



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Anthony Muller

**Respondent:** London Ambulance Service NHS Trust

**Heard at:** Croydon

**On:** 16 May 2019

**Before:** Employment Judge Fowell

Ms E Thompson

Ms H Bharadia

**Representation:**

Claimant: Mr P Morgan, instructed by Truth Legal Limited

Respondent: Mr N Caidan, instructed by DAC Beachcroft LLP

## JUDGMENT ON REMEDY

1. The claimant is awarded compensation of £71,078.22.

## REASONS

### Background

1. This judgment follows a hearing on liability from 18 to 22 March 2019 in which it was established that Mr Muller was unfairly dismissed by London Ambulance Service NHS Trust and that the dismissal was an act of discrimination related to his disability. In short, he was dismissed on grounds of capability following a shoulder injury, and we found that the respondent ought to have delayed its decision to dismiss until he had recovered and redeployed him to a non-frontline role in the meantime.

2. At this hearing we heard evidence from Mr Dave Leonard, the respondent's head of Employee Relations, and from the claimant. There was also a further remedy bundle of about 250 pages. Mr Muller's evidence related to the emotional impact on him of his dismissal and his efforts to find alternative employment. Mr Leonard's evidence related to the availability of other work with London Ambulance Service and others, in support of the respondent's claimed that he had failed adequately to mitigate his loss. Having considered that evidence and the supporting arguments we make the following findings of fact.

### **Findings**

3. Some aspects were undisputed and Mr Muller set out in his witness statement further details of the events immediately following his dismissal. He emphasised his long service (17 years) and commitment to the ambulance service, and the consequent sense of loss he felt to be dismissed on capability grounds as a result of his shoulder injury. He described, and we accept, that after his dismissal he had only one follow-up call from the Trust. At some point he came back in to clear his locker and that was the end of his service. He had already been suffering from moderate to severe depression and in June 2017, shortly after the expiry of his notice period in May that year, he was referred by his GP for counselling because of the effect of the loss of his job on him. In fact, it is clear from his medical records that he first began to suffer from depression following the unfortunate death of his niece in 2005; this was not properly diagnosed until 2012 when he received some treatment and after an improvement he suffered a further setback in 2015. He therefore has long-standing mental health difficulties which were exacerbated by his dismissal.
4. He was given notice in February 2017 which expired in May. Surgery on his long-standing shoulder injury was booked in for July that year so at that stage he was simply awaiting treatment. He was fit for non-frontline duties at that time, and so as previously found, he could only have carried out duties in the respondent's clinical hub if they had waived the requirement for two days of frontline service per month. Since they were unwilling to assign him to that role or any other at any stage until the expiry of his notice period, there was no realistic possibility in our view of the respondent agreeing to appoint him to such a role in response to an external application, and it would be quite unrealistic to expect him to do so.
5. His statement went on to describe having suicidal thoughts about that time and we accept that his mental health was particularly affected for much of 2017. There was a period of convalescence following his operation and by November 2017 he was fit to return to frontline duties but his personal situation was difficult. He was living alone in London, the most obvious employer for a paramedic in London was the respondent and they had dispensed with his services.
6. Even before his dismissal he had been in receipt of employment support allowance (ESA) and from 1 May 2017 he began to receive industrial injuries disablement

benefit (IIB). That lasted until September 2018. In February 2018 he began work as bank staff with the private Hertfordshire Ambulance Service based in St Albans (Hearts). Mr Muller was simply not willing to return to the NHS given his feelings of rejection and humiliation following his dismissal. We consider that to be perfectly understandable given his length of service and commitment to his role. It is not usually argued that an employee has a duty to mitigate his loss by applying for re-employment with the same employer, even where the reason for the decision, as here, was medium-term physical capability which had been resolved.

