IN THE UPPER TRIBUNAL **Upper Tribunal case No.** CAF/3235/2015
ADMINISTRATIVE APPEALS CHAMBER

Before: Mr. E Mitchell, Judge of the Upper Tribunal

Decision: The appeal is allowed. The decision of the First-tier Tribunal (20th August 2014, First-tier file reference AFCS/00321/2014) 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 hearing. Directions for the rehearing are at the end of this decision.

Mr Glyn Tucker, of the Royal British Legion, represented the Appellant Mr S.

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

REASONS FOR DECISION

Introduction

1. In this case, the Upper Tribunal is asked to give guidance to the First-tier Tribunal as to the exercise of any power it may have in relation to the making of interim awards under the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 ("the Order"). I am not comfortable about using this case to give such guidance since the Appellant does not, and never has, sought an interim award. I am asked to assume that the decision of a Tribunal of Northern Ireland Pensions Appeal Commissioners about a tribunal's powers in relation to temporary awards can be read across to interim awards. However, the 2011 Order confers a duty on the Secretary of State to make temporary awards, if specified conditions are met, but only a power to make interim awards. In the light of that difference, which was not explored in the submissions on this appeal, I do not think this is the right case to use to give general guidance about a tribunal's powers in relation to interim awards.

Background

2. Mr S made a claim under the Order on 7th February 2012. On 9th August 2013, the Secretary of State decided that his injury caused by service satisfied the descriptor at item 5 in Table 4 in Schedule 3 to the Order: "Physical disorder causing permanent moderate functional limitation or restriction". That is a tariff level 11 descriptor.

3. The Secretary of State's decision entitled Mr S to a lump sum payment of £15,500 and a Guaranteed Income Payment (GIP).

4. On 30th September 2013, Mr S appealed to the First-tier Tribunal on the following grounds:

(a) the wrong descriptor was applied because his disability was severe, not moderate;

(b) his award should have been backdated to the date of the injury;

(c) he should have qualified for a supplementary payment for incontinence;

(d) it was unfair that his GIP was abated against his retirement pension.

5. In response to Mr S's appeal, on 6th June 2014 the Secretary of State reconsidered but did not change his decision.

6. Subsequently, by letter dated 25th July 2014, Mr S argued he had suffered two separate injuries, an anal fissure and faecal incontinence (caused by consuming dehydrated Army rations). He argued the former satisfied Table 2, item 19 ("injury to abdomen, including pelvis or perineum, or both, causing permanent significant functional limitation or restriction") and the latter either Table 2, item 16 ("injury to abdomen, including pelvis or perineum, or both, with complications, causing permanent significant functional limitation or restriction") or Table 2, item 17 (complex injury to abdomen, including pelvis or perineum, or both, causing permanent significant functional limitation or restriction"). In that letter, Mr S also argued that, if in fact there was a single injury, it satisfied Table 2, item 10 ("complex injury to abdomen, including pelvis or perineum, or both, with complications, causing permanent significant functional limitation or restriction").

7. On 28th August 2014, the First-tier Tribunal gave a decision which it described as follows:

> "The unanimous decision of the Tribunal is to adjourn the appeal against the decision to place the appellant's invaliding conditions on the following descriptor: faecal incontinence and anal fissure at Table 4, Item 5, Tariff Level 11."

8. The Tribunal's decision notice added:

> "The Tribunal considers that the award should be on the same tariff but made interim for a period of 2 years from today's date".

9. The Tribunal's administration then supplied Mr S with standard information about how to appeal against the Tribunal's decision.

10. Even though the Tribunal said it was adjourning the appeal, its statement of reasons made a finding of fact, namely that Mr S suffered a single injury of an anal fissure. It also stated it was too early to decide whether Mr S had a permanent functional limitation or restriction and whether it was moderate or severe (it may have meant moderate, significant or severe).

11. The Tribunal's statement of reasons added:

> "For these reasons, we consider that there should be an interim award for 2 years in order to establish the position at which it can more confidently be said that Mr S met the definitions….
>
> The Secretary of State has exhausted his powers of review and is therefore unable, without the Tribunal's direction, to make this award". [I think the Tribunal must have meant to refer to powers of reconsideration since the powers of review were not exhausted: see below].

