for 6 of the next 30 years. On the evidence it does not seem likely that this Claimant will be out of work for over 12 years of the next 30 years. As the articles of Dr Wass identify, I am not able to determine where this Claimant's level of disability might fall within the spectrum in the statistics. However, bearing in mind I must establish what is likely to happen (see paragraphs 1822 to 187), the level of the Claimant's disability and the factors I have identified for and against an adjustment to the RF, which on balance favour an upward adjustment, I conclude that a RF of 0.7 is appropriate. This falls below the RF for people without disability in his age range. I accept the average will be towards the upper end of the range due to the number of people with "mild" disability included in the statistics. Nevertheless, I have to establish an appropriate figure for this Claimant on the evidence. Leaving the RF at the average would result in over compensation.

218. The parties have agreed the multipliers in the injured and uninjured scenarios and have agreed the total loss for future net earnings having seen the draft of this Judgment at £257,518 and that is the sum I award.

<u>Issue 5 - did damage to the Claimant's hearing stop when exposure to excessive noise ceased?</u>

219. The records show that after the Claimant's discharge from the Royal Marines his audiogram on 12th February 2013 had deteriorated showing thresholds of 125 dB in the right ear and 135 dB in the left ear.

220. In Mr Zeitoun's report he commented: "*There is disagreement in relation to whether the effect of noise ceases to cause further deterioration of hearing once an individual is removed from noise. There is some evidence in the medical literature that indicates nerve degeneration does occur at a later age causing additional hearing loss.*" It was also for this reason that he recommended a report from Prof Moore.

221. Prof Moore's evidence was that hearing deteriorated with age in any case. However, in response to Mr Healy's cross examination, Prof Moore explained that there were two studies that showed that following cessation of exposure to damaging noise the decline

in hearing was more rapid with increasing age when compared to those who have not been exposed to damaging noise. Recent evidence, he said, suggested that damaging noise can accelerate age-related hearing loss especially in frequencies adjacent to the impaired frequency, for example if 6 Hz is damaged then hearing loss in the 4 and 2 Hz frequencies is accelerated. Prof Moore accepted there were a mixture of opinions on this and that the current accepted view was that the hearing loss ceases when the exposure ceases. Prof Moore said his opinion was that the recent evidence contradicts that view and that the effects of exposure to damaging noise continue. In re-examination, in response to Mr Steinberg's suggestion that Prof Moore had raised this issue in his expert report (see the extract quoted in paragraph 113 above), Prof Moore confirmed that he had not done so, because he was not asked to enter this debate in this case. In his report of 24 March 2016 at section VII he stated that it is very likely that the Claimant's hearing problems will worsen as he gets older. However, Prof Moore explained this was a reference to the effect of ageing alone and not to an acceleration as a result of exposure to damaging noise.

222. I had no other evidence on this point and I understand it is an issue that may be significant in other cases. The "*orthodoxy*" that Prof Moore described is that when the damaging noise ceases the damage to hearing that it has caused ceases. Mr Steinberg accepted, when I asked him, that in this case it would make no material difference if I made such a finding. In these circumstances, I am not prepared to make a finding on this point in the absence of further evidence, relevant medical literature and argument.

Issue 6 – assessment of other heads of loss

General damages

223. I have already set out above in paragraphs 93 to 99 the impact on the Claimant of his hearing loss and that I have accepted his evidence and rejected the evidence of Mr Byrom where it conflicts with that of Prof Moore. Prof Moore's evidence was that the Claimant's need for hearing aids had been advanced by about 30 years (and this was agreed by Mr Zeitoun). The average estimated noise induced hearing loss for the right ear at 1, 2, and 4 kHz was 16 dB and for the left ear was 17.7 dB. Mr Zeitoun has a lower figure. However, I accept Prof Moore's evidence having heard how he performed the calculations. The impact of the noise induced hearing loss on speech intelligibility was 20% without background noise and 24% with background noise. Using the $PTA_{2,4}$ (referred to in paragraph 110 above) the decrease in correctly understood sentences was 41%. In the joint statement of Prof Moore and Mr Byrom it is agreed that the Claimant's ability to understand speech "*was significantly poorer than normal even after fine tuning*" and it was agreed that the Claimant had "*mild hearing loss*." It was agreed that the subjective assessment of the benefits of the trial of hearing aids "*indicated a reduction in the percentage of problems with background noise of 37%…*"

224. The 14th edition of the Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases (JCG) provides the following for damages for hearing loss[1]:

