IN THE UPPER TRIBUNAL **Upper Tribunal case No.** CAF/2582/2015
ADMINISTRATIVE APPEALS CHAMBER

Before: E Mitchell, Judge of the Upper Tribunal

Decision: The appeal is allowed. The decision of the First-tier Tribunal (9th April 2015, First-tier file reference SD/00032/2015) involved the making of an error on a point of law. It is **SET ASIDE** under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is **REMITTED** to the First-tier Tribunal for rehearing. Directions for the rehearing are at the end of this decision.

Ms Galina Ward, of counsel, represented the Secretary of State.

Mr T was unrepresented.

REASONS FOR DECISION

Introduction

1. This appeals concerns unemployability allowance (UA). In the Upper Tribunal, at any rate, this is a rarely encountered part of the Naval, Military and Air Forces etc (Disablement and Death) Service Pensions Order 2006 (S.I. 2006/606) ("the 2006 Order").

2. The 2006 Order provides for a person to be treated as unemployable despite being "in receipt" of therapeutic earnings. This appeal raises the issue whether this type of work is to be disregarded in determining unemployability even if a person is not in receipt of therapeutic earnings. I decide that it is not.

3. The appeal also raises the question whether "unemployable" means permanently unemployable. I decide it does not. The 2006 Order is simply concerned with whether a person may fairly be considered unemployable at the date on which a claim for UA is determined.

Factual background

4. Mr T was medically discharged from the Army on 4th November 2013. He was awarded a War Disablement Pension. For that purpose, the Secretary of State assessed Mr T as 60% disabled from osteoarthritis of the knees. Mr T's knee condition was considered to be linked to high-impact stresses to his knees over a number of years as part of his Army service.

5. In assessing Mr T as 60% disabled the Secretary of State relied on a report of an examination carried out by a registered medical practitioner on 26th January 2014. The report:

(a) states that Mr T had had three arthroscopies on his right knee and two on the left, as well as tibial osteotomies performed on both knees;

(b) states that Mr T had had two courses of cortisone injections to his knees;

(c) records Mr T's opinion that none of these medical procedures had helped him;

(d) records that Mr T had recently been discharged from hospital, on 22nd January 2014, having had surgery on 20th January 2014 to graft bone on the left knee and remove a metal plate from the right knee;

(e) records Mr T's statements that he had not driven for two years due to his knee problems and, after walking 15-20 metres, would need to stop due to pain;

(f) records Mr T's statement that, since he left the Army on 4th November 2013, he had not worked due to his knee problems;

(g) expresses the opinion, in the light of the examination, that there were abnormalities in Mr T's hip, knee and ankle joints and records reduced range of movement in those joints. The report also found significant reduction of muscle mass in the left quadriceps muscles and moderate reduction in the right;

(h) expresses the opinion that Mr T "cannot walk more than a few steps without stopping or severe discomfort";

(i) ends with the following summary:

> "Severe disability noted due to both knees problem. He recently had operations on both knees. He uses crutches all the time. Severe disability likely with walking / standing / using stairs / squatting. His symptoms will improve with time in 12 months as currently he is recovering from surgery".

6. The medical evidence also lists the pain relieving medication taken by Mr T, including Tramadol, Paracetomol, Ibuprofen, Codeine and Amityrptyline.

7. A report from Mr T's consultant dated 24th January 2014 states that, when Mr T is old enough, he will need full replacements of both knees. The consultant's report also states Mr T has "mood swings and bouts of depression".

8. On 19th November 2014, a registered medical practitioner advised the Secretary of State that "although [Mr T] has restricted mobility and agility I feel that he would be able to manage sedentary, administrative type work". The doctor also noted that Mr T had worked as an Army

Career Adviser until the point at which he was medically discharged. The Secretary of State relied on this advice in rejecting Mr T's claim for UA.

9. On his appeal to the First-tier Tribunal, Mr T argued:

> (a) the Secretary of State's decision was unfair because he had been told he would be medically examined for the purposes of his UA claim but the examination had not materialised;
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> (b) he wanted to work but was in too much pain to do so;
>
> (c) he had not been working as an Army Careers Adviser until the point at which he was medically discharge from the Army. He had been "off sick";
>
> (d) the Secretary of State did not take into account his post-discharge surgical procedures. Moreover, those procedures had not been successful.

