IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Case Nos.: CAF/1647/2013
CAF/1681/2013

Before Upper Tribunal Judge Rowland

For the Appellants: Mr Glyn Tucker of the Royal British Legion

For the Secretary of State: Ms Galina Ward of counsel, instructed by the Government Legal Department

Decisions: The claimants' appeals are unsuccessful.

In the case on file CAF/1647/2013, the First-tier Tribunal's decision dated 29 October 2012 is set aside and there is substituted a decision that –

(a) insofar as the claimant's appeal to the First-tier Tribunal was against the decision of the Secretary of State not to make an award under the tariff, the appeal is dismissed;
(b) insofar, as the claimant's appeal to the First-tier Tribunal was against the decision not to make a temporary award, the appeal is struck out because the First-tier Tribunal did not have jurisdiction to consider it.

In the case on file CAF/1681/2013, the First-tier Tribunal's decision dated 28 August 2012 is set aside and there is substituted a decision that –

(a) insofar as the claimant's appeal to the First-tier Tribunal against the decision of the Secretary of State notified on 3 May 2012 was against the decision to revise the decision dated 30 June 2010 and make an award at level 12 under item 16A of Table 9, the appeal is dismissed;
(b) the appeal to the First-tier Tribunal against the decision of the Secretary of State notified on 30 June 2010 is therefore academic and is treated as having lapsed;
(c) insofar as the claimant's appeal to the First-tier Tribunal against the decision of the Secretary of State notified on 3 May 2012 was against the decision not to make a temporary award, the appeal is dismissed because the conditions for the making of a temporary award are not all satisfied.

REASONS FOR DECISIONS

1. These cases both raise questions about the First-tier Tribunal's power to make decisions in respect of temporary awards under the Armed Forces Compensation Scheme. Permission to appeal to the Upper Tribunal was granted in both cases by the late Judge Hugh Stubbs, President of the War Pensions and Armed Forces Compensation Chamber of the First-tier Tribunal, as long ago as 18

March 2013 "so that the Upper Tribunal can give guidance on the correct approach for the Tribunal to take when the Secretary of State refuses to make a temporary award under AFCS 2005". The cases were stayed by the Upper Tribunal on 29 October 2013 to await the decision of a Tribunal of Pensions Appeal Commissioners in Northern Ireland on a similar issue. That decision, *Secretary of State for Defence v FA (AFCS)* [2015] NICom 17, was handed down on 26 May 2015 and considered the approach to be taken by the Pensions Appeal Tribunal in Northern Ireland under the 2011 Scheme. None of the parties has invited me to consider afresh the issues determined in that case, but the parties have not agreed as to the relevance of that decision or, in one of the cases before me, the effect of following it. There was therefore an oral hearing before me.

The legislation

2. Section 1(2) of the Armed Forces (Pensions and Compensation) Act 2004 enables the Secretary of State to make schemes that provide for benefits to be payable to a person by reason of an injury which is attributable to service in the armed forces or the reserve forces. The Armed Forces and Reserve Forces (Compensation Scheme) Order 2005 (SI 2005/439) ("the 2005 Order") and the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 (SI 2011/517) ("the 2011 Order"), which replaced the earlier Order with effect from 9 May 2011, both provide for compensation to be calculated under a tariff in which the level of the award depends on which "descriptor" in the relevant schedule best describes the claimant's injury.

3. Both Orders also recognise that the tariff needs to be developed in the light of experience and so they make provision for cases where the tariff does not currently include a descriptor appropriately describing the particular injury sustained by the claimant. In such a case, a temporary award may be made and, if the tariff is subsequently amended, the award is then made permanent. Article 26 of the 2011 Order provides –

> "**26.**—(1) This article applies where the Secretary of State considers that—
>
> (a) a person has sustained an injury of a description for which no provision is made in the tariff in force on the date—
>
> (i) on which the claim for benefit was made; or
>
> (ii) of an application for a review under articles 55, 56, 57 or 59;
>
> (b) that the injury is sufficiently serious to warrant an award of injury benefit; and
>
> (c) that injury is listed in the International Statistical Classification of Diseases and Related Health Problems or in the Diagnostic and Statistical Manual of Mental Disorders.
>
> (2) The Secretary of State is to make a temporary award in respect of that person relating to the level of the tariff which the Secretary of State considers appropriate for that injury.
>
> (3) The amount of the lump sum payable under a temporary award is the amount which would have been payable had a descriptor been included in the tariff at the tariff level which the Secretary of State considers appropriate for the injury.
>
> (4) Where guaranteed income payment is payable under a temporary award, the amount payable is that which would have been payable had the descriptor been

included in the tariff at the tariff level which the Secretary of State considers appropriate for the injury.

(5) The making of a temporary award does not give rise to a right to—

(a) a reconsideration of the decision under article 53; or

(b) a review of the decision under article 55, 56 or 57.

(6) Except where paragraph (7) applies, if the Secretary of State—

(a) does, within the period of 1 year starting with the date on which the temporary award is given or sent to the claimant, amend this Order by including a descriptor which describes the injury and is at the same tariff level for which the temporary award is made—

(i) a decision is to be issued making a permanent award in favour of the claimant, which takes effect on the day on which the amending Order comes into force; and

(ii) guaranteed income payment is to continue to be paid in accordance with this Order; or

(b) does not within the period of 1 year so amend this Order—

(i) a decision is to be issued refusing to make a permanent award in favour of the claimant; and

(ii) guaranteed income payment ceases to be payable under the temporary award at the end of the period but no amount of benefit paid in accordance with that award is recoverable.

(7) This paragraph applies where, after the date of a claim or application for review (referred to in paragraph (1)(a)(ii)) but before the determination of that claim or application, the Secretary of State has amended this Order, by including a descriptor in the tariff which describes the injury at the tariff level which the Secretary of State considers appropriate for that injury.

(8) Where paragraph (7) applies the Secretary of State is to make a temporary award and immediately issue a decision making the temporary award permanent."

