THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

DECISION OF THE JUDGE OF THE UPPER TRIBUNAL

The appeal is allowed. The decision of the tribunal given at Edinburgh on 22 October 2018 is set aside. The case is referred to the Pensions Appeal Tribunal for Scotland for rehearing before a differently constituted tribunal in accordance with the directions set out at the end of this Decision.

REASONS FOR DECISION

Summary and background

1. This is an appeal about a claim for a disablement pension made under the Naval, Military and Air Forces etc (Disablement and Death) Service Pensions Order 2006 (the "**2006 Order**"). I have allowed the appeal, because the decision of the Pensions Appeal Tribunal for Scotland (the "**tribunal**") dated 22 October 2018 was made in error of law. The decision was made in breach of natural justice due to apparent bias and inadequate reasoning.

2. The background facts, as they appear from the papers before me, are that the appellant (the "**claimant**") served in the Royal Navy from 5 September 1975 to 1 August 1993, when he was made redundant. During the claimant's time in service, in 1977 and while on shore leave in Curacao, the claimant sustained a serious head injury. He was in a coma for four weeks and treated in RNH Haslar. He made a successful claim for a war pension in connection with this head injury in or about 2007. This is not the claim with which this appeal is directly concerned, but is relevant to its outcome. Initially the claimant was assessed as 20% disabled as a result of the head injury. Some years later, he put in a further claim on the basis that related diagnosed conditions had not been assessed. This further claim led to a revised award of war pension from 20 February 2017, based on 30% disablement. The certificate of entitlement to a war pension dated 5 September 2017 from the Secretary of State for Defence ("**SSD**") records that head injury and subdural haemorrhage (both 1977) were certified as due to injuries which existed before or arose during service and have been and remain aggravated by service (p158). The certificate of entitlement also specifically records the following symptoms accepted as "part and parcel": "As before plus 2) associated personality changes, 3) associated impairment of social cognition, 4) associated impairment of executive functioning". There is nothing in this certificate which mentions an award in respect of leg injury. The certificate does not appear to have been before the tribunal which made the decision under appeal to the Upper Tribunal, but was produced to the Upper Tribunal on 4 March 2019 together with the SSD's submission on the appeal before the Upper Tribunal.

3. The claim for a war pension with which this appeal is concerned was for mental health problems and an abscess to the left leg, leaving muscle damage (p2). The date of claim is noted as 11 November 2014 (p2). There is a completed form at page 50 of the bundle, stamped as received on 29 January 2015, which is listed as the claim form in the index to the papers. The claim form states that it is for brain injury which occurred in Curacao in 1977, and an abscess in the left leg which had left muscle damage (p50). The claimant explained some of his problems (p63), which included panic attacks, anxiety, poor attention, and difficulty making friends. The claimant claims that he was ridiculed and taunted when working for the navy after his accident, as a result of symptoms brought about by his brain injury and lack of insight, and this brought on other mental health problems (p66). The claimant was medically examined in connection with his claim on 28 April 2015. The report of the examining doctor, Dr John H Brown, covered both the claimant's leg condition as well as mental health problems, including findings of features of moderate anxiety and depression "felt to be linked to previous head injury" (p75). A report was then obtained from the claimant's GP dated 15 June 2015, which noted "no specific diagnosis of a psychiatric condition in notes" (p77). After that, the claim was considered in the light of the medical information. Page 4 of the notes of consideration of the claim dated 26 September 2015 (p4), headed up "certificate refused", contains two relevant matters. First, "Part and parcel applies" is ticked and an entry is made: "rejected condition symptoms included as part and parcel". It then goes on to say "Psychiatric Illness not found". The certificate set out an explanation that on the balance of probabilities the claimant has not satisfied the primary onus of showing the presence of the claimed disablement and for that reason the condition was neither attributable to, nor aggravated by service. It also notes that service medical documents and a GP report have not diagnosed mental illness or a psychiatric condition. The decision was sent to the claimant by letter dated 30 September 2015 (p82), narrating that "our doctors have advised us that there is nothing in the available medical evidence to show that you were suffering from the following condition PSYCHIATRIC ILLNESS when you were discharged, or that you are suffering from it now".

