UA-2023-SCO-000090 - WP

GAM v Secretary of State for Defence
[2024] UKUT 10 (AAC)

IN THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER) **Appeal No. UA-2023-SCO-000090-WP**

On Appeal from the First-tier Tribunal (War Pensions and Armed Forces Compensation Chamber) PATS/S/22/0025

BETWEEN

Claimant GAM

and

Respondent THE SECRETARY OF STATE FOR DEFENCE

BEFORE UPPER TRIBUNAL JUDGE WEST

Decided after an oral hearing: 3 January 2024

DECISION

The decision of the First-tier Tribunal sitting at Edinburgh dated 11 July 2023 under file reference PATS/S/22/0025 does not involve a material error on a point of law. The appeal against that decision is dismissed.

This decision is made under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS

Introduction

1. This is an appeal, with the permission of the President of the Pensions Appeals Tribunal for Scotland, against the decision of the First-tier Tribunal sitting at Edinburgh on 11 July 2023.

2. I shall refer to the claimant hereafter as "the claimant". The respondent is the Secretary of State for Defence. I shall refer to him hereafter as "the Secretary of State". I shall refer to the tribunal which sat on 11 July 2023 as "the Tribunal".

3. The claimant appealed against the decision of 20 January 2022 that his unemployability supplement ("UnSupp") be abated in respect of his award of universal credit ("UC") with effect from 9 February 2022. As set out in the decision letter, the effect of the abatement was that the UnSupp was reduced by £79.03 per week from £119.90 to £56.37 per week. His war disablement pension and his comfort allowance were not reduced and remained payable at £135.80 and £15.75 per week respectively. Thus, with effect from 9 February 2022 he was to receive £207.92 per week, comprising the war disablement pension of £135.80, the abated UnSupp of £56.37 and the comforts allowance of £15.75.

4. The matter came before the Tribunal on 11 July 2023 when the claimant appeared by video and gave oral evidence. A presenting officer (Mr Ferguson) also appeared by video on behalf of the Secretary of State. The appeal was refused and the decision of the Secretary of State upheld.

The Statement of Reasons

5. In its statement of reasons dated 21 July 2023 the Tribunal stated that

> "6. Article 41 of the Naval, Military and Air Forces (Disablement and Death) SPO 2006 applies and governs

this Appeal. The effect of that Article is to place the burden of proof on the claimant at least to the extent of him requiring to raise a reasonable doubt in [his] favour based upon reliable evidence.

7. [The claimant] advised that he was in receipt of State benefit of Universal Credit and part of that award was a component for limited capability for work related activity (LCWRA). He indicated he was also in receipt of State benefit Personal Independence Payment (PIP). He indicated that he was not in receipt of the State benefit Employment Supplement Allowance (ESA).

8. [He] advised that the Benefits Agency had confirmed to him that they would not take into account any of the unemployability supplement payment being paid under the SPO when assessing eligibility for the amount of payment of Universal Credit benefits. As far as the Benefits Agency were concerned there was no overlap of benefit when assessing Universal Credit.

9. [He] said he was not attempting to claim double compensation for the same injury. He advised that the Benefits Agency had accepted all of his stated injuries under the War Pension Scheme. [He] accepted that an award of ESA would be an overlapping benefit. We have considered the case by the Secretary of State.

10. Mr. Ferguson referred to page 3 of the Statement of Case which was the written reasons for the Secretary of State's reason for the decision under review. It is stated in that that [the claimant] was initially awarded Unemployability Supplement on 18 March 2019 and there was a review on 15 March 2021.

11. On the claim form [the claimant] had stated that he was receiving Universal Credit and an e-mail enquiry from the Department of Work and Pensions (DWP) dated 29 October 2021 confirmed that [his] Universal Credit included a component for limited capability for work and work-related activity (LCWRA). The DWP confirmed this had been in payment since 7 August 2018 and included a health allowance component at the rate of £343.63 per month.

12. It was stated that upon claiming Universal Credit, an individual's ability to work will be assessed via a Work Capability Assessment. Those who are considered unable to work and are not expected to be able to prepare for work in the future are placed in the limited capability for work-related

activity group and receive a monthly health allowance component.

13. It is also stated that Universal Credit currently disregard the War Disablement Pension (WDP) and supplementary allowances in their consideration of Universal Credit, and there is no provision within the overlapping benefit regulations which can prevent an award of allowances under both schemes.