Article 20 of the 2005 Order was in similar terms and need not be set out in full because the differences are not material to these cases. It is sufficient to record that paragraph (1) of article 20 of the 2005 Order, as in force from 16 September 2008, provided –

"**20.**—(1) Where the Secretary of State considers that—

(a) a person has sustained an injury of a description for which no provision is made in the tariff in force on the date on which the claim for benefit was made; and

(b) that injury is sufficiently serious to warrant an award of injury benefit or of an additional multiple injury lump sum; and

(c) that injury is listed in the International Statistical Classification of Diseases and Related Health Problems or in the Diagnostic and Statistical Manual of Mental Disorders

he shall make a temporary award in respect of that person relating to the level of the tariff which he considers appropriate for that injury."

4. Both Orders make provision for the determination of questions arising under them by the Secretary of State and for the reconsideration of decisions and the review of decisions. Under article 45(1) of the 2005 Order and article 53(1) of the 2011 Order, there is a power to reconsider most decisions, provided the claimant makes a request within the time allowed, and, if an appeal is lodged against a decision without the decision having first been reconsidered, the Secretary of State

is required, under article 45(5) and article 53(5) or the respective Orders, to reconsider the decision before the appeal is heard. Article 53(7) of the 2011 Order precludes a further reconsideration of a decision made on reconsideration (save where the decision is to make a temporary award or interim award in which case a right to apply for reconsideration arises when the award is made final). Among the various types of review, article 49 of the 2005 Order and article 59 of the 2011 Order provide for a review on the ground of ignorance of, or a mistake as to, a material fact.

5. The transitional provisions in Part 12 of the 2011 Order broadly have the effect that outstanding decisions by the Secretary of State under the 2005 Order – i.e., where the Secretary of State was required to make a decision because a claimant has made a claim or an application for reconsideration or review (or had appealed without having previously applied for a reconsideration) before 9 May 2011 but the Secretary of State had not made a decision by that date – are to be made in accordance with the 2011 Order (see article 85) and any reconsideration or review under the 2011 Order of a decision made under the 2005 Order must also be determined in accordance with the 2011 Order (see article 86). These provisions are, however, subject to article 88, which permits certain provisions of the 2005 Order to be applied and certain provisions of the 2011 Order to be disapplied. As far as is material to these cases, articles 85 and 86 provide–

> "**85.**—(1) Where paragraph (2) applies, and subject to article 88, a claim, a reconsideration, or a review is to be determined in accordance with this Order.
>
> (2) This paragraph applies where before 9th May 2011—
>
> (a) a claim or application, under a provision of the AFCS 2005 specified in paragraph (3) was made, but a decision on that claim or application was not given or sent to the claimant before that date;
>
> (b) an appeal was made to an appropriate tribunal but the Secretary of State had not reconsidered the decision under appeal under article 45(5) of the AFCS 2005 before that date.
>
> (3) The claims and applications referred to in paragraph (2) are—
>
> (a) …;
>
> (b) …;
>
> (c) …;
>
> (d) an application for review under article 49(1).
>
> (4) In paragraph (2)(a) "a decision on that claim or application" means a decision under the following provisions of the AFCS 2005—
>
> (a) …;
>
> (b) …;
>
> (c) …; or
>
> (d) article 49(3).
>
> **86.**—(1) Where paragraph (2) applies, and subject to article 88, the Secretary of State is to determine a reconsideration or review in accordance with this Order.
>
> (2) This paragraph applies where on or after 9th May 2011 the Secretary of State reconsiders or reviews a decision made before 9th May 2011 in the circumstances specified in paragraph (3).
>
> (3) The circumstances referred to in paragraph (2) are—
>
> (a) …;
>
> (b) an appeal is made to an appropriate tribunal on or after 9th May 2011 and article 53(5) applies;

(c) the Secretary of State reviews a decision under article 58 or 59 (including a review under article 59 following an application by the claimant made on or after 9th May 2011);
(d) ….
(4) ….

6. The Orders do not themselves make provision for appeals. However, section 5A of the Pensions Appeal Tribunals Act 1943 provides for an appeal to an appropriate tribunal, which in England and Wales is the First-tier Tribunal and in Scotland and Northern Ireland is a Pensions Appeal Tribunal, against a "specified decision", which is a decision specified in Regulations.

7. For the purpose of section 5A of the 1943 Act, regulations 2 and 3 of the Pensions Appeal Tribunals (Armed Forces and Reserve Forces Compensation Scheme) (Rights of Appeal) Regulations 2005 (SI 2005/1029) ("the 2005 Regulations"), as amended by the Pensions Appeal Tribunals (Armed Forces and Reserve Forces Compensation Scheme) (Rights of Appeal) Amendment Regulations 2006 (SI 2006/2892), provided –

"**2.** In these Regulations—
"benefit" means a benefit payable under section 1(2) of the Armed Forces (Pensions and Compensation) Act 2004;
"specified decision" means a decision specified for the purposes of section 5A(2) of the Pensions Appeal Tribunals Act 1943;
…;
…; and
"temporary award" means a temporary award of benefit made pursuant to Article 20(1) of the Armed Forces and Reserve Forces (Compensation Scheme) Order 2005.

3.—(1) Subject to paragraph (2), a decision which determines—
(a) whether an award of benefit is payable,
(b) the amount payable under an award of benefit, or
(c) whether a permanent award is made.
is a specified decision.
(2) A decision which—
(a) …,
(b) …, or
(c) determines whether a temporary award should be made
is not a specified decision."

8. Those Regulations were revoked by regulation 4 of the Pensions Appeal Tribunals (Armed Forces and Reserve Forces Compensation Scheme) (Rights of Appeal) Regulations 2011 (SI 2011/1240) ("the 2011 Regulations"), which came into force on 9 May 2011, the same day as the 2011 Order. Regulations 2 to 4 of the 2011 Regulations provide –

"**2.** In these Regulations—
"2011 Order" means the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011;
"benefit" means a benefit payable under the 2011 Order.