4. The claimant appealed to the tribunal on 25 February 2016 under Section 1 of the Pensions Appeal Tribunals Act 1943 (the "**1943 Act**"). The appeal prompted the SSD to review the case, but the decision remained unchanged. The tribunal sat on 23 September 2016 to hear the appeal. The tribunal noted the absence of a diagnosis of any psychiatric condition in the papers and explained to the claimant, who was unrepresented, that it was critical for the appeal that he had a confirmed psychiatric diagnosis. The hearing was adjourned to allow a medical report from a psychiatrist to be obtained. A report was obtained from a Consultant Psychiatrist, Dr Thomas Elanjithara. Among other things, it concluded that the claimant suffered from ICD Version 8 (1965) 309.2; mental disorders not specified as psychotic, associated with physical conditions due to brain trauma. The report did not contain any formal diagnosis of other mental health conditions such as anxiety or depression, finding at paragraph 11.4 that changes in mood (depression and suicidal thoughts) are a recognised feature of brain injuries. The tribunal sat again on 22 October 2018 when it refused the appeal. The tribunal's

Decision notice dated 29 October 2018 finds that the injury on which the claim is based, namely psychiatric illness, is not attributable to service and has not been aggravated by service. The Reasons for Decision state that the tribunal found no additional evidence had been produced to support a finding of psychiatric injury. On 19 December 2018 leave to appeal was refused by the President of the Pensions Appeal Tribunal for Scotland.

5. Permission to appeal was granted by the Upper Tribunal on 20 March 2019 on the basis that the grounds of appeal merited consideration. Parties were invited to make further submissions and did so. The claimant lodged further submissions in addition to the extensive grounds of appeal that were before the Upper Tribunal, in letters of 2 February 2019 and 17 February 2019, referring to various earlier claims in 2008, including in respect of bullying, and an assessment by a Dr Skelton. The SSD indicated that they relied on letters of 8 November 2018 and 4 March 2019 and further medical comment from their medical adviser dated 15 April 2019 (which had not been before the tribunal).

6. Neither party has requested an oral hearing and I am satisfied that I am in a position to decide the appeal fairly on the papers. Below, I set out the legal provisions governing this appeal, then explain why I consider that the tribunal acted in breach of natural justice and failed to give adequate reasons for its decision.

Governing legal provisions

7. Under Article 41(1) of the 2006 Order, where a person claims for disablement more than seven years after the termination of service, that disablement will be accepted as due to service where:
   (a) the disablement is due to an injury which –
   (i) is attributable to service before 6 April 2005, or
   (ii) existed before or arose during such service and has been and remains aggravated thereby.

   The claimant must therefore establish by evidence that there is a disablement, due to an injury, and that injury was either attributable to or aggravated by service (CAF/3198/2012). However, under Article 41(5), where, upon reliable evidence, a reasonable doubt exists whether the conditions set out in paragraph (i) are fulfilled, the benefit of that reasonable doubt shall be given to the claimant. "Disablement", under paragraph 27 of Schedule 6 to the 2006 Order, includes mental injury as well as physical impairment. Whether a disablement has a service cause falls to be determined in accordance with the principles set out in *JM v Secretary of State for Defence* [2015] UKUT 332 ("**JM**"). Where a claimant is successful in their claim, other provisions of the 2006 Order govern whether a gratuity or pension is payable.

8. Section 1 of the 1943 Act makes provision for appeals against rejection of war pension claims made in respect of members of the naval forces. Where claims are rejected by the SSD on the ground that the injury is not attributable to any relevant service, or has not been aggravated by service, an appeal lies to the

tribunal on the issue whether the claim was rightly rejected on that ground. The "ground" referred to is whether the statutory conditions of entitlement to an award are satisfied, rather than the reasons for that conclusion (*JM* at paragraph 25).