12. Mr S applied to the First-tier Tribunal for permission to appeal to the Upper Tribunal against the Tribunal's 'decision'. In response, on 25th October 2014 a Tribunal official informed him that he had mistakenly been sent information about how to appeal. He was informed the tribunal adjourned in order for Veterans UK to consider making an interim award and he could appeal against such award once final but "there is no right of appeal against an interim award".

13. In the meantime, on 9th October 2014 Veterans UK informed Mr S they had accepted the Tribunal's recommendation and "his award had been made an interim award for review in two years" and he would have the right to appeal against the final award decision once made.

14. On 9th December 2014, the Chamber President invited the parties to agree to a consent order to give effect to the adjournment decision which would "keep you on the existing tariff but convert your final award to an interim award for 2 years". If not, the adjourned hearing would have to be re-convened.

15. Mr S did not agree. He disputed the Tribunal's apparent finding that he suffered a single injury and made further arguments about the substantive merits of his case.

16. On 30th December 2014, the Veterans Agency wrote to the Chamber President explaining they had misconstrued the Tribunal's decision. They thought they had been directed, rather than merely recommended, to make an interim award. On the assumption that a direction was made, the Veterans Agency thought the appeal was closed because they did not accept the Tribunal could make an interim award of its own volition. The Agency went on to say they should have applied to the Tribunal for a consent order before making an interim award, which they then proceeded to do. If Mr S did not agree, "the appeal should be relisted and heard in full".

17. Mr S did not agree and arrangements were made for a further hearing. Before that could be held, however, the acting Chamber President granted Mr S permission to appeal to the Upper Tribunal. The President observed Mr S was entitled to appeal against an adjournment decision and noted that the Tribunal had decided to make an interim award. The President referred to

the Veterans Agency's view that the Tribunal had no power to make an interim award and that it would be useful to have the Upper Tribunal's guidance on that point.

Legislative framework

18. Article 52(1) of the Order empowers the Secretary of State to make an interim award where he is satisfied that a person is entitled to injury benefit but the prognosis is uncertain and it is not possible to determine the applicable descriptor. On making an interim award, the Secretary of State must select the descriptor that appears most appropriate "at the date of the decision" (article 52(2)).

19. On making an interim award the Secretary of State must specify the period for which it is to have effect but this "is to be a maximum of two years starting from the date the award was first made" (article 52(4)). Where the specified period is less than 2 years, the Secretary of State "may extend and further extend the award but, subject to paragraph (6), a final award must be made within the period of 2 years starting with the date on which an interim award was first made".

20. Where the prognosis remains uncertain at the end of any initial two year period and the Secretary of State considers further extension "just and equitable", an interim award may be extended and further extended for a period not exceeding 2 years. However, a final award must be made "within the period of 4 years starting with the date on which an interim award was first made" (article 52(6)).

21. Article 53(1) requires the Secretary of State to reconsider an original decision "if an application for a reconsideration, made in accordance with paragraph (4), is given or sent to the Service Personnel and Veterans Agency". Article 53(4) includes the requirement that "an application for a reconsideration must be made within the period of 1 year starting with the date on which notice of the original decision is given or sent to the claimant".

22. On reconsideration, the Secretary of State may revise the original decision so as to make an interim award (see article 53(7)). Where he does so, the claimant may again apply for reconsideration when that award is made final (article 53(8)).

23. In this case, the Secretary of State purported to make an interim award (on 9th October 2014) more than one year after notification of the original decision and without any application for reconsideration having been made.

24. Article 53(5) also requires the Secretary of State to reconsider an original decision where an appeal has been made. He did so in this case (on 6th June 2014).

25. Article 54(1) provides that a final decision awarding benefit may not be reviewed other than in accordance with articles 56 to 59. A decision becomes final where there has been no

application for reconsideration under article 53 or the time for applying for reconsideration has expired (article 54(4)).

26. Article 56, headed "Review – exceptional circumstances within 10 years", requires the Secretary of State, on application, to review an injury benefit decision. On a review, the Secretary of State may revise a decision but only if:

> "within the period of 10 years, starting with the date of the injury benefit decision, the injury in respect of which the decision relates has
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> (a) become worse or caused a further injury to develop;
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> (b) the worsening or the development is unexpected and exceptional; and
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> (c) the injury, or the injury and the further injury together is described by
>
> > (i) a descriptor at a tariff level which is higher than that already awarded for the injury; or
> >
> > (ii) an additional descriptor for the injury or further injury" (article 56(3)).