14. There is reference to Article 52 of the Naval, Military and Air Forces (Disablement and Death) Service Pensions Order and that the provisions of Article 52 had been applied in the current case namely that individuals should not be compensated twice for the same purpose from public funds.

15. It goes on to say under Article 52 the Secretary of State may take compensation into account against a pension or gratuity in such a manner and to such an extent as he thinks fit and may withhold or reduce the pension or gratuity accordingly.

16. The position is summarised on reverse of page 3 and it is stated that the Secretary of State considers the claimant's unemployability supplement should be abated in respect of the health allowance component of Universal Credit under Article 52 of the Naval, Military and Air Force Etc (Disablement and Death) Service Pensions Order 2006. The Tribunal finds the following material facts.

17. [The claimant] was initially awarded unemployability supplement on 18 March 2019.

18. A review claim form was received on 15 March 2021.

19. The claimant was and is in receipt of Universal Credit and [his] Universal Credit included a component for limited capability for work and work-related activity (LCWRA). Universal Credit had been paid to the claimant since 7 August 2018 and included a health allowance component at the rate of £343.63 per month.

20. [The claimant] is in receipt of Personal Independence Payment (PIP).

21. The Benefits Agency do not consider unemployability supplement as an overlapping benefit when assessing eligibility for Universal Credit. The State benefit ESA could be taken into account by the Secretary of State when

assessing Unemployability Supplement payments. The Tribunal's consideration in deciding this Appeal are:

22. We considered Article 12 of the SPO 2006 which is found on page 4 of the Statement of Case and comprises of awards in respect of disablement.

23. Under the heading Unemployability Allowances in Article 12 which article provides that 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.

24. Article 12(10)(b) provides that where a personal allowance or additional allowance has been awarded under the law of any place outside the United Kingdom being a benefit which, in the opinion of the Secretary of State, is analogous to benefits under Chapters 1 or 2 of part 2 of the Social Security Act 1975, the Secretary of State may take into account any pension referred to and may make any adjustment which would be made if the person were eligible for analogous benefits under Chapters 1 or 2 of part 2 of the Social Security Act 1975. Taking this Article along with Article 52 we came to the view that if any element of Universal Credit contained a component analogous to one of the 1975 listed benefits then we believe it would be appropriate to make adjustment to the unemployability supplement.

25. The benefits listed under the 1975 Social Security Act are as follows. The Chapter II non-contributory benefits listed are:-

Descriptions of non-contributory benefits.

1. Attendance allowance

2. Non-contributory invalidity pension

3. Invalid care allowance

4. Guardians allowance

5. Retirement benefits for the aged

6. Age addition.

26. We considered the fact that [the] LWRCA is paid due to a health condition or disability a person's condition is such that they are not capable of preparing for work.

> 27. We have considered that sickness benefit as listed in the 1975 Act was paid when a person was unable to work for reasons of ill health and that benefit would be paid for a period of 168 days and thereafter would convert to invalidity benefit both of which were listed in the 1975 Act. We came to the view that the health component and LWRCA payment within the Universal Credit payments were analogous benefits to those found in the 1975 Act and therefore the Secretary of State was entitled to abate.
>
> 28. We considered the UK Government guidance entitled War Pension Scheme: Unemployability Supplement (UnSUPP) published on 21 February 2020.
>
> 29. That guidance contains eligibility rules for claiming UnSUPP one of which is that the applicant for UnSUPP must have a War Pension disability assessment of 60% or higher. [The claimant] has an award of 70% so he meets this eligibility criteria.
>
> 30. The guidance also states that UnSUPP cannot be claimed when in receipt of Employment and Support Allowance (ESA).
>
> 31. Universal Credit replaced a number of benefits one of which was ESA and [the claimant] accepted ESA could be offset against UnSUPP."