Bias and breach of natural justice

9. The issue of bias arises in this appeal in the following way. In the claimant's application for leave to appeal to the Upper Tribunal, the claimant stated that "I also only recently found out the Chairman [of the tribunal who had heard the claimant's appeal] is from [a firm of solicitors in Scotland] and he is representing my daughter in a spinal injury (broken neck) negligence claim". He also raised an issue about the medical member, who had been a member of an earlier tribunal involving the claimant, which he had stormed out of. She had asked at the tribunal hearing if she should recuse herself. The claimant, who was representing himself, said no. He now says he had not understood the ramifications and should have said she should recuse herself, but because of his brain injury he had difficulty with the response on the day.

10. The Registrar of the Upper Tribunal wrote to the Chairperson on 17 January 2019 in connection with the appeal, explaining that in the application for permission the claimant alleged that he represented the claimant's daughter in a spinal injury (broken neck) negligence claim. The letter asked whether if by the claimant's name the Chairperson was able to identify the client, and if the Chairperson was aware of that at the time. In a letter dated 21 January 2019 in response, the Chairperson of the tribunal stated "The terms of the data protection act prevent me from answering all your questions. I cannot confirm whether [the firm of solicitors] act on behalf of the appellant's daughter. I can confirm that when I heard the appeal I had never previously met or spoken to the appellant and I was unaware of his connection with anyone who may or may not be a client of [the firm of solicitors]".

11. The Upper Tribunal then issued a direction to parties specifically to address the statement made by the claimant about the Chairperson acting for the claimant's daughter. In response, the claimant explained he had looked up the internet to find out who the tribunal members were. He then mentioned to his daughter the name of the Chairperson of the tribunal, who said he was her contact at the firm of solicitors in connection with a claim being brought in Australia in respect of a car accident there in 2015. He confirmed that prior to the tribunal he had never previously met nor spoken to the Chairperson. The SSD submitted that the claimant's contention was of no substance in the light of the Chairperson's comments, because no conflict of interest had been demonstrated.

12. In my opinion, the circumstances of this case reveal a breach of natural justice because of apparent bias on the part of the Chairperson. The applicable legal principles are that hearings of the tribunal must be conducted fairly and in accordance with natural justice (*JM* paragraph 34). An aspect of natural justice is that parties are entitled to have their case heard by a tribunal which is independent and impartial, and not biased. It is important to note that natural

justice requires that justice is not only done but also seen to be done. In this appeal, there is no suggestion that there was actual bias by the Chairperson (and indeed he decided against the claimant). But that is not the end of the matter because, as a matter of law, there also must be no appearance of bias. There is a rule which automatically disqualifies a judge from sitting who is involved in promoting the cause of a party to a suit (*R v Bow Street Metropolitan Stipendiary Magistrate ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119). Such a disqualification arises irrespective of the judge's state of knowledge as to interest (*Locabail (UK) Ltd v Bayfield Properties Ltd and Another* [2000] QB 451). In cases where there is no automatic disqualification, apparent bias will still be established if a fair minded and informed observer would conclude that there was a real possibility of bias (*Porter v Magill* [2002] 2 AC 357). The particular circumstances of the case must be looked at in order to determine whether there is such a possibility on the facts (*SW v SSWP* [2010] UKUT 73 paragraph 42). The rules of natural justice apply to tribunal hearings, including the rule against bias. The *Locabail* case recommends that solicitors sitting judicially conduct a careful conflict search within their firm before embarking on a case (paragraph 20).