27. On a review, the Secretary of State may revise the original decision

28. Article 57, headed "Review – final", requires the Secretary of State in certain circumstances to review an injury benefit decision made "10 or more years" before an application for review. The conditions for revising under article 57 include that it would be "manifestly unjust" to maintain the effect of the original decision.

29. Article 58 permits the Secretary of State to review an award in response to an award of damages made to a claimant. Article 59 permits the Secretary of State to review a decision at any time if satisfied "the decision was given in ignorance of, or was based on, a mistake as to a material fact or of a mistake as to the law".

30. Under section 5A of the Pensions Appeal Tribunals Act 1943, there is a right of appeal to the First-tier Tribunal against a specified decision of the Secretary of State. When the Secretary of State notifies a claimant of a specified decision, he must set out the ground on which it is made. The appeal lies "on the issue whether the decision was rightly made on that ground". The original decision in this case was an appealable specified decision. The specified decisions include a decision which "determines whether a benefit is payable".

31. However, a decision to make an interim award is not a specified decision. Regulation 3(2) of the Pensions Appeal Tribunals Act 1943 (Armed Forces and Reserve Forces Compensation Scheme) (Rights of Appeal) Regulations 2011 (S.I. 2011/1240) provides "the following decisions are not specified decisions, that is a decision which…(a) makes or arises from the making of an interim award under article 52(1) of the 2011 Order".

32. Under section 5B of the 1943 Act, the tribunal "shall not take into account any circumstances not obtaining at the time when the decision appealed against was made". Section 5B also provides the tribunal "need not consider any issue that is not raised by the appellant or the Minister in relation to the appeal".

Proceedings before the Upper Tribunal

33. In case management directions on this appeal, I made the following observations:

> "The First-tier Tribunal said it was adjourning Mr S's appeal. If it did in fact adjourn, it cannot have decided Mr S's appeal.
>
> I find it difficult to see how the Tribunal's decision can properly be described as a decision to make an interim award. If it was making a decision on the appeal, it would not have adjourned. If the Tribunal did not itself purport to make an interim award, I find it difficult to see how the Upper Tribunal can properly give guidance on the First-tier Tribunal's powers, if any, to make interim awards.
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> I am struggling to see on what basis the Veterans Agency made an interim award following the Tribunal's adjournment. Mr S was too late to apply for reconsideration and the Secretary of State had already reconsidered in response to Mr S's appeal…
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> My initial impression is that the Tribunal probably adjourned in the hope that the Secretary of State would make an interim award in the same terms as the existing award (although the reference in the statement of reasons to a direction muddies the waters)…
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> If the Secretary of State could not have validly reconsidered the original decision so as to make an interim award, it seems to me that Mr S's appeal to the First-tier Tribunal remains live. It may be simplest to resolve this appeal by allowing it on the basis that the Tribunal decided to adjourn on a flawed understanding of the law. The matter would then go back to the First-tier Tribunal for it to complete the proceedings on Mr S's appeal. In those circumstances, I do not see how the Tribunal would be bound by the apparent finding of fact in the present Tribunal's statement of reasons."

34. The Secretary of State's response was drafted by Ms G Ward of counsel. The response:

(a) relied on the decision of a Tribunal of Northern Ireland Pension Appeal Commissioners in *Secretary of State for Defence v FA* (AF) [2016] AACR [2015] NICom 17 to argue that a decision to make an interim award is not appealable and a tribunal on appeal has no power to make an interim award. *FA* concerned temporary awards but the Secretary of State submitted that the interim award provisions were in material respects identical. In *FA* the Commissioners decided a decision not to make a temporary award was a specified decision, that is a "decision which determines whether a benefit is payable";

(b) relied on *FA* to argue that a decision *not* to make an interim award is appealable in the same way as a decision not to make a temporary award. On such an appeal, the task for the

tribunal is to decide whether the conditions precedent in article 52(1) are made out (prognosis uncertain and not possible to determine the appropriate descriptor). If so, the tribunal should remit the matter to the Secretary of State to decide whether to make an interim award. That reflects the guidance given by the Commissioners in *FA*;

(c) where, as in this case, the tribunal simply adjourns, the Secretary of State's power to make an interim award does not arise but if "the appeal is allowed and remitted that has the effect that the original decision has to be remade by the Secretary of State, so that difficulty is avoided";

(d) it would be "extremely helpful" to have the Upper Tribunal's guidance on how the First-tier Tribunal should proceed where it considers an interim award might be appropriate.

