

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. CAF/634/2016

Before Judge S M Lane

DECISION

1. The decision of the tribunal heard on 19 November 2015 under reference AFCS/00417/2015 is SET ASIDE because its making involved an error on a point of law.
2. The appeal is REMITTED to a fully reconstituted tribunal for a complete rehearing.
3. The Secretary of State for Defence shall provide the tribunal with evidence regarding any leave taken by the claimant between 24 August 2011 and 26 September 2011. If he was not on leave for some or all of this time, the Secretary of State shall provide evidence about his service duties during that time.

REASONS FOR DECISION

- 1 The Secretary of State for Defence (the appellant) brings this appeal with my permission. The respondent to the appeal is the claimant, and that is how I shall refer to him.
- 2 The Secretary of State argues that, in making its decision, the F-tT either ignored significant medical evidence or failed to give any or any adequate reasons for rejecting that evidence. The F-tT refused permission to appeal on the basis that the F-tT considered the relevant evidence and gave a succinct reason for preferring it: it found the claimant a credible witness.
- 3 I accept the Secretary of State's submissions and allow the appeal.
- 4 A Tribunal must analyse the evidence on which it bases its findings of fact, make the necessary findings and explain why it made those findings. This does not mean that a Tribunal must examine each and every item of evidence given by the parties, but it goes without saying that the Tribunal must explain why significant evidence was accepted or rejected. The decision must allow the parties to understand why the decision was made.
- 5 This appeal involved compensation for an injury to a serviceman during his duties. The circumstances in which the claimant sustained the injury were these: He was injured in a road traffic accident on 19 August 2011 when the vehicle in which he was a passenger hit a pot hole and turned over several times. The claimant said (p19 and 66 of the UT bundle) that he had to be pulled from the vehicle, tried to walk but collapsed. He was then taken by helicopter to Southampton hospital where he was diagnosed as having soft tissue injury to his neck and back. The claimant was nevertheless in great pain, said he could not feel his legs for awhile. He was in

hospital for a few days. He claimed that he continued to have serious back pain since that time.

6 The Secretary of State was prepared to accept that the back pain from which the appellant claimed to suffer was attributable to service, but concluded that the injury was not serious enough to attract any award under Armed Forces and Reserve Forces (compensation Scheme) order 2011 ('the AFCS'). He produced a substantial body of objective medical evidence to support his case.

7 The F-tT found that the claimant was entitled to a significant level of compensation for back pain caused by a traumatic injury to his spinal cord in the accident. It found the relevant descriptor to be item 21 in Table 6 of the AFCS 2011.

Traumatic spinal injury resulting in partial paresis of lower or upper limbs or both, with substantial recovery, restoration of lower and upper limb motor and sensory function, including a useful ability to walk.

8 The F-tT's consideration of the evidence was described in two sentences. The first was a mere heading –

"Having considered and assessed the evidence before it, the Tribunal finds the following material facts". [Tribunal's emphasis]

The second was -

'The Secretary of State recalls that [the claimant] was involved in a serious road vehicle accident on Salisbury plain as evidenced by the service medical records all [sic] the reverse side of page 32'.

It did not address the content of that evidence, nor any of the other evidence supplied by the Secretary of State. It went on to accept the claimant's evidence because -

'We found [the claimant] a credible and honest witness [sic] and accept his evidence'.

It then decided that the back pain fell to be compensated under descriptor 21 at level 7 as -

'a traumatic spinal cord injury as a result of the accident, leaving him unable to move his legs for a time from which he has substantially recovered by continues to experience lower back pain.'

This descriptor itself refers to 'traumatic spinal injury', a concept that the Tribunal did not address in the context of the other evidence.

Discussion

9 It is almost impossible to see how this decision can meet the minimum standards of adequacy in decision writing. The essence of an acceptable decision lies in the explanation the Tribunal gives for what it has done and how it did it, not in reciting

mantras such as those used by the Tribunal in this case. Those phrases were meaningless without further explanation.

10 There was nothing at all to show that the Tribunal had regard to the substance of the Secretary of State's evidence on the nature and extent of the injury. The Tribunal manifestly failed to deal with the body of evidence which pointed only to soft tissue only. It made findings of credibility without making any effort to explain why it rejected evidence medical evidence pointing to a different conclusion. It failed to explain why parasthesia was accepted as paresis.

What were the two sides of the story?

11 The claimant maintains that on his release from hospital, he remained in great pain and was unable to leave bed independently. He said had to be assisted to walk to the toilet and had his meals brought to him by fellow soldiers. Thereafter, he said he resumed normal duties because he 'did not want to let the side down' by complaining. When he left the army in 2013, he still had back pain from the accident and says he still does.