> **3.**—(1) Subject to paragraph (2), the following decisions are specified for the purposes of section 5A(2) of the Pensions Appeal Tribunals Act 1943, that is a decision which—
>
> (a) determines whether a benefit is payable;
> (b) determines the amount payable under an award of benefit; and
> (c) is issued under article 26(6) (refusal to make a temporary award permanent etc.) or 26(8) (addition of new descriptor) of the 2011 Order, relating to the making of a permanent award.
>
> (2) The following decisions are not specified decisions, that is a decision which—
>
> (a) …;
> (b) …;
> (c) makes or arises from the making of a temporary award under article 26(2) of the 2011 Order;
> (d) …;
> (e) ….
>
> **4.** The following instruments are revoked—
>
> (a) The Pensions Appeal Tribunals (Armed Forces and Reserve Forces Compensation Scheme) (Rights of Appeal) Regulations 2005;
> (b) The Pensions Appeal Tribunals (Armed Forces and Reserve Forces Compensation Scheme) (Rights of Appeal) Amendment Regulations 2006."

Secretary of State for Defence v FA (AFCS) [2015] NICom 17

9. In this case, the Secretary of State had accepted that the claimant had suffered an injury caused by service but had notified the claimant on 10 February 2011 that he had decided not to make an award because the injury was not described in the tariff and he did not consider that it was sufficiently serious to warrant a temporary award. The claimant appealed to the appropriate tribunal, which in her case was the Pensions Appeal Tribunal for Northern Ireland, and on 19 April 2012 the Tribunal allowed her appeal and purported to make a temporary award at level 10. The Secretary of State appealed to the Pensions Appeal Commissioners (the Northern Ireland equivalent of the Upper Tribunal in this context) on the ground that the Tribunal had exceeded its jurisdiction in making a temporary award. A Tribunal of Commissioners (*i.e.*, three Commissioners sitting together) held that the Pensions Appeal Tribunal's jurisdiction had been governed by whichever of the 2005 Regulations and the 2011 Regulations applied. The Commissioners found that the claimant's appeal to the Pensions Appeal Tribunal had been made on 24 May 2011 and, for reasons that will be considered below, decided that the 2011 Regulations governed her appeal. They further held that, where those Regulations apply, the limited terms of regulation 3(2)(c) – which provides that a "specified decision" does not include any decision which "makes or arises from the making of a temporary award" – have the effect that a decision *not* to make a temporary award *is* a specified decision within the scope of regulation 3(1)(a). However, the Commissioners held that, because a claimant had no right of appeal against a decision to make a temporary award, an appropriate tribunal had no jurisdiction to make a temporary award on an appeal against a decision not to make such an award; it merely had jurisdiction to decide whether the conditions for

making a temporary award set out in article 26(1)(a), (b) and (c) of the 2011 Order were satisfied. Accordingly, while it allowed the Secretary of State's appeal, it also substituted for the Pension Appeal Tribunal's decision a decision to the effect that all the conditions of article 26(1) of the 2011 Order were satisfied in the claimant's case.

10. Judicial comity requires that a single judge of the Upper Tribunal should normally follow a decision of a Tribunal of Commissioners and, as I have said, the parties were content that I should follow *Secretary of State for Defence v FA (AFCS)* in these cases.

CAF/1647/2013 – the facts

11. In the first of the cases before me, the claimant enlisted in the Royal Marines on 14 May 2007, but he was unfortunately injured during his initial training and he was medically discharged on 18 June 2009 with the result that his case was automatically referred for consideration of his entitlement, if any, to an award under the 2005 Order. It was accepted that his injury, identified as "right hip pain", was caused by service and an administrator raised the question whether an award should be made at level 13 under item 20 in Table 9 of the tariff but referred the case for medical advice. The medical advisor considered that the injury did not fall within the descriptor for that item or for any other item under the tariff and referred the case for consideration of a temporary award. However, it was considered that the injury was not sufficiently serious to warrant a temporary award and the claimant was informed by letter dated 25 September 2009 that he was not entitled to any award. The claimant applied for reconsideration. A medical advisor suggested an award at level 14 under item 33 of Table 9 of the tariff ("low back or neck pain syndrome") as then in force, but the claimant was informed by letter dated 8 January 2010 that the original decision had been confirmed. However, it appears that a separate claim form was issued in respect of the condition "low back pain syndrome" and an award at level 14 was made in respect of that injury in about April 2012. Meanwhile, the claimant had appealed against the confirmation of the refusal to make an award in respect of his right hip pain, his appeal being received by the Secretary of State on 17 September 2010. No action appears to have been taken on the appeal for over a year. The claimant was then requested to provide up-to-date information about his condition. The appeal was eventually referred to the First-tier Tribunal in, or shortly after, April 2012, which was over 18 months after it had been lodged.

12. The appeal was heard by the First-tier Tribunal on 4 September 2012. It reserved its decision and gave full reasons in its decision dated 29 October 2012. It stated that its decision was "to allow the appeal against the decision made on 25 09 2009". In its reasoning, it said that it agreed with the Secretary of State that the injury identified as "right hip pain" was not within the tariff under the 2005 Order and it also noted that the descriptor at item 27 of Table 9 under the 2011 Order was also not satisfied because operative treatment had not been, and was not expected to be, required. On the understanding that the 2011 Regulations applied and having referred to a "decision" of the Upper Tribunal on file CAF/111/2011 and to "remarks of Upper Tribunal Judge Mesher" made in that case in relation to the 2005

Regulations and having refused to adjourn to allow the Secretary of State's representative to seek legal advice on the issue, the First-tier Tribunal then went on to consider the Secretary of State's refusal to make a temporary award. It found that his decision was flawed because he had failed to give any reasons and because he appeared to have failed to have regard to material medical evidence. It concluded enigmatically –

> "In the Tribunal's view it is now for the Secretary of State to reconsider the decision, although that issue is strictly not before the Tribunal on this appeal."

The Secretary of State did consider the case again but he maintained his decision not to make a temporary award.