13. In applying these applicable legal principles to the facts, I note that the SSD does not dispute the truthfulness of the claimant's comments about his connection with the Chairperson; and the Chairperson has not denied the allegation. I therefore proceed on the factual basis that the Chairperson was indeed representing the claimant's daughter in a spinal injury (broken neck) negligence claim, and that at the time of the tribunal hearing that claim was still live. As a matter of law, under Section 8 of the Administration of Justice Act 1982 (the "**1982 Act**"), personal injury claims in Scotland may include an element of compensation in respect of necessary services being rendered to the injured person by a relative in consequence of the injuries in question. Under Section 8(2), the injured person is under an obligation to account to the relative for any damages recovered for services rendered. The Upper Tribunal does not have information about whether the claim being litigated in Australia includes a claim of this nature in respect of any services provided by the claimant to his daughter (or how the Chairperson is being remunerated for his work in this claim). Equally, the Upper Tribunal has not been given information excluding the possibility that this type of claim is part of the personal injuries claim in which the Chairperson is acting. In the result, I find there is a strong possibility that the Chairperson was doing work, presumably in expectation of remuneration, in order to recover sums of money which would financially benefit one of the parties to this appeal. The Chairperson therefore falls within the category of a judge being involved elsewhere in promoting the cause of one party to a case, and automatic disqualification follows, regardless of his knowledge. And even if I am wrong about that and he is not automatically disqualified, I consider that the fair minded and informed observer would conclude that there was a real possibility of bias on the facts of this case. I take into account all of the circumstances, including the nature of the connection between the claimant and the Chairperson, the fact that the daughter's claim appears to be current, and that the Chairperson is her direct contact. I also take into account that the Chairperson decided against the claimant, and that the claimant and the Chairperson had not met or spoken prior to the case and the

Chairperson had not been aware of the connection at the time of determining the case. I acknowledge that this lack of knowledge may in some cases be a relevant factor (*Locabail* paragraph 18). But a further weighty factor is the unsatisfactory nature of the response from the Chairperson to the Upper Tribunal's inquiry about the allegation of bias. Caselaw concerning bias makes it clear that statements from judges about their connection may be used in considering bias (*Helow v. Secretary of State for the Home Department* 2009 SC (HL) 1 at paragraph 39); and that where any allegation of bias comes to light it should be disclosed by the judge and addressed (*Locabail (UK) Ltd v Bayfield Properties Ltd and Another* [2000] QB 451 at paragraph 20). Part time tribunal members exercising judicial functions are not exempt from these requirements. The Chairperson of the tribunal did not address this caselaw, nor state the particular statutory provisions of the "data protection act" upon which he purported to rely to justify his guarded response. He did not address, for example, the exemptions concerning judicial independence and judicial proceedings in the Data Protection Act 2018 Schedule 2 part 2 paragraph 14, reflecting Article 23(1)(f) GDPR (Regulation EU 2016/679). The Chairperson's response did not inspire confidence; it was skeletal and did not give full disclosure of factors bearing on whether there was apparent bias or not. I consider that it is important to bear in mind that what is in issue is the integrity of the decision making process, and that justice must be seen to be done. I find that the nature of the connection between the Chairperson and the claimant, and the unsatisfactory response from the Chairperson, raise a real possibility of doubt and scepticism in the mind of the fair minded observer as to the Chairperson's independence and impartiality (*Locabail* paragraph 19). I find that the fair minded and informed observer would conclude that there was a real possibility of bias, and apparent bias is established in the circumstances of this case. There has been a breach of natural justice.

14. Because of this breach of natural justice, the case will need to be remitted to the tribunal for a rehearing. It is therefore not necessary for me to decide whether the claimant's complaints about the medical member would have given rise to actual or apparent bias. In any given case the answer to that question would turn on all of the facts. I note that as a generality, the fact that the medical member had previously sat in a case involving the claimant would not, without more, give rise to apparent bias (*Locabail* paragraph 25); and in situations in which appropriate disclosure has been made and no objection is made, the doctrine of waiver may mean that a party cannot thereafter complain of the matter disclosed as giving rise to a real possibility of bias (*Locabail* paragraph 26).

Inadequate reasons

15. As stated in *Wordie Property Co Ltd v Secretary of State for Scotland* 1984 SLT 345, the tribunal must:

"give proper and adequate reasons for [its] decision which deal with the substantial questions in issue in an intelligible way. The decision must, in short, leave the informed reader … in no real and substantial doubt as to what the reasons for it were and what were the material considerations which were taken into account in reaching it".

To be adequate, reasons do not have to involve a consideration of every issue raised by the parties, and nor do they require to deal with every piece of material in evidence (*Eagil Trust Co Ltd v Pigott-Brown* [1985] 3 All ER 119 at 122 per Griffiths LJ; *AJ (Cameroon) v Secretary of State for the Home Department* [2007] EWCA Civ 373 at para 15 per Laws LJ).