7. Mr Leonard gave evidence that the position of paramedic was designated by the government as a national shortage category, so that employers are entitled to recruit staff from outside the EEA, and so many paramedics were recruited from Australia. He considered that there were many vacancies for those with Mr Muller's skills, but no evidence was
8. taken by the respondent to keep in touch with him, or to suggest that he reapplied when his shoulder had recovered, as one might expect from an organisation with such a shortage.
9. In about March 2018 Mr Muller put his flat on the market. His parents were living in Dorset and he decided that his best bet would be to leave London and move in with them, and then find work in the Dorset area. In the same month he began work as bank staff for another private ambulance service in the Dorset area, E-Zec Medical Transport (E-Zec). He continued to do shifts for Hearts until October that year and his flat sold in November. At the date of this hearing he is still living with his parents in Dorset but from 1 June 2019 he is due to take up a permanent role with E-Zec at £16.57 per hour for 39 hours per week.
10. His work with E-Zec was/is rather different in terms of its pay structure and duties from his former role with the respondent. It does not involve emergency cover. It largely involves the planned move of patients to and from hospital, such as from hospital to a care home. The hours are more predictable. Given the figures just set out, his salary on the basis of those full-time hours will be approximately £33,000 per annum whereas his former role was at approximately £43,000 per annum including allowances for working overtime and in a high cost area. The biggest difference in the reward structure however is the pension scheme: his new employment has a standard NEST scheme which is very much less generous than his NHS pension.
11. Nevertheless, we take the view that this is a compromise on his part which has some advantages for him. He is no longer living in a high cost area, he does not have the physical and psychological demands of emergency work, and given his ongoing mental health problems this more settled arrangement is much more manageable.
12. The main point at issue in this hearing is whether he has adequately mitigated his loss, and if not, at which point in time it should be said that he ought to have done

so. That is not an easy question to resolve. His mental health is an important component in that assessment. We take the view that:

- a. during his notice period there was no realistic possibility of obtaining any employment with the respondent;
  - b. from May to July 2017 he was unfit for frontline work as a paramedic, his intention was to try to return to work in that capacity at some stage, if not with the NHS, and given his mental health it was unrealistic to expect him to find some non-frontline alternative clinical role in that period;
  - c. after his operation there was a period of convalescence in which the same considerations applied;
  - d. by November 2017 or thereabouts he was physically able to return to a frontline role but he was still suffering from depression, was still in receipt of both benefits, and we remain of the view that it was unrealistic to expect him to seek work again with the London Ambulance Service;
  - e. his action taken to obtain alternative employment with Hearts in February 2018 and with E-Zec in March 2018 were reasonable and effective steps to mitigate his loss;
  - f. as his base changed from London to Dorset, the preponderance of his work switched from Hearts to E-Zec and by 1 August 2018 he was receiving a relatively steady net monthly income of about £1600; and
  - g. he has subsequently decided to continue in this role on a long-term basis, albeit on improved terms.
13. Mr Leonard described five non-frontline roles available between August and October 2017 within the Trust, and his suitability for each of them was disputed, but given our general view that his physical and mental health, and the circumstances of his dismissal, made any such appointment unrealistic, it is not necessary to consider each of them.
14. Mr Leonard also gave evidence that he would have been able to secure a role as a paramedic with the Trust from November 2017 onwards, and that between November and the following January they advertised for four paramedic roles. Again, that appears to us to have been asking too much of Mr Muller in the circumstances.
15. We note that in his claim form, Mr Muller sought reinstatement. Indeed, following the liability hearing the respondent has offered reinstatement in London. Each such Trust has a geographical area and so it is not in the gift of the respondent to offer reinstatement in the Dorset area. Mr Muller's solicitors responded in late March 2019 to the effect that he would be willing to take up such a post locally but not in

London. His own evidence was that he never agreed to accept reinstatement in his claim form and he was not consulted about the suggestion that he would do so in Dorset. We accept his evidence on that point and it may well be that those representing him felt that such statements were in his best interests, without checking in detail with him.

16. Our overall conclusion therefore is that Mr Muller has essentially now opted for a less demanding role, and that he was essentially undertaking that role from 1 August 2018. That therefore is the date by which we consider it reasonable for him to have mitigated his loss, i.e. the date beyond which it is not reasonable to expect any further compensation from the respondent. This has implications for his pension loss. We were directed to the new guidelines on pension calculations which indicate that a period of 18 months or more might make the assessment of pension loss more appropriate to the detailed or complex approach, starting with the overall value of the original pension fund with the NHS. For shorter periods, as here, a more simple approach is appropriate, involving an assessment of the loss of employer contributions during the relevant period. We therefore decided that that was the appropriate measure.
17. Some agreement had been reached between the parties on a number of issues including:
  - a. the basic award;
  - b. the levels are gross and net pay with the NHS;
  - c. the figure for loss of statutory rights of £500; and
  - d. that the award of damages for injury to feelings should fall within the middle 'Vento' band.