10. Following a hearing at which Mr T gave oral evidence, but was unrepresented, the First-tier Tribunal dismissed his appeal. The Tribunal's findings of fact included:

> (a) Mr T's surgery "has not proved productive";
>
> (b) Mr T's painkillers take the edge off his pain but they make him feel "drowsy with a fuzzy head" and "unable to make snap decisions". His medication regime had been unchanged for 2 to 3 years but the side effects "would not be a permanent effect and [Mr T] would gradually be able to get used to the side effects of the medication" (even though Mr T had had the same medication regime for two to three years);
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> (c) Mr T's "knee" is frequently locked for 30 seconds at a time;
>
> (d) Mr T mobilises using two crutches although "his mobility was reasonable on the basis that he managed to mobilise from New Street Station to the hearing today, admittedly slowly on crutches and with the help of his wife";
>
> (e) Mr T was "off sick" for the last 18 months of his Army service;
>
> (f) Mr T was "IT literate and has man management organisational and training skills from his time in the Army".

11. The Tribunal's reasons for concluding that Mr T did not meet the criteria for UA were:

> "the Tribunal could not accept that Mr [T] was so disabled as to make him unemployable. Particularly we find that he could undertake works similar to what he

> had done before but specifically he could undertake training or lecturing type work, or work where he would be able to alternate between standing and sitting, such as possibly stores based work or packing or light assembly work which would allow him to alternate between standing and sitting. Although he has elected not to drive, the Tribunal consider that he could certainly drive short distances when he has taken his medication and again it was the evidence of the Medical Member that the taking of Tramadol would not result in advice being given to a patient not to drive".

12. I granted Mr T permission to appeal to the Upper Tribunal on the grounds that arguably the First-tier Tribunal erred in law by:

> (a) making an irrational finding that Mr T's mobility was "reasonable" since it appeared also to accept the finding in the 26th January 2014 medical report that Mr T was severely disabled by his knee condition;
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> (b) failing to consider the therapeutic earnings rules for UA;
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> (c) failing to consider whether to make a provisional award in the light of Mr T's uncertain prognosis.

Legal Framework

Unemployability allowances (UA)

13. Part II of the 2006 Order provides for various awards in respect of disablement including, in Article 12, UA.

14. The principal entitlement condition for UA is found in article 12(1):

> "where a member of the armed forces is in receipt of retired pay or a pension in respect of disablement so serious as to make him unemployable, he shall be awarded unemployability allowances".

15. Article 12(1) is subject to 12(2)(b), which disapplies article 12(1) where "where the degree of disablement is assessed at less than 60 per cent" (to recap, Mr T's disablement had been assessed at 60%). There will be an existing disablement assessment given article 12(1)'s requirement for a member to be in receipt of retired pay or a pension.

16. Article 12(4) provides for a statutory fiction in that it permits a person, in certain cases, to be treated as unemployable even though the person is employed:

> "For the purposes of this article…a member may be treated as unemployable although in receipt of therapeutic earnings which are, in the opinion of the Secretary of State, unlikely to exceed per year the figure specified in paragraph 5(c) of Part IV of Schedule 1 [currently £5,590]".

17. The definition of "therapeutic earnings" can easily be overlooked because it is contained in item 60 of Part II of Schedule 6 to the Order. The definition is:

> "earnings from work for no more than 16 hours per week and which in the Secretary of State's view is not detrimental to the health of the member".

18. Article 12(6) provides for additional allowances in respect of certain of a member's dependants. That is not directly relevant in Mr T's case but I note that article 12(9) makes the award of an additional allowance for a child living apart from the claimant entirely within the discretion of the Secretary of State:

> "For the purposes of paragraph (6)(b) and (c), an award, continuance and amount of an additional allowance under that paragraph in respect of a child who is living apart from the member shall be at the discretion of the Secretary of State".

19. Mr T's assessed disability of 60% is not in issue in these proceedings but I should mention the assessment rules. They show an assessment does not involve an assessment of the limitations likely to be faced by the disabled member in the workplace. Article 42(2)(a) enacts the general rule that

> "the degree of the disablement due to service of a member of the armed forces shall be assessed by making a comparison between the condition of the member as so disabled and the condition of a normal healthy person of the same age and sex, without taking into account the earning capacity of the member in his disabled condition in his own or any other specific trade or occupation, and without taking into account the effect of any individual factors or extraneous circumstances".

20. Of itself, therefore, an assessment of disability says nothing about the disabled member's earning capacity (which must be linked to employability).

Altering awards

21. Article 2(5) of the Order contains the general rule that, where the conditions for an award cease to be fulfilled, the award itself ceases to have effect. It is in these terms:

> "Subject to article 44(7), any condition or requirement laid down in this Order for an award, or the continuance of an award…shall, except where the context otherwise requires, be construed as a continuing condition or requirement, and accordingly the award…shall cease to have effect if and when the condition or requirement ceases to be fulfilled".

22. Article 44(7) is not relevant in this case. It permits the Secretary of State to continue an award even if he has revised it under the other provisions of article 44.

23. Article 5(1) provides that an award "may be made provisionally or on any other basis". As Ms Ward for the Secretary of State points out, the 2006 Order says nothing further of relevance about provisional awards.