CAF/1681/2013 – the facts

13. In the second of the cases before me, the claimant was injured playing football on 11 May 2006. At that time, he was a corporal in the Parachute Regiment and the game of football was a recognised service event. He made a claim under the 2005 Order that was received on 27 June 2007. It was accepted that his injury, a prolapsed disc, was predominantly caused by service and an award at level 14 under item 31 of Table 9 under the 2005 Order, as in force from 1 October 2007, ("Back sprain or strain, with one prolapsed disc or vertebral fracture, which has caused, or is expected to cause significant functional limitation and restriction at 13 weeks, from which the claimant has made, or is expected to make a substantial recovery within 2 years") was made and notified to him by letter dated 20 November 2007. However, he required further surgical intervention and submitted a further claim, which was received on 18 June 2008. That was rejected, because a claim had already been made in respect of the back injury, and an appeal lodged on 18 July 2008 against the decision notified on 20 November 2007 was rejected as being out of time. However, the claimant was treated as having applied for a review under article 48 of the 2005 Order. He was medically discharged on 18 November 2009, which appears to have triggered another review process under article 47. In any event, on 23 December 2009, he was notified that the award notified on 20 November 2007 had been revised and there had been substituted an award at level 13 under item 24 of Table 9 of the version in force from 15 December 2008 ("Traumatic back injury with one or more intervertebral disc prolapses or vertebral body or facet joint fractures which has caused or is expected to cause, significant functional limitation and restriction beyond 13 weeks"). On 5 January 2010, he applied for reconsideration. This resulted in an additional award at level 14, under item 33 of Table 9 ("low back pain syndrome"), which was notified to him by letter dated 31 March 2010. An application for a further reconsideration was unsuccessful on 30 June 2010 and so he appealed to the First-tier Tribunal by a letter received by the Secretary of State on 15 July 2010.

14. On three occasions during 2011, the claimant provided further up-to-date medical information but no action was taken on his appeal until April 2012 when advice was obtained on the new information in the light of the current version of the tariff. In a decision notified on 3 May 2012, an award was made at level 12, under

item 16A of Table 9 of the tariff under the 2011 Order ("Traumatic back injury with one or more intervertebral disc prolapses or vertebral body or facet joint fractures which has required, or is expected to require, operative treatment and which has caused, or is expected to cause, significant functional limitation or restriction beyond 13 weeks"). On 25 May 2012, the claimant submitted further evidence in respect of his "on going appeal". Whether he expressed any other dissatisfaction with the decision notified on 3 May 2012 is not clear but the case was then promptly referred to the First-tier Tribunal as an appeal against both that decision and the decision of 30 June 2010. The case was heard on 29 August 2012.

15. The First-tier Tribunal's decision notice recorded that –

> "The tribunal allowed the appeal, to the extent that the decision is sent back to the Secretary of State with a recommendation that a temporary award should be made using the same wording as Table 9, Item 16A, save that the last phrase is amended to read 'or is expected to cause permanent significant functional limitation, or restriction'."

The reasoning was brief but clear –

> "There is no dispute that the appellant suffered his injury in 2006. The Tribunal accepts the findings of the medical board dated August 2011 which records that the appellant continued to suffer a very limited range of movements of his lumbar spine. He was tender in the lumbar region and movement aggravated his pain. The Tribunal is satisfied that the appellant had significant functional limitation in late 2011 which, some five years after injury, should be considered permanent.
>
> The tribunal noted that there is no current descriptor for a one level spinal injury with no neurological signs but which is beyond 13 weeks and permanent.
>
> The Tribunal considers that the current awards do not adequately and appropriately reflect the appellant's continued conditions.
>
> The Tribunal therefore strongly recommends the temporary award as stated at paragraph 3 [which effectively reproduced what was in the decision notice] which would be at a tariff level above level 12."

16. The Secretary of State subsequently decided not to make a temporary award, partly because he considered that it was too early to regard the claimant's condition as settled (because the claimant was still awaiting yet further surgery) and partly because, even if the claimant's condition was permanent, he did not agree that the claimant's injury did not fall within the scope of the descriptor.

The jurisdiction of the First-tier Tribunal

17. The original grounds of appeal in both these cases alleged that the First-tier Tribunal had erred in law in making a final decision incorporating a recommendation that there be a temporary award, rather than either adjourning the case to await the Secretary of State's decision or itself making a temporary award. However, in light

of the Northern Ireland Commissioners' decision, it is now accepted by the claimants that the First-tier Tribunal did not have jurisdiction to make a temporary award. Instead, it is argued that, as in that case, the scope of the First-tier Tribunal's jurisdiction in each of these cases is governed by the 2011 Regulations so that it had jurisdiction to consider whether the conditions for making a temporary award were satisfied. In neither case had a decision been made in those terms. The Secretary of State, on the other hand, submits that the First-tier Tribunal's jurisdiction in each of these cases was governed by the 2005 Regulations under which the First-tier Tribunal had no jurisdiction in respect of temporary awards.

18. It is common ground that, if the 2005 Regulations apply, the First-tier Tribunal had no jurisdiction at all in relation to temporary awards. I agree. The observations of Judge Mesher in the case on file CAF/111/2011, to which the First-tier Tribunal referred in the first case before me, were made, without him having heard argument, when he directed an oral hearing of the claimant's application for permission to appeal (which was subsequently refused). It seems quite possible that, in making the observations, he overlooked the 2006 amendment that added regulation 3(2)(c). He did not mention the amendment and regulation 3(2)(c) of the 2005 Regulations, as amended, could hardly have been clearer.

19. The claimants argue that the 2011 Regulations apply because their appeals were heard after the 2011 Regulations had come into effect. It is argued that the Northern Ireland Commissioners decided the case before them on the basis that, having found that the tariff made no provision for the injury, the appropriate tribunal then had jurisdiction under the Regulations in force at the time of its decision to consider whether the conditions for making a temporary award were satisfied. They submit that the Commissioners could not have made their decision on the basis that the appeal to the Pensions Appeal Tribunal had been brought against a decision not to make a temporary award because the Secretary of State's decision in that case had been made before 9 May 2011, although it is acknowledged that the Commissioners felt it necessary to say that "the decision under appeal in the instant case may be classified as including a decision not to make a temporary award" (see paragraph 35). The Secretary of State, on the other hand, argues simply that the appeals in both the present cases were brought before 9 May 2011 against decisions made before that date and so they can only have been governed by the 2005 Regulations. He emphasises the importance that the Commissioners apparently attached to the appeal before them having been brought after 9 May 2011.