[1] The *Simmons v Castle* [2013] 1 WLR 1239 10% uplift is applicable

"(d) Partial Hearing Loss or/and Tinnitus This category covers the bulk of deafness cases which usually result from exposure to noise at work over a prolonged period. The disability is not to be judged simply by the total measurement of hearing loss; there is often a degree of tinnitus present and age is particularly relevant because impairment of hearing affects most people in the fullness of time and impacts both upon causation and upon valuation, such that the amount of noise-induced hearing loss ('NIHL') is likely to be less than an individual's total hearing loss.	
(i) Severe tinnitus and NIHL.	£26,040 to £39,940
(ii) Moderate tinnitus and NIHL or moderate to severe tinnitus or NIHL alone.	£13,080 to £26,040"

225. Mr Healy submitted that the appropriate damages were £15,000 and category (d)(ii) of the JCG was appropriate and relied upon 2 authorities first, *Bradlaugh v MOD* (2009) (Reported on Lawtel AM0201443) an award of £11,988 (uplifted by RPI) by HHJ Walton. The Claimant had noise induced hearing loss falling in the description mild tinnitus with some hearing loss, but he was at the top end of the bracket because of his young age (17 date of injury). Secondly *Lee v MOD* (Lawtel AM0201984) a settlement of £29,443 (uplifted by RPI) out-of-court. Permanent bilateral hearing loss of 15 dB with severe tinnitus within category (d)(i) and again because of his young age (18 at

the time he joined the Army and 26 when he was medically discharged) he was placed at the top of the bracket. The Defendant said that this case was more serious than the Claimant's.

226. Mr Steinberg submitted that the Claimant's injuries straddled d(i) and d(ii) (and the range in d(ii) uplifted by RPI was £13,582 to £27,034). Mr Steinberg said the appropriate award was a figure of £27,500, but it should be increased to £30,000 because of the way the defence had been handled and the allegations of bias made by Mr Byrom. He referred to *Holland v Hoechst Trespaphan* [2001] 3 WLUK 86 where £20,690 (uplifted by RPI) was awarded by District Judge Singleton to a man aged 52 with bilateral hearing loss and tinnitus. Hearing loss in 1, 2 and 3 kHz was 30 dB on the left and 32.33 dB on the right (although it does not say how much of that was due to noise damage) and a "*19% disability with 5% due to age*". Tinnitus made it difficult to sleep and concentrate. He had difficulty understanding people on the telephone and conversing face-to-face with more than one person because the background noise. He required digital hearing aids. A very brief report of *Balham v Ford Motor Co* (1989) (reported in Kemp) has an award of Judge Paynter-Reece of £31,859 (uplifted by RPI) to a man 31 years of age at the date of trial, with constant moderate tinnitus and 6-7 years of hearing loss. *Bragg v Ford Motor Company Limited* [1992] PIQR Q72 reports and award of HHJ Lewis Bowen at £23,000 (uplifted by RPI) to a 47-year-old man who had day in day out moderate tinnitus that was a substantial cause of complaint. He had difficulty hearing in social situations and his sleep pattern and working life had all been adversely affected.

227. The Claimant's hearing is affected in social situations, but this is improved by wearing hearing aids. The impact of his hearing loss is more significant in his working life and is not improved significantly by hearing aids. The impact of noise damage on his hearing was first identified in 2006 when the Claimant was in his mid-20s and he now has the hearing of a 70-year-old. His tinnitus affects his ability to sleep and is intrusive although improved by the hearing aids and may be described as moderate. I factor in the evidence from the audiometry and the calculations of Prof Moore on the degree of his hearing loss but also take into account the Claimant's description of the impact on him. The Claimant's situation is more severe than *Bradlaugh* and similar to *Bragg* I do not place much weight on *Lee* as it is and out-of-court settlement. Taking all of these features into account I make an award of general damages of £25,000.

228. I make no additional award or uplift as I was invited to do by Mr Steinberg for the Defendant's conduct of the case. This was raised in closing submissions and no submissions were made on either aggravated or exemplary damages and I was not referred to any authority for making such an uplift. I have criticised the evidence of Mr Byrom, but that was not sufficiently "bad" to justify any additional award of damages or uplift. There is no evidence that this conduct has adversely affected the Claimant. To the extent that the Claimant is entitled to a justification for his position and a rejection of the Defendant's assertions, that is provided by this Judgment.

Loss of congenial employment

229. The Claimant seeks a sum of £13,500 as he "*loved*" being a member of the Armed Forces and retired 7 years early because of his hearing problems. He relies upon the case of *Brown v MOD* [2006] EWCA Civ 546). The Defendant's initial position was

that the Claimant was entitled to no award as he did not leave the Royal Marines because of his hearing loss, but I have rejected that submission. In the alternative the Defendant argued for an award in the region of £8-£10,000 and relied on the case of *Murphy v MoD* [2016] EWHC 0003 (QB).