24. Article 44 contains a framework for reviewing various decisions under the Order. Article 44(2) confers power on the Secretary of State to review an award made under the Order. The grounds on which the review power may be exercised include that "there has been any relevant change of circumstances since the award was made".

25. Article 44 draws a distinction between reviewing and revising. Reviewing is used in the sense of looking again at an award. The distinction is seen most clearly in article 44(4):

> "…following a review under paragraph (1) of any decision accepting a claim for pension or any assessment of the degree of disablement of a member of the armed forces, that decision or assessment may be revised by the Secretary of State to the detriment of a member of the armed forces only where the Secretary of State is satisfied that—
>
> (a) the decision or assessment was given or made in consequence of ignorance of, or a mistake as to, a material fact, or of a mistake as to the law…"

26. Revision involves altering an award. Article 44(5) provides:

> "An award under this Order may be revised by the Secretary of State to the detriment of a member of the armed forces only where the Secretary of State is satisfied that—
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> (a) the award was made in consequence of ignorance of, or a mistake as to, a material fact, or of a mistake as to the law; or
>
> (b) there has been any relevant change of circumstances since the award was made…".

27. The output of revision is governed by article 44(6):

> "…any revised decision, assessment or award shall be such as may be appropriate having regard to the provisions of this Order".

28. If the Secretary of State thinks a decision on an award "should be reviewed", article 65(1) gives him power to require the pensioner to supply information or evidence which is reasonably required to determine whether the award should be revised, or to attend a medical examination. In default, the Secretary of State has power to suspend payment of the award. Continued default may result in cancellation of the award under article 66.

Jurisdiction of the First-tier Tribunal

29. Section 5A of the Pensions Appeal Tribunal Act 1943 (as amended) applies to "any such claim as is referred to in section 1…of this Act" (war pension claims). This includes a claim under the 2006 Order.

30. By section 5A(1), where the Secretary of State makes a "specified decision" on a claim he is required to specify the ground on which it is made and "thereupon an appeal against the

decision shall lie to the appropriate tribunal on the issue whether the decision was rightly made on that ground".

31. Section 5B provides:

> "In deciding any appeal under any provision of this Act, the appropriate tribunal—
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> (a) need not consider any issue that is not raised by the appellant or the Minister in relation to the appeal; and
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> (b) shall not take into account any circumstances not obtaining at the time when the decision appealed against was made."

32. "Specified decisions" are set out in regulations. For present purposes, these are the Pensions Appeal Tribunals (Additional Rights of Appeal) Regulations 2001. Regulation 3A(1) specifies a decision:

> "(a) which is made in exercise of any provision of the 2006 Service Pensions Order listed in Schedule 1A; and
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> (b) which—
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> (i) refuses or discontinues an award;
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> (ii) establishes or varies the amount of an award; or
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> (iii) establishes or varies the date from which an award has effect".

33. Within Schedule 1A we find an entry for "Article 12 – unemployability allowance".

The arguments and my conclusions

Ground 1

34. For the Secretary of State, Ms Ward's argues the Tribunal's finding that Mr T's mobility was "reasonable" at the date of the First-tier Tribunal's decision could not be considered irrational. This was because the Tribunal accepted the contents of the January 2014 medical report which included the opinion that Mr T would improve over the following twelve months.

35. The first point to make is that section 5B of the 1943 Act prevented the Tribunal from taking into account circumstances not obtaining when the decision under appeal was taken. The decision was taken on 27th November 2014 and the Tribunal decided the appeal in April 2015 although, of itself, that may not be significant given Mr T's evidence that he did not improve.

36. The second point is that the Tribunal did not, in its statement of reasons, adopt all the findings of the January 2014 report. It said it accepted "that notice of disability" contained in the January 2014 report which it found to be consistent with Mr T's oral evidence. The Tribunal also accepted Mr T's evidence that he had not improved, in particular that his most

recent surgery had not "proved productive". So far as improvement was concerned, on the Tribunal's findings that was still to come and not as a result of a lessening of his knee symptoms but solely from him becoming accustomed to his pain relief: "his pain is to some extent controlled by medication and the effects of drowsiness can be expected to improve". At no point do the Tribunal's reasons show that his case was approached on the footing that, judging matters as they stood at the date of the Secretary of State's decision, Mr T would improve as a result of his January 2014 surgery.

36. For the above reasons, I do not accept that the apparent inconsistency in the Tribunal's reasons is explained by the Tribunal having adopted the view that Mr T was likely to improve over the twelve months to January 2015. The Tribunal's inconsistent findings amount to an error on a point of law because they mean inadequate reasons were given for its decision.