20. Perhaps because both parties in the Northern Ireland case had agreed that the 2011 Regulations had governed the Pensions Appeal Tribunal's jurisdiction, the Commissioners' reasoning on this issue is in my respectful view not as clear as it might have been and it is not surprising that the parties before me have drawn different conclusions from the Commissioners' decision. Nonetheless, it is possible to provide a satisfactory rationale for their decision on this issue that can form a basis for deciding the cases before me.

21. As the Commissioners held, a tribunal has jurisdiction to determine only those matters in respect of which legislation confers a right of appeal or otherwise provides

for a matter to be referred to the tribunal. Despite their titles, neither the 2005 Regulations nor the 2011 Regulations directly provide rights of appeal. What they do is specify decisions so as to make effective in those cases the right of appeal conferred by section 5A of the 1943 Act.

22. The 2011 Regulations were plainly drafted in the knowledge that the transitional provisions in Part 12 of the 2011 Order would have the effect that any decisions under the 2005 Order outstanding on 9 May 2011 were to be made under the 2011 Order and so the question whether those decisions were "specified decisions" carrying a right of appeal would be determined under regulation 3 of the 2011 Regulations. That is why regulations 2 and 3 of the 2011 Regulations are drafted with only the 2011 Order in mind while at the same time regulation 4 revokes the 2005 Regulations with immediate effect and no saving provision. The 2011 Regulations therefore confer a jurisdiction on an appropriate tribunal only insofar as they specify from 9 May 2011 the decisions that carry a right of appeal and, due to the effect of the transitional provisions in the 2011 Order, all decisions made after that date are made in accordance with that Order. The overall effect is therefore that the 2005 Regulations determine whether decisions made before 9 May 2011 in accordance with the 2005 Order are "specified decisions" and the 2011 Regulations determine whether decisions made from 9 May 2011 in accordance with the 2011 Order are "specified decisions". The 2011 Regulations contain no transitional provision that has the effect of conferring any additional jurisdiction in respect of appeals brought against earlier decisions that were not specified when they were made. Thus, as one might expect, the appropriate tribunal must consider the case under the same Order as the Secretary of State did when making the decision being challenged.

23. The claimants are right to point out that the Commissioners' decision is expressed in terms that indicate an understanding that the decision under appeal to the Pensions Appeal Tribunal was that notified on 10 February 2011. At first sight, it appears to follow that, when stating that "the decision under appeal in the instant case may be classified as including a decision not to make a temporary award", it was that decision of 10 February 2011 that they had in mind. However, such a decision was clearly not a specified decision under the 2005 Regulations that were then still in force. (I observe that the Commissioners also said (in paragraph 36) that, "[i]n correspondence dated 10 February 2011, the respondent was informed that she was not entitled to an award of compensation or benefit under the AFCS 2011", which seems improbable because the 2011 Order had not even been laid before Parliament on that date.)

24. The Secretary of State is equally correct to point out that the Commissioners apparently regarded the fact that the claimant's appeal had been brought after 9 May 2011 as having been important (see paragraphs 14 and 17).

25. On the other hand, the Commissioners clearly considered it to be significant (see paragraphs 15 and 16) that, not only was the appeal in that case received by the Pensions Appeal Tribunal after 9 May 2011, but also there had not previously been an application for reconsideration so that article 53(5) of the 2011 Order applied and the case fell within the scope of article 86(3)(b). The effect of those two

provisions was that the Secretary of State was required to reconsider the decision being challenged before the appeal was heard and to do so in accordance with the 2011 Order. The Commissioners recorded that the reconsideration decision had in fact been notified on 15 February 2012.

26. The Commissioners' emphasis on the date on which the appeal was received by the Pensions Appeal Tribunal is, in my judgment, understandable because it was due to the appeal being received on 24 May 2011 that article 86(3)(b) applied. However, if the appeal had been received before 9 May 2011 without there having been a previous reconsideration and the reconsideration required under article 45(5) of the 2005 Order had not taken place by that date, the case would have fallen within the scope of article 85(2)(b) of the 2011 Order and article 85(1) would therefore have had the effect that the reconsideration was to be considered under the 2011 Order. Thus, although the date on which the appeal was received was important for determining which of articles 85 and 86 applied in circumstances where the reconsideration decision had been made on or after 9 May 2011, it was ultimately irrelevant to the question whether or not the decision being challenged was made under the 2005 Order or the 2011 Order. That question turned solely on whether or not the decision being challenged was made before 9 May 2011.

27. Therefore, in the light of the importance that the Commissioners attached to article 86(3)(b), I am satisfied that they must be taken to have made their decision on the basis that the claimant was to be treated as having appealed against the reconsideration decision of 15 February 2012 (which had effectively replaced the decision of 10 February 2011) and that the decision of 15 February 2012, which was made under the 2011 Order, could be treated as having included a decision not to make a temporary award. That, in my judgment, provides the best explanation for their decision that the 2011 Regulations applied so that the Pensions Appeal Tribunal had had jurisdiction to consider whether the condition set out article 26(1)(b) of the 2011 Order was satisfied in the claimant's case.

CAF/1647/2013 – jurisdiction

28. On this approach, the First-tier Tribunal deciding the first of the cases before me had no jurisdiction to consider the claimant's appeal insofar as it related to the Secretary of State's refusal to make a temporary award. The decision under appeal was made on 8 January 2010 – not 25 September 2009 as the First-tier Tribunal said, because, where a decision is maintained on reconsideration, any subsequent appeal is to be brought against the reconsideration decision rather than the original decision (in respect of which the time for appealing might have expired) – and there was no subsequent reconsideration or review. Insofar as it was a decision not to make a temporary award it was not a specified decision when it was made and was not retrospectively made one when the 2011 Regulations came into force.

29. I have considered whether it is relevant that a decision was later made under the 2011 Order in respect of the claimant's back pain, which he had in fact mentioned as part of his condition before the first decision in 2009. In my view it is not. The scheme permits more than one award to be made where separate injuries

can be identified and so it was perfectly appropriate for the back pain to be taken into account separately in the way that it was and for the injury causing the hip pain to be considered to be outside the tariff. Although they may have been closely linked in medical terms and could have been dealt with at the same time, separate decisions in respect of each injury were necessary.