16. In this case, the tribunal had to give adequate reasons for its conclusion under Section 1 of the 1943 Act that the claim was rightly rejected because the statutory conditions of entitlement to an award were not satisfied. It had to consider under Article 41 of the 2006 Order whether there was a disablement, due to an injury, and that injury was either attributable or aggravated by service, and explain why the SSD was correct to find these tests were not satisfied. In the circumstances of this case, an important additional substantial question was whether any disablement claimed had already been included in the earlier award of war pension.

17. The facts found by the tribunal, and its reasons for refusing the appeal, were as follows:

> 1. "The appellant, in 1977, sustained a serious head injury in Curacao. He was admitted to hospital on 1 December 1977. The circumstances of the accident are unknown.
> 2. Patients who have a severe brain injury suffer some form of long term neuropsychological and behavioural consequence, more often than not.
> 3. The appellant is slow in his mentation, likely to have suffered information processing difficulties, frequent preservation, impulsive tendency both in speech and in behaviour.
> 4. The appellant is socially withdrawn and has difficulty in understanding aspects of social communication and interactions and adapting his social response in an appropriate manner.
> 5. The appellant's presentation fits the description of mental disorders not specified as psychotic, associated with physical conditions due to brain trauma.
>
> The findings in fact are on the balance of probabilities.
> The tribunal found no additional evidence had been produced to support a finding of psychiatric injury and refuses the appeal accordingly".

18. In my view these reasons fell short of the necessary standard for proper and adequate reasons.

18.1 There is no consideration of the claim in respect of leg injury, or reasons given why the claim on that ground was rejected. Assuming the correct claim form for the decision under appeal was before the tribunal, there was a claim in respect of this matter (p50), together with findings in the War Pensions medical board report (p69 and 75). The tribunal's reasons leave unexplained what it made of whether the claim on this ground was

rightly rejected because the statutory conditions of entitlement to an award were not satisfied.

18.2 The informed reader is left in real and substantial doubt about the tribunal's reasoning on disablement and mental illness. The context is a decision of the SSD to reject the claim based on the absence of disablement because there was no mental illness (p4) or psychiatric illness (p82), and the tribunal being tasked with determining whether the claim was rightly rejected. The tribunal finds in terms that the claimant's presentation fits the description of a mental disorder (paragraph 5 of its findings). Quite why it then refused the appeal on the basis that no additional evidence to support a finding of psychiatric injury, which on the face of it appears contradictory to its finding of the presence of a mental disorder, is not explained by the tribunal. It is possible that the tribunal thought that the symptoms claimed were all covered by the existing war pension. Or it might have thought that any symptoms that were not so covered did not amount to a psychiatric injury qualifying as disablement. But if either of those were its reasons, it should have said so, and explained why.

18.3 There is also inadequate and contradictory reasoning in relation to whether the claimant suffered from psychiatric illness or not. The Decision notice dated 29 October 2018 finds that the injury on which the claim is based, namely psychiatric illness, is not attributable to service and has not been aggravated by service. On a plain reading, this suggests that the tribunal accepted that psychiatric illness was present, but there was no service cause. But then the reasons for the decision dated 29 October 2018 end by saying that the tribunal found no additional evidence had been produced to support a finding of psychiatric injury. This appears to suggest the tribunal did not think there was psychiatric illness. There is an unexplained contradiction between the Decision notice and the reasons (*NJ v SSD* (AFCS) [2018] UKUT 211 (paragraphs 15-19)). It is true that the claimant's case is not always easy to follow, but one of the issues it raised was whether workplace bullying as a result of his head injury had resulted in additional psychiatric conditions. There is an absence of fact finding and reasoning on this matter. Dr Brown had made findings at the examination board of moderate anxiety and depression, felt to be linked to the head injury, not referred to or discussed by the tribunal. Mr Elanjithara, Consultant Psychiatrist, had also produced a report which contained various findings bearing on mental illness; but other than referring to the existence of this report and repeating the words of the diagnosis in that report of ICD Version 8 (1965) 309.2 in fact 5, the tribunal's reasons did not explain what it made of the report's conclusions. The informed reader is left guessing as to the tribunal's reasons why there was or was not psychiatric injury or disablement.