230. In *Brown* the Claimant came from an army family but after only 8 weeks into service she was injured and was discharged after 18 months. The award made under this head was £10,000 which uplifted by RPI comes to £14,800. The case of *Murphy* resulted from an injury after approximately 4 years of service and then a discharge 3 years later therefore serving 7 years of the 22 year period. The award in this case, adjusted for RPI comes to £11,000.

231. I accept that the Claimant derived a lot of pleasure from his service and also note in particular his comment that it was an "*honour and privilege*" to represent the Naval Service. I also accept that he would have served the full 22 year term but at the time of his PVR he had 7 years of service remaining. In those circumstances, the award should come at a lower level than both *Murphy* and *Brown* and taking into account the effect of RPI and bearing in mind that this is not a mathematical exercise I award the Claimant £8,000.

Past loss of earnings

232. The Claimant's schedule identifies that rather than having lost earnings the Claimant has in fact done better than he would have done if he had remained in the Royal Marines by the sum of £24,133.33. The Claimant says that this should not be deducted from the remainder of the award as there is no right in principle to deduct one head of damage against another. The Defendant submits that this should be set off against any future loss of earnings. I was not referred to any articles or authorities on this point.

233. The general principle in compensation is that a Claimant should be placed in the position that he or she would have been in the absence of negligence. It is necessary to be fair to both the compensator and the compensated. There are circumstances where sums that a claimant receives as a consequence of the injury are not taken into account, for example, if there is a payment under an insurance policy. However, in this case, the majority of this claim for compensation arises out of a loss of earnings and loss of pension and it would not be just to the Defendant not to set off the additional income that the Claimant has obtained against any award for future earnings. Not setting off the sum referred to above would result in overcompensation of the Claimant. The sum of £24,133.33 shall be deducted from the future loss of earnings award.

Past loss of benefits

234. This is agreed at £7,662.36.

Miscellaneous past losses

235. The sum of £300 is claimed for travelling expenses and telephone, post and similar expenses. There is no evidence of these losses and I make no award under this head.

Future loss of benefits

236. The sum of £562.19 is agreed but a claim of £6,000 for Enhanced Learning Credits is not agreed. Mr Sephton, the Claimant's employment expert, at paragraph 8.6 states:

> "For the Claimant to secure Enhanced Learning Credits he would have needed to serve the 4 years to 12 February 2010 to be eligible to make 3 low threshold claims of £1,000 per year for 3 years. If he had served a further 4 years until 12 February 2014, he would have been eligible to make 3 high threshold claims currently set at £2,000 per annum. Provided length of service requirements have been met personnel may use Enhanced Learning Credits up to 10 years after leaving the service."

237. The Defendant's expert, Mr Craggs, at paragraph 3.12 of his report states:

> "[The Claimant] had enrolled into Enhanced Learning Credit (ELC) scheme but as he had served more than 8 years at the time of his discharge, he was eligible to claim the full amount of ELC's and in my opinion had suffered no loss of ELC due to injury. All service personnel are entitled to claim standard learning credits (SLC) of up to 80% of the cost of courses the personal development up to a maximum of £175 per year and [the Claimant] would have been entitled to this for the remainder of his service career no matter how long he served. However, in my experience less than 10% of service personnel claim this grant each year."

238. Mr Healy submitted on the basis of Mr Craggs' evidence that no award should be made. Mr Steinberg did not make any oral submissions on this point. I am not able to reconcile the difference between the 2 experts on this point and accordingly, I am not satisfied that the Claimant has proved this head of loss. The Claimant did during his evidence state that he had used some learning credits to fund some of his training to date but there is no evidence of how the Claimant might use any future learning credits. I make no award for Enhanced Learning Credits.

Future loss of pension

239. This has been agreed between the parties in the sum of £351,313.

Cost of hearing aids

240. This is been agreed between the parties at £54,919.

Conclusion

241. The Claimant left the Royal Marines after 15 years of service having sustained damage to his hearing by exposure to damaging noise. The parties have agreed that liability for those injuries should be split 80:20 in the Claimant's favour. I have concluded that the reason the Claimant left the Corps was due to the damage to his hearing and to prevent further damage. Accordingly, he is entitled to compensation for that damage, his loss

of earnings, pension and other losses caused as a result of his hearing loss. The sums awarded and agreed are set out in the table below:

General damages	£25,000
Loss of congenial employment	£8,000
Loss of earnings to date	-£24,133.30
Loss of benefits to date	£7,662.36
Miscellaneous past losses	0
Future loss of earnings	£257,518
Future loss of benefits	£562.19
Future loss of pension	£351,313
Future claim for hearing aids	£54,919

242. These figures will allow the parties to calculate the interest and the final total sum to be awarded (subject to the agreed 20% reduction) and prepare a draft order.