30. I did not hear argument on the original ground of appeal – whether the First-tier Tribunal should give a final decision when merely making a recommendation that a temporary award be made – and the issue has become academic in these proceedings because the Secretary of State has already considered whether he should make a temporary award following the First-tier Tribunal's decision and I was not invited to make any further recommendation. However, the concern may have been that the Secretary of State might not have the power to reconsider the refusal to make a temporary award unless the appeal before the First-tier Tribunal remained live. Whether the Secretary of State has such a power depends partly on whether the making of a temporary award is a decision within the main structure of decision-making, reconsideration and reviews, or whether it is a form of decision-making that takes place alongside, but outside, that framework. As originally drafted, the 2005 Order was silent on this issue but both article 20 and article 45 were amended in 2006 (by the Armed Forces and Reserve Forces (Compensation Scheme) (Amendment) Order 2006 (S.I. 2006/1438)) and article 53 of the 2011 Order adds further refinement. I am not sure that these amendments have made matters a great deal clearer.

31. Before the 2006 amendments, I would have been inclined to take the view that any decision under article 20 of the 2005 Order fell outside the scheme of adjudication under Part VII of the Order and that the Secretary of State could consider whether to make a temporary award in a particular case as often as, and whenever, he saw fit (although decisions would normally be made when awards were refused on the ground that an injury did not fall within the tariff). The amendment to article 45 in 2006 expressly provided that a claimant had no right to apply for a reconsideration of "a decision, under article 20(1), to make a temporary award". On a literal interpretation, it therefore allowed an application for reconsideration of a decision *not* to make a temporary award.

32. Nonetheless, the inserted words can alternatively be read as referring to any decision whether to make a temporary award (see the approach taken by Rix and Dyson LJJ in *Wood v Secretary of State for Work and Pensions* [2003] EWCA Civ 53 (reported as R(DLA) 1/03) to a similar drafting issue, albeit in a different statutory scheme), thus preserving the position as it had been (perhaps in an unsuccessful attempt to introduce clarity). Such an alternative reading would be consistent with the contemporaneous amendment to the 2005 Regulations that had the effect of excluding any right of appeal against decisions whether or not to make temporary awards and would not have had the effect of precluding consideration of a temporary award at any time. One advantage of that reading would be that otherwise the Secretary of State's practice of considering afresh whether to make temporary awards in the light of recommendations of the First-tier Tribunal would presumably have been unlawful except where there were grounds for a review or the claimant had taken some action that could be construed as an application for reconsideration

within the permitted period of three months from the date of the decision challenged in the appeal. I do not consider that keeping the claimant's appeal live by not making a final decision could have made any difference because the First-tier Tribunal had no jurisdiction in respect of temporary awards. Because there was no right of appeal against a decision whether to make a temporary award, there could not even have been any duty under article 45(5) to reconsider such a decision while an appeal was pending.

33. However, I incline to the view that a different construction is now required for the almost identical provision in article 53(2)(a) of the 2011 Order. The implication of article 53(7) seems to be that, while a decision to make a temporary award is not subject to reconsideration, a decision *not* to make a temporary award *may* be reconsidered. Otherwise, how can a decision on reconsideration be to make a temporary award, as is contemplated by article 53(7)(a)? Perhaps more importantly, this construction is arguably required for consistency with the Northern Irish Commissioners' decision to the effect that there is a right of appeal in relation to a decision *not* to make a temporary award even if it is only to the extent of deciding whether the conditions for making such an award are satisfied.

34. It is unnecessary for me to reach any firm conclusion on this issue and I mention it only to draw attention to the fact that the potential ambiguity in the 2011 legislation arises in the 2011 Order as well as in the 2011 Regulations. I am not entirely sure that it was intended, or always intended, that there should be the distinction between decisions to make temporary awards and decisions not to make such awards that the literal approach to the current drafting taken by the Northern Ireland Commissioners in the context of the 2011 Order implies.

35. What, however, *is* clear is that the First-tier Tribunal in this case erred in its understanding that the 2011 Regulations applied. The decision under appeal had been made while the 2005 Regulations were in force and therefore the First-tier Tribunal had no jurisdiction in relation to the Secretary of State's decision not to make a temporary award under the 2005 Order.

CAF/1647/2013 – conclusion

36. The First-tier Tribunal erred in "allowing" the claimant's appeal on the ground that the Secretary of State had failed to give adequate reasons for his decision not to make a temporary award. It had no jurisdiction to consider that issue. However, the claimant's appeal to the Upper Tribunal is unsuccessful, because I substitute for the First-tier Tribunal's decision the decision it should have given. There is no challenge to the First-tier Tribunal's decision that the claimant's right hip pain was not described in the tariff under the 2005 Regulations. Therefore, insofar as the claimant's appeal was against the decision not to make an award under the tariff, the First-tier Tribunal ought to have dismissed the appeal. Insofar, as the claimant's appeal was against the decision not to make a temporary award, the First-tier Tribunal had no jurisdiction and was therefore required to strike the appeal out under rule 8(2) of the Tribunal Procedure (First-tier Tribunal) (War Pensions and Armed Forces Compensation Chamber) Rules 2008 (SI 2008/2686) ("the 2008 Rules").

CAF/1681/2013 – jurisdiction

37. The second of the cases before me is very similar to the Northern Ireland case in that, after the appeal had been lodged, a decision in respect of the same injury was made under the 2011 Order. In this case, the decision was not made on reconsideration under article 53 of the 2011 Order but on review under article 59 (see doc 10). Consideration of the tariff under the 2011 Order on that review was required, subject to article 88, because the case fell within or article 86(3)(c). (It appears that the Secretary of State reviewed the decision under appeal on his own initiative but, had he done so because the claimant had made an application for review before 9 May 2011, article 85(3)(d) would equally have had the effect of requiring him, subject to article 88, to make his decision under the 2011 Order.) Because the review resulted in a revision, it brought rule 22(1)(a) of the 2008 Rules, as amended, into play with the result that the claimant's appeal was required to "proceed … as if it had been brought in relation to the revised decision".