18.4 Finally, there is inadequate reasoning addressing whether any disablement claimed had already been included in earlier awards of war pension. The tribunal was, admittedly, in some difficulty making detailed findings because of the inexplicable failure of the SSD to produce the certificate of entitlement to a war pension dated 5 September 2017 to the tribunal, even though it was issued prior to the appeal being heard. But the

question of what earlier awards of war pension covered was on any view a central issue in the present appeal. In that context, if the tribunal had decided not to exercise its powers under Rule 14 of the Pensions Appeal Tribunals (Scotland) Rules 1981 to adjourn in order to obtain the certificate and details of what existing awards cover, then in my view it should have explained why in its statement of reasons. The certificate now before the Upper Tribunal specifies as part and parcel conditions already included in the war pension awarded: associated personality changes, associated impairment of social cognition, associated impairment of executive functioning. It was a matter for the expertise of the tribunal whether these part and parcel conditions encompassed the additional symptoms claimed (given that the existing award proceeded on the basis of aggravation by service rather than an injury caused by service), or whether there were additional disablements with a service cause or aggravation which were not covered. For the tribunal's reasons to be adequate, it was incumbent on it to make relevant findings in fact about these matters, and explain whether or not the existing awards covered any of the mental health problems now claimed, and why.

I therefore find that the tribunal's reasons were not proper and adequate.

Conclusions

19. Because the tribunal's decision was made in error of law due to apparent bias and inadequate reasons, I set it aside. I am not in a position to remake the decision because of the absence of relevant fact finding. I remit the case to a differently constituted tribunal for reconsideration in accordance with the Directions made below. The claimant raises a number of additional matters in his grounds of appeal, but it is not necessary to decide them as they will be subsumed in the rehearing of the case. In setting aside this decision and remitting for reconsideration, I should make it clear that I am making no finding about nor expressing a view about whether the claimant is entitled to a war pension in respect of the particular claim under consideration by the tribunal. That is a matter for the new tribunal to decide.

DIRECTIONS

1. **The case is to be reconsidered at an oral hearing. The members of the Pensions Appeal Tribunal for Scotland who are chosen to reconsider the case are not to be the same as those who made the decision which has been set aside. When re-determining the case, the new tribunal should have regard in particular to paragraphs 7, 8, 16 and 18 above.**

2. **Within one month from the date of issue of this Decision, the SSD must provide to the Pensions Appeal Tribunal for Scotland a Schedule listing the claims made by the claimant for war pensions by date, what injuries the claims were for, and their outcome. The SSD should also provide copies of**

the following documents insofar as they are in its possession, or an explanation why they are not;

2.1 Certificates of entitlement or refusal in respect of claims under the 2006 Order by the claimant;

2.2 The claim forms submitted by the claimant for the war pension already awarded to him based on 20% disablement in or about 2007 and 30% in or about 2017; and the medical evidence relied on by the SSD in determining those claims.

2.3 Any claim forms submitted by the claimant previously to the claim form submitted in this particular claim which related to abuse or bullying while in service, and the outcome of those claims.

2.4 The report of Dr Seldon referred to by the claimant at page 156 of the bundle.

3. Parties may provide any further evidence upon which they wish to rely before the Pensions Appeal Tribunal for Scotland, the deadline for doing so being one month from the date of issue of this Decision.

4. The new tribunal is not bound in any way by the decision of the previous tribunal. It will not be limited to the evidence and submissions before the previous tribunal. It may consider all aspects of the case entirely afresh, and it may reach the same or a different conclusion to the previous tribunal.

These Directions may be supplemented by later directions by a Tribunal Judge in the Pensions Appeal Tribunal for Scotland.

(Signed)
A I Poole QC
Judge of the Upper Tribunal
Date: 27 June 2019