35. The response also informed the Upper Tribunal that the Secretary of State supported the appeal. The First-tier Tribunal's approach was flawed because it misunderstood the law, took a course that was not suggested by either party and on which neither were given the opportunity to comment and failed to determine the key issue on the appeal (the degree of Mr S's functional limitation). The Secretary of State also submitted that any tribunal to which the appeal might be remitted would not be bound by the First-tier Tribunal's findings of fact.

36. In reply, Mr S's representative, Mr Tucker, pointed out that "[Mr S] does not seek and has never sought an interim award and has no direct interest in the request for guidance on the jurisdictional issue". However, Mr Tucker did address the point. While he did not take issue with most of the Secretary of State's response, he disputed the implication that the Secretary of State, in response to a tribunal remitting a case for him to consider an interim award, had a free hand to decide whether or not to make an interim award. He relied on the Upper Tribunal's recent analysis of *FA*, in *JB v Secretary of State for Defence* (AFCS) [2016] UKUT 0248 (AAC) (in which Mr Tucker and Ms Ward both appeared). In *JB*, Upper Tribunal Judge Rowland said:

> "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."

Discussion

37. I am not comfortable about using this appeal as a vehicle to give guidance to the First-tier Tribunal about its powers in relation to interim awards. As Mr S's representative says, he has never sought an interim award. And the specified ground against which the appeal lay in this case made no mention of interim awards (although I accept the tribunal has discretion under section 5B of the 1943 Act to consider issues not raised by the parties).

38. I do, however, accept the Secretary of State's argument that the course taken by the present First-tier Tribunal – to give a recommendation to make an interim award – was flawed. That left the Secretary of State's original decision in place. In the circumstances, the outcome sought could only have been achieved by the Secretary of State exercising his powers of reconsideration in article 53 (there being no suggestion that any of the powers of review might be available). However, the Secretary of State had already carried out the reconsideration required in response to Mr S's appeal. In those circumstances, it seems to me that the Secretary of State could not have carried out an article 53 reconsideration. He would only have had that power if an application for reconsideration had been made within one year of notification of the original decision. There was no application at all in this case (Mr S's submission on this appeal makes that very clear), let alone one made within one year of the original decision.

39. Like temporary awards, decisions to make interim awards are not specified decisions against which the 2011 Regulations confer a right of appeal. However, I do not agree with the Secretary of State that the interim award and temporary award provisions are materially identical. The Secretary is under a duty to make a temporary award if specified conditions are met. Article 26(2) of the Order provides "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". By contrast article 52(1) confers power to make an interim award if specified conditions are met ("an interim award may be made"). The relevance, if any, of this difference was not explored in the submissions made on this appeal.

40. I accept that *FA* indicates, as does the plain wording of the 2011 Regulations, that there is no right of appeal against the making of an interim award. I am not certain whether *FA* also suggests that a tribunal has power to consider an appeal against a refusal to make a discretionary interim award. I am not, I am afraid, going to address that point on an appeal brought by an Appellant who has never sought an interim award and where I do not have the benefit of argument on the point.

Conclusion

41. Mr S's appeal is allowed. The First-tier Tribunal's decision to adjourn was based on a flawed understanding of the law. It thought this would allow the Secretary of State to exercise

his reconsideration powers so as to make an interim award but, in the absence of a duly made application for reconsideration, those powers did not arise.

42. The First-tier Tribunal's decision is set aside and Mr S's appeal remitted to the First-tier Tribunal. The Tribunal is not bound by the previous Tribunal's findings. In fact, the next Tribunal must carry out an entirely fresh consideration of the issues arising on this appeal.

Directions

Subject to any further direction by a judge of the First-tier Tribunal, I remit this appeal to the First-tier Tribunal and direct as follows:

(1) A hearing of Mr S's appeal must be held by the First-tier Tribunal. The Tribunal must not, in its reasoning, take into account the reasons 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 either party wishes to rely on further written evidence or arguments, these must be received by First-tier Tribunal within one month of the date this Decision is issued.

(4) The Secretary of State must consider whether to send a representative to the re-hearing. I strongly suggest he does send a representative.

(Signed on the Original)

E Mitchell
Judge of the Upper Tribunal
19th October 2016