38. I do not accept either of the Secretary of State's arguments to the contrary. First, it is argued that the review did not revisit the question whether a temporary award should be made. However, the Northern Ireland Commissioners' decision clearly suggests that any decision to refuse an award under the tariff should be taken to include a decision not to make a temporary award, if no temporary award has been made and the claimant raises that issue on the appeal (see paragraphs 35 and 46). Not adopting such an approach would be liable to cause a great deal of complication and therefore potential unfairness to unrepresented claimants. Secondly it is argued that to apply rule 22 would amount to the Rules conferring jurisdiction, which they cannot do. However, the rule is purely procedural where, as Ms Ward conceded was the case here and as is nearly always the case, the revision of a specified decision is itself a specified decision. Section 5A of the 1943 Act confers the jurisdiction. Anyway, even if that rule did not apply, the claimant should be treated as having appealed to the First-tier Tribunal against the review decision, as was done in the Northern Ireland case where there was no equivalent of rule 22, both because in reality that last decision was the decision being challenged and also because, in the present case, the Secretary of State had expressly referred the appeal to the First-tier Tribunal as an appeal against the review decision (see doc 11) and the claimant can hardly be expected to have brought a separate appeal against that decision in those circumstances. (In fact, the Secretary of State had clearly had rule 22 in mind when referring the case to the Upper Tribunal (see the wording of docs 133 and 135). I also consider that the Secretary of State was right to refer the case to the First-tier Tribunal as an appeal against both the decision of 30 June 2010 and the decision of 3 May 2012, because although, if correctly made, the latter decision replaced the former, the claimant might have needed to challenge the former decision separately before the First-tier Tribunal were the First-tier Tribunal to decide that the latter decision was not correctly made, particularly as it was a review rather than a reconsideration.)

39. Accordingly, in this case, I am satisfied that, in the light of the Northern Ireland Commissioners' decision, the First-tier Tribunal was entitled to consider in

the context of the appeal against the decision of 3 May 2012 whether the conditions for the making of a temporary award under article 26 of the 2011 Order were satisfied.

CAF/1681/2013 – the construction of the tariff

40. It appears to have been common ground that the second and third conditions of article 26(1) of the 2011 Order were satisfied in this case and it was the first condition – whether the claimant had "sustained an injury of a description for which no provision is made in the tariff in force on the [material] date" – that was, and is, in dispute. This potentially raises both legal issues and medical issues: legal issues because it involves the construction of the tariff in Part 1 of Schedule 3 to the Order and medical issues because it involves identifying the injury sustained by the claimant and considering whether it corresponds to an injury described in the tariff as properly construed. For this reason, it is at first sight a question particularly suitable for resolution by an appropriate tribunal, comprised of a lawyer, a medical practitioner and a service member.

41. It is worth emphasising, however, that the changes to the appropriate tribunal's powers in relation to temporary awards that have resulted from the 2011 Regulations as construed by the Northern Ireland Commissioners, require it to take a rigorous approach to an appeal against a refusal to make such an award. No longer is an appropriate tribunal confined to making a mere recommendation that can properly be rejected by the Secretary of State. Instead, if satisfied that all of the conditions for making a temporary award are satisfied, it must make findings to that effect that are presumably binding on the Secretary of State and may well, unless he appeals, have the effect of imposing on him a public law duty, enforceable through judicial review proceedings in the courts, to make a temporary award. Although an appeal lies only on a point of law, the Upper Tribunal or the Commissioners can correct any error of the appropriate tribunal on legal issues and, given the close relationship of the legal and medical issues, the Upper Tribunal and the Commissioners are likely to require particularly clear reasoning on the medical issues. In these circumstances, it behoves the appropriate tribunal, if minded to find that the conditions for making a temporary award are satisfied, to provide the Secretary of State with a proper opportunity to respond to the point, which may well require an adjournment for his representative to obtain medical policy advice in the light of any relevant reports of the Independent Medical Expert Group.

42. Here, the Secretary of State had found that the claimant's injury was described by item 16A of Table 9. The First-tier Tribunal considered that to be wrong and it went on to state that none of the descriptors was satisfied. If the First-tier Tribunal's reasoning was sound, it should – assuming for the purposes of this case that the relevant version of the tariff for the purposes of article 26(1)(a) would have been the same version as that taken into account by the Secretary of State on his review, although the point is not entirely clear on the facts of this case – have found that the conditions for making a temporary award were satisfied. However, the Secretary of State submits that the reasoning was legally flawed. I agree.

43. The First-tier Tribunal's only reason for finding that the claimant had sustained an injury of a description for which no provision was made in the tariff was that "there is no current descriptor for a one level spinal injury with no neurological signs but which is beyond 13 weeks and permanent". However, the concluding words of the descriptor that had been found satisfied – "which has caused, or is expected to cause, significant functional limitation or restriction beyond 13 weeks – were apt to include significant functional limitation or restriction that was permanent.

44. Certainly such permanent limitation or restriction falls within a literal interpretation of that descriptor. The Secretary of State also explains that the word "permanent" was deliberately omitted from the descriptor because "best practice is always reluctant to regard back pain as permanent as it usually comes and goes". Be that as it may, it is not necessarily irrational to have a descriptor that has the effect that the same descriptor applies whether significant functional limitation or restriction lasts for 14 weeks or is permanent. A substantial part of the compensation may be in respect of severe, short-term, discomfort and loss of function following the initial injury or, perhaps more relevantly in the present context, the view may be taken that most people who suffer from significant functional limitation or restriction for 14 weeks are likely to have a continuing, albeit perhaps intermittent, problem for an indefinite period. I also accept Ms Ward's point that any tariff scheme is bound to lack precision to a greater or lesser extent. Ease of administration is a legitimate consideration to weigh against the desirability of recognising the relative severity of the disablement of individual claimants, although the lack of precision may be regarded by some as a weakness of tariff schemes.