Neutral Citation Number: [2019] EWHC 1153 (QB)

Case No: HQ16X04384

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/05/2019

Before:

PETER MARQUAND
(sitting as a Deputy High Court Judge)

- -

Between:

ALISTAIR CRAIG INGLIS

Claimant

- and -

MINISTRY OF DEFENCE

Defendant

- -
- -

Harry Steinberg QC and Robert O'Leary (instructed by **Hugh James**) for the **Claimant**
Sam Healy (instructed by **Plexus Law**) for the **Defendant**

Hearing dates: Determined on the papers

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Peter Marquand:

1. Today, 8 May 2019, I have handed down the substantive Judgment in this case having determined that the Claimant left the Royal Marines due to damage to his hearing and to prevent further damage. The Defendant's case was that the Claimant left the Royal Marines to pursue a more lucrative career in maritime security. As part of the assessment of damages, I concluded that to assess the future loss of earnings of the Claimant the appropriate method was a multiplier/multiplicand approach and not a *Smith v Manchester* ((1974) 17 KIR 1) award. Furthermore, in assessing an appropriate multiplier I concluded, based on the evidence, that a reduction factor of 0.7 should be applied following my analysis of tables A – D in the Ogden Tables.

2. Having circulated the draft of the Judgment, the Defendant has applied for permission to appeal. Both parties have agreed for this to be determined on the papers and have provided written submissions.

3. Pursuant to the Civil Procedure Rules (CPR) 52.3(1)(a) the Defendant requires permission to appeal the Judgment and may obtain that permission from this court (CPR 52.3(2)(a)). The test for permission is set out in CPR 52.6 (rule 52.7 is not relevant) as follows:

> **"(1)** Except where rule 52.7 applies, permission to appeal may be given only where—"
>
> **(a)** the court considers that the appeal would have a real prospect of success; or
>
> **(b)** there is some other compelling reason for the appeal to be heard.

4. On behalf of the Defendant, Mr Healy, raises 3 grounds of appeal on the conclusion that the Claimant discharged the burden of proof on him and left the Royal Marines because of his hearing loss and they are as follows:

   i) The Court failed to take any account of the Claimant's own evidence that if it had not been for the offer of maritime security work the Claimant would have stayed within the Royal Marines;

   ii) The Court treated the fact that the Claimant had not looked for any other jobs other than in maritime security as an example of the Claimant's honesty rather than evidence relevant to the question of why the Claimant left the Royal Marines. That evidence suggesting the Claimant was not at the time of his departure particularly concerned by his noise exposure and its effect on his hearing; and

   iii) The Court erred in deciding that the Claimant's failure to mention any concerns about his hearing loss at an interview following his application for Premature Voluntary Release, did not undermine the Claimant's evidence that his principal reason for leaving the Royal Marines was his hearing loss.

5. Mr Healy also seeks to appeal the conclusions on the assessment of future loss of earnings on 2 grounds namely:

   i) The Court erred in concluding that a *Smith v Manchester* assessment should only be adopted if the uncertainties were such as to preclude a conventional multiplier/multiplicand approach. The correct approach was in accordance with *Billett v Ministry of Defence* [2005] EWCA Civ 773.

   ii) If the Court was correct to reject *Smith v Manchester*, it erred in choosing to apply a reduction factor of 0.7 and ought in light of conclusions at paragraph 215 of the Judgment to have taken a reduction factor much closer to that in Table A of the Ogden Tables, in accordance with *Billett*.

6. As to the issues identified at paragraph 4 above, they are all issues of fact and I will take them together. I accepted the Claimant's evidence, as can be seen at paragraph 80 through to 92 of the Judgment, having seen and assessed the factual witnesses and taken into account all of the evidence both for and against the Claimant's position. There is no real prospect of success in an appeal.

7. The conclusions on the appropriateness of a *Smith v Manchester* award are set out a paragraph 213 through to 218 of the Judgment. The analysis of the authorities is at paragraph 213 and the reference at paragraph 215 to a 'risk of handicap in the labour market' does not mandate an application of *Smith v Manchester*. It is clear from tables A – D in the Ogden Tables that individuals who are disabled are at risk of a handicap in the labour market. The question to be determined is whether or not there are many uncertainties such that only a broad-brush approach can be applied, in other words a *Smith v Manchester* assessment. However, as set out in the Judgment such a broad-brush judgement was not necessary. The modification of the reduction factor is a matter of discretion based upon the evidence and is analysed at paragraph 217 of the Judgment. There is no real prospect of success in an appeal on these issues.

8. The Defendant has not set out any arguments on whether or not there is some other compelling reason for an appeal to be heard. I conclude there is no such reason.

9. Accordingly, the Defendant's application for permission to appeal the Judgment is refused.