*Injury to Feelings*

18. Turning to the question of injury to feelings, we refer to a number of cases set out in Harvey's on Industrial Relations and Employment Law. Mr Caiden relies on the case of **O'Neill v Department for Social Development (Belfast)** Case No 1922/11) [2012] EqLR 990) which concerned an administrative officer in the Child support agency. She suffered from rheumatoid arthritis and there was a long-standing failure by the employer to make reasonable adjustments over about eight months. She was not however dismissed.
19. Mr Morgan relied instead on **Burke v Clinton cards & Walker (Abergele)** (Case number 2900622/2009) (24 September 2010, unreported), in which a female manager had breast cancer and suffered offhand and offensive treatment sufficient to amount to constructive dismissal; and **Peers v Victim Support Norfolk (Norwich)** (Case number 1502369/2007) (28 May 2009, unreported) in which a charity administrator was bullied and subjected to inappropriate disciplinary

proceedings over her absence – the respondent’s approach was characterised as complete intransigence – and then dismissed.

20. Without comparing the financial awards in each case, adjusted for inflation, none of these cases appears entirely apposite. Both **Peers** and **Burke** involved hostile or offensive acts by the employer, leading to dismissal, whereas there was no blame attached to Mr Muller. We did take the view in our judgment on liability that he was essentially fast-tracked to dismissal from an early stage and that little or no attention was paid to the possibility of redeployment, but there was no apparent ill feeling towards him. On the other hand, unlike in **O’Neill**, it did result in his dismissal.
21. Broadly speaking, Mr Caiden contended for a figure of £9000, and Mr Morgan put the figure in the £20,000-£25,000 range, although the previous schedule of loss had sought approximately £19,000. We felt that the position of Mr Muller was certainly nearer to those in the cases relied on by Mr Morgan, despite the absence of hostility, especially given the extent of the sense of loss felt by him on dismissal. As already noted, this was entirely understandable given his length of service and dedication. Mr Muller’s life was centred around his work. He lived alone and most of his social contacts were at work. To be suddenly cut off from all this and, as he saw it, discarded or treated as valueless, was a huge blow. In our view this placed him well within the middle Vento band, which of the time in question extended from £8400-£25,200. The middle point is therefore £16,800, and after some discussion we concluded that the figure of £17,000 was justified.
22. Most of the calculations were carried out at the hearing and announced in accordance with the figures set out in the accompanying annex to this judgment. One further feature was the decline in earnings which Mr Muller experienced before his dismissal. On this aspect, Mr Caiden submitted that he could only recover loss in consequence of the discrimination, which did not occur until his dismissal, but we take the view that the first act of discrimination was referring him to the capability process in September 2016.
23. The relevant figures were then largely undisputed. The claimant’s schedule of loss sets out a calculation £3,393.59, although this erroneously included £1000 which was deducted from Mr Muller’s salary following a previous overpayment, and so the relevant loss of wages was £2,393.59.
24. As to the pension loss, the relevant simplified approach was set out in the respondent’s schedule of loss, which involves identifying the employer deductions by reference to the page in question and percentage figure of 14.38.
25. We did not make an award for loss of death in-service benefits. This was a potential benefit available to Mr Muller had he remained in employment with the respondent. Had he incurred the cost of corresponding insurance cover this would have been a recoverable head of loss, but not otherwise.
26. The relevant figures, is broken down in the attached annex, are therefore as follows.

27. Compensation for unfair dismissal:

a. basic award of	£9,291
b. compensatory award of	<u>£34,780.05</u>
Total	£44,071.05

28. (The figure for the compensatory award comprises pension loss of £5,708.37)

29. The additional damages for discrimination includes:

a. injury to feelings (ITF) of	£17,000
b. interest on those damages	<u>£2,693.92</u>
c. total compensation for ITF	£19,693.92

30. In addition, interest on financial loss amounts to £2,759.53, bring the total additional award for discrimination to £22,453.45.

31. The compensation for unfair dismissal and discrimination therefore amounts to £66,524.50.

32. Finally, an additional amount has to be added to this total to gross it up for tax. Lack of time precluded detailed consideration of the tax treatment of damages for injury to feelings but the approach we took was that these damages were not liable to tax.

33. As part of this calculation it was also necessary to estimate the amount of other earnings which Mr Muller will receive during this financial year. On the basis that he is commencing employment on 1 June 2019 approximately £33,000 per year, and has received earnings at a lower level during April and May, an approximate figure of £30,000 was agreed.

34. On that basis the total has to be 'grossed up' by a further £4,553.72, bringing the total to **£71,078.22** and compensation is ordered in that amount.

35. Since the dismissal was an act of discrimination, and all benefits received have been discounted from this total, the Recoupment Provisions do not apply.

Employment Judge Fowell

Date 21 May 2019