45. Moreover, a literal construction of item 16A fits perfectly well with other descriptors in Table 9. Thus, where it is intended that a descriptor refer to significant functional limitation or restriction at 13 weeks that is *not* permanent, that is made clear – e.g., item 29 ("significant functional limitation or restriction at 13 weeks, from which the claimant has made, or is expected to make, a substantial recovery within 26 weeks"). It is also clear that the fact that significant functional limitation or restriction may be permanent does not necessarily require an award at more than level 12, because "permanent significant functional limitation or restriction" resulting from a ligament injury falling within item 13 attracts an award at that level. The First-tier Tribunal appears to have had in mind the then recently-added item 2A, which now, as further amended to correct a minor drafting error, describes "traumatic back injury resulting in vertebral or intervertebral disc damage and medically verified neurological signs, which has required, or is expected to require, operative treatment and which is expected to result in permanent significant functional limitation or restriction". However, as it noted, that involves a finding of neurological signs which may have a bearing both on the reliability of a prognosis of permanent significant functional limitation or restriction and on the level of disablement. This is therefore not a case where there is clearly a gap in the Table as there would be if, for instance, provision were made for a person suffering significant functional limitation or restriction for no more than 13 weeks but made no provision for people who suffered such limitation or restriction for more than 13 weeks. Accordingly, as a mere matter of statutory construction, there seems no reason to depart from the literal meaning of the descriptor for item 16A. I am

satisfied that that meaning was intended and that the descriptor is to be construed literally.

46. I would, however, not entirely rule out the possibility that, although an injury falls within the literal description of a descriptor, that descriptor leads to an award that is so plainly inadequate having regard to awards in respect of injuries giving rise to disablement comparable to the claimant's disablement that it can be properly said that "no provision is made in the tariff" in respect of the injury, or part of the injury, sustained by the claimant. There is a reference to article 26 in article 16(1) of the 2011 Order, which provides –

> "**16.**—(1) Subject to articles 25 and 26—
> (a) benefit for injury is payable only in respect of an injury for which there is a descriptor;
> (b) where an injury may be described by more than one descriptor, the descriptor is that which best describes the injury and its effects for which benefit has been claimed; and
> (c) more than one injury may be described by one descriptor."

It seems undesirable that the Secretary of State should not have the power to make a temporary award if he is satisfied that he cannot make an adequate award, albeit that he could make an inadequate one, and article 16(1)(b) clearly anticipates the possibility of a claimant falling within the literal scope of more than one descriptor in the tariff.

47. However, even if that is so, it seems to me that, if the claimant's injury falls within the literal scope of a descriptor, an appropriate tribunal is not entitled to find that "no provision is made in the tariff" unless it can be said that the claimant's injury is only partially described by the descriptor. The Northern Ireland Commissioners considered (at paragraph 39) that it would be inappropriate for a tribunal to fix the level of a temporary award because to do so could "involve detailed comparative assessments of the types of injuries which appear in the Tables and is not a task for which a tribunal is well suited" and that was one reason why it considered that, although a Pensions Appeal Tribunal had jurisdiction to consider an appeal against a decision not to make a temporary award, its powers on such an appeal were limited by comparison with those of the Secretary of State. Consistency with the Commissioners' decision requires an appropriate tribunal to accept that provision *is* made in the tariff where, applying normal canons of construction or in the light of admissible extra-statutory material, it is evident that it was intended that a descriptor, within the literal scope of which the claimant's injury falls, was intended fully to cover a case such as the claimant's.

48. In this case, the only reason given by the First-tier Tribunal for concluding that the award at level 12 did not "adequately and appropriately reflect the appellant's continued conditions" appears to be that it expected there to be a separate descriptor in respect of "permanent significant functional limitation or restriction". It may have considered that the claimant was being under-compensated by comparison with some other claimants, but nothing in its decision suggests that, had the descriptor been drafted so as more clearly to have included the case of a person

who was suffering from significant limitation or restriction that was permanent, it would have considered that an award at level 12 was so inadequate that it could properly be said that the claimant's condition was not fully described by the descriptor for item 16A and that therefore "no provision is made in the tariff". Nor has Mr Tucker advanced any argument to that effect or to the effect that it could not have been intended that a claimant in the present claimant's position should receive an award at level 12, although he did submit that the case should be remitted to the First-tier Tribunal. I do not consider that the present case raises a medical issue that requires remission.

49. At the time of the Secretary of State's decision on 3 May 2012, the claimant was plainly still suffering from significant back problems as a result of his prolapsed disc and his letter of appeal to the First-tier Tribunal mentioned that he was receiving employment and support allowance and "the highest level of disability allowance". In an earlier letter, he had commented that he had lost earnings but was not entitled to a guaranteed income payment under the 2005 Order because he was not entitled to an award under the tariff at level 11 or above. It is unfortunate that the imprecision of the tariff scheme can have the effect that a person receiving an award at level 12 who is more disabled than most people suffering from the same injury may not be entitled to a guaranteed income payment when an equally disabled person who happens to qualify for an award at level 11 does. However, even if that were the position in the present case, that would be a consequence of the structure of the system and it would not justify a finding that no provision is made in the tariff for the claimant's injury. This is not a case where there is an obvious gap in the tariff and, while there may be an argument for adding a descriptor for those with back problems that have caused significant limitation or restriction for many years without there being neurological signs, I do not consider it to be arguable that it is irrational not to have done so. The claimant falls squarely within the terms of item 16A of Table 9 and it has not been suggested that his injury is not fully described by the descriptor as properly construed. In these circumstances, I am satisfied that the First-tier Tribunal was not entitled to find that "no provision is made in the tariff" for the injury sustained by the claimant, even if the Secretary of State might have been entitled to do so.

CAF/1681/2013 – conclusion

50. Accordingly, the First-tier Tribunal's decision is wrong in law because it misconstrued the legislation and I am satisfied that it ought, first, to have confirmed the decision of the Secretary of State notified on 3 May 2012 to make an award at level 12 under item 16A of Table 9, secondly, to have found that the appeal against the decision dated 30 June 2010 had therefore become academic and could be treated as having lapsed and, thirdly, to have found that the conditions for the making of a temporary award were not all satisfied. In these circumstances, its decision should be set aside, but I can substitute the decision it should have given. The claimant's appeal is therefore unsuccessful.

Mark Rowland
18 May 2016