12 The hospital evidence included an x-ray and MRI which showed that there was no spine or spinal cord injury (p27). Page 27 and 28 recorded that the claimant had developed some left arm weakness. He was released without needing any follow up or rehabilitation and given co-codamol 30/500. Page 28 gives a diagnosis of sprain. It mentions that the claimant was tender over his spine with some subjective sensory changes.

13 The army medical records note that the appellant suffered from right lower limb parasthesia (change of sensation, often described as 'pins and needles'), neck, low back and right arm pain when he was admitted to hospital (p32). Page 32 also indicates that following the accident and his return to base (seemingly 22 August) the appellant was certified as unfit for work for only two days. He was scheduled to go on leave from 24 August 2011 to 26 September 2011. There is an indication that he was to be on light duties 'until then', but the meaning of this is not clear. A factual report from RMO Lt. Col Thorpe at pages 35 – 37 completed in on 30 January 2013 indicates that the claimant was last seen for the injury on 23 August 2011, was to do stretching exercises, that treatment had finished and he did not need to be seen again. He notes that there were no significant functional limitations or restrictions and no ongoing functional impairments or restrictions.

14 There is no mention of physiotherapy in the medical notes during the material time. This is in contrast to a previous episode of injury noted at page 33 which specifically mentions physiotherapy.

15 The army records also show that the claimant attended medical services at least monthly after 27 September 2011. None of the attendances were for back pain, neck pain or limb numbness. He attended for a wide variety of other ailments, including haemorrhoids (for which he was unfit for duty for 2 days and on light duties for a time), malaise (light duties), a cold (1 day of unfitness for duty), a flu like illness (light duties), ear ache , inguinal lymphadenopathy with associated leg pain and a genital

complaint, a sprained ankle (July 2012) caused by doing a jig after a concert, non-specific chest pain, a facial rash which stopped him shaving and red eye.

Assessing medical evidence

16 It should not be necessary for the Upper Tribunal to tell the First-tier Tribunal, especially a Tribunal sitting with a doctor, how to go about this task but it is obvious from this case that it is a skill that needs to be reinforced. The Secretary of State's evidence clearly raised important issues about the extent of the injuries and their effects on the claimant. The Tribunal had to decide which evidence was more likely to be accurate.

17. In order to reach a supportable conclusion, the Tribunal had to test the strengths and weaknesses of the evidence and compare it to the other evidence after it had been similarly tested. To do this, it had to consider a number of factors including (but not limited to) the reliability of the evidence in terms of, for example, its source, its internal consistency, and its relationship to the other evidence.

18 There were two main sources of information: one was medical, the other was the claimant's views.

19 What might be said about the hospital evidence? It was from disinterested 3rd party. The hospital was reporting the results of an MRI and x-ray. These showed no injury to the spine or spinal cord. It is, of course, possible for test results to be ambiguous or for results to be misinterpreted so the Tribunal had to ask itself whether or not either of those was likely. The hospital also mentioned that the claimant complained of two subjective symptoms of left arm weakness and change of sensation in his leg. The hospital notes do not suggest paresis (paralysis), which is a requirement of descriptor 21 of Table 6. If the claimant was paralysed or partially paralysed, would the claimant have been discharged after 3 days with no further treatment or follow up?

20 What might be said about the army notes? The army medical services saw the claimant. Is what they report and their treatment of the claimant consistent with the hospital notes? For example, the army note of the claimant's attendance on 23 August (p32) does not mention paralysis, and does not mention the use of walking aids or a lack of independent mobility. Both the hospital and the army notes do mention parasthesia and subjective loss of sensation. If there was paralysis, was it likely that the claimant would have been given no further treatment or follow up or have been considered fit for leave?

21 The Tribunal then had to weigh the claimant's evidence. A person may give evidence honestly without it being accurate. That is why identification evidence in criminal cases is treated with great circumspection by the law. Similarly, a person's evidence may be plausible, but not credible after it has been tested against the other evidence. On the other hand, of course, an unlikely explanation may be the correct one. The problem is that the Tribunal in this case failed to carry out *any* such exercise.

22The claimant offered an explanation as to why he did not complain further about his back pain. He said he did not want to let the side down. The credibility of that explanation needed to be assessed in the light of the further medical records before the Tribunal.

23The end result is that this decision cannot stand. It fundamentally fails to meet the most minimal requirements of judicial decision writing.

24The claimant's representative submitted that, if the Secretary of State's appeal succeeded, the case should be remitted to a fresh Tribunal so that the claimant could be given the opportunity to adduce further evidence to support his case. I accept that submission. The claimant has been through hard times recently and has had a period of homelessness. He was new to the surgery which provided the medical evidence in the file and it knew little about the claimant. It may be that with further directed enquiries, evidence will emerge which justifies an award.

[Signed on original]

[Date]

S M Lane
Judge of the Upper Tribunal
22 July 2016