37. This cannot be considered an immaterial error and so I must set aside the Tribunal's decision. The types of employment proposed for Mr T, such as packing and light assembly, would be likely involve him trying to perform anatomical operations that, on the 2014 report's findings, would either be very difficult or impossible.

Ground 2

38. I accept Ms Ward's argument that the interpretation of "unemployable" is not influenced by the role played by therapeutic earnings in Article 12. In particular, I do not think the view on which I invited submissions – whether capacity to do work of a type envisaged by the therapeutic earnings provisions is always to be ignored – stands up to analysis.

39. The therapeutic earnings provisions do not include a typical deeming provision in that they are not declaratory. They confer a power to deem. Specifically, they confer a power to treat as unemployable a person who is in receipt of therapeutic earnings. Furthermore, the definition of "therapeutic earnings" is itself a moving target since it is dependent on the exercise of another power (an exercise of judgement). The decision maker must take the view that the work in question is not detrimental to the health of *the* member. All of this means the likely application of the therapeutic earnings exception is uncertain and may well vary from case to case. As a result, the legislative scheme cannot accommodate any assumption that certain types of work will always be disregarded.

40. To conclude, the therapeutic earnings provisions have no wider effect than that suggested by their literal meaning. They can only assist a person (a) who is "in receipt" of earnings within the specified limit; (b) whose work is considered by the decision maker not to be detrimental to their health; and (c) whom the decision maker decides to treat as unemployable.

Ground 3

41. I think the question whether the Tribunal should have considered making a provisional award is in fact a red herring. Since I have decided to set aside the Tribunal's decision on ground 1, I shall give only brief reasons why.

42. The 2006 Order contains a mechanism for altering awards. These are the review and revision provisions. Whether they could adequately have catered for the uncertainty over Mr T's prognosis depends on what "unemployable" means.

43. Ms Ward argues that, in Article 12 of the Order, unemployable means permanently unemployable simply because the Secretary of State has always interpreted the term in accordance with Schedule 7(2) to the Social Security Contributions and Benefits Act 1992. Schedule 7(2) provided for an "unemployability supplement" to industrial injury disablement pensions where a person was "incapable of work and likely to remain so permanently". However, Article 12 does not refer to a person being permanently unemployable and I do not consider such a qualification must necessarily be implied. My attention has not been drawn to any provision which requires Article 12 to be interpreted in accordance with Schedule 7 to the 1992 Act.

44. Even if a disabled person's health condition is not likely to change, the way in which different people adjust to their disabilities can be difficult to predict. And new assistive technologies continue to be developed. To require a person to be permanently unemployable asks the decision maker to make predictions about matters which are often inherently uncertain and is unlikely to have been intended by the legislator.

45. Further support for this view is found in the conditions for invalidity allowance under Article 13 of the 2006 Order. That allowance may only be paid to a person awarded UA under Article 12(1)(a). Article 13(4) of the invalidity allowance conditions assumes UA may be awarded during an interruption in employment:

> "If the unemployability in respect of which the allowance is awarded forms part of a period of interruption of employment for [specified statutory purposes] which has continued without a break from a date earlier than the date fixed under paragraphs (2) and (3), the relevant date shall be the first day of incapacity for work for those purposes in that period."

46. UA takes the form of a weekly allowance, rather than a gratuity. And so the imperative to protect public funds is not undermined by construing Article 12 so that a person is unemployable if, at the decision date, the person can fairly be considered unemployable even if, at some point in the future, the person might not be.

47. For the above reasons, there was no need for the Tribunal to consider making a provisional award in order to cater for the possibility that Mr T's circumstances might change.

48. I observe that if the circumstances of a person do change so that the person may no longer be unemployable, Article 44 of the Order permits the Secretary of State to look again at (review) the award and, if he thinks appropriate, exercise his power of revision so as to discontinue it. I do not however discount the possibility that the power to make a provisional award might be exercised in response to an uncertain prognosis. For example, it might be legitimate to make an award provisional on the disabled person submitting to a medical examination by some specified date.

Disposal

49. I allow this appeal and remit the matter to the First-tier Tribunal for re-hearing in accordance with the following directions.

Directions

Subject to any later Directions by a Judge of the First-tier Tribunal, I remit this appeal to the First-tier Tribunal and direct as follows:

(1) A rehearing of Mr T's appeal must be held by the First-tier Tribunal. The Tribunal must not, in its reasoning, take into account the decision or findings of the Tribunal whose decision I have set aside.

(2) The Tribunal's membership must not include any of the members of the Tribunal whose decision I have set aside.

(3) If Mr T has any further written evidence or submission upon which he wishes to rely, they must be received by First-tier Tribunal within one month of the date this Decision is issued.

(Signed on the Original)

E Mitchell
Judge of the Upper Tribunal
2nd August 2016