Permission To Appeal

6. On 2 August 2023 the President, Judge Caldwell KC, acceded to the claimant's application and granted him permission to appeal. It seemed to her that there was an arguable case that the Tribunal erred in point of law on the basis that

> "7. Essentially, the applicant argues that the legislation does not permit the abatement of UnSupp in respect of UC because UC is not named in Article 12(10) of the SPO as one of the benefits that the Secretary of State can take into account when adjusting an award of UnSupp to take account of other benefits.
>
> 8. The Secretary of State does not support the appeal. The gravamen of the SSD's argument is as follows:-

> The Secretary of State considers that the Tribunal has given a clear and detailed explanation of its process of reasoning. It explains that it considered Articles 12 and 52 together to find that the Secretary of State has the power to adjust UnSupp in respect of other benefits equivalent to those specified in Article 12, which refers to the Social Security Act 1975. It then explains that sickness benefit as listed in the 1975 Act is equivalent to the health and LCWRA components of UC. Consequently, it reached the only logical conclusion: that UnSupp can be adjusted in respect of the health and LCWRA components of UC. This reasoning is cogent and easy to understand and the Secretary of State therefore considers that the Tribunal has fulfilled its obligation to provide adequate reasons for its decision.

Discussion and Decision

9. Article 12 of the SPO provides for the payment of UnSupp and for those entitled to receive it. Art. 12(10) gives the SSD a discretion to take into account certain state pension benefits and equivalent non-UK benefits and set them off against the UnSupp allowance.

10. Part VII of the SPO (articles 51 to 66) makes provision for reduction and cancellation of awards. Article 52 gives the SSD discretion to adjust awards in respect of other "compensation". Compensation is defined in article 52(3). The purpose of this article is to prevent duplication of payments. Article 56 provides for abatement of awards in respect of social security benefits paid under certain Acts. This includes Part I of the Welfare Reform Act 2012. Part I of the 2012 Act makes provision for the payment of UC. The tribunal dealt with the abatement in this case by reference to article 52. To my mind, it is arguable that it should have been considered in terms of article 56. I am therefore concerned that the tribunal may have been in error of law.

11. For the reasons given in the preceding paragraph, I grant leave to appeal."

The Secretary of State's Submission

7. On 21 September 2023 the Secretary of State provided submissions, but did not support the appeal. He submitted that

"4. For the purposes of this Response, the Secretary of State proceeds on the basis that the claimant's fundamental concern is as set out at para. 7 of the President of the PAT's decision granting leave to appeal dated 2 August 2023:

> Essentially, the applicant argues that the legislation does not permit the abatement of UnSupp in respect of UC because UC is not named in Article 12(10) of the SPO as one of the benefits that the Secretary of State can take into account when adjusting an award of UnSupp to take account of other benefits.

5. Assuming that is the claimant's central complaint, it is misconceived.

6. Of note, the claimant also seems to argue that his current conditions merit a higher assessment than the 70% he currently receives. That is the subject of a different appeal (UA-2023-SCO-000076). Accordingly, the Secretary of State does not address that issue in this response. The claimant also appears to challenge the finding that his NCFI is not severe enough to prevent him working. Given the Secretary of State has agreed that Unemployment Supplement should be paid, any such challenge is irrelevant.

The Secretary of State was entitled to abate in terms of Art 52

Abatement under Art. 52

7. Art. 52 (1) of the Naval, Military and Air Forces etc. (Disablement and Death) Service Pension Order 2006 provides:

> "(1) Where the Secretary of State is satisfied that—
>
> (a) compensation has been or will be paid to or in respect of a person to or in respect of whom a pension or gratuity is being or may be paid; or …
>
> the Secretary of State may take the compensation into account against the pension or gratuity in such manner and to such extent as he thinks fit and may withhold or reduce the pension or gratuity accordingly".

8. "Compensation" is defined in Art. 52(3) and includes:

> "any periodical … payment in respect of the disablement … of any person … being a payment for which provision is made by or under any enactment".

9. The clear policy basis of this rule is to prevent double-compensation. If the recipient of a pension is compensated from another source, it is not appropriate for the state to also make an analogous payment via a war pension. That policy can be ascertained having regard to the whole scheme of the 2006 Order, including Arts. 52, 56 and 12(10). Accordingly, the Secretary of State is afforded a discretionary power to withhold or abate pension payments "as he thinks fit".

Universal credit payment

10. The claimant is in receipt of Universal Credit with a LCWRA component. Of note, it is the LCWRA component which has been the reason for abatement of the claimant's pension payments.

11. Universal Credit is provided for in terms of Part 1 of the Welfare Reform Act 2012 and replaced various previous social security benefits. The definition of limited capability for work related activity is set out at s. 37(2) of the 2012 Act:

> "(2) For the purposes of this Part a claimant has limited capability for work-related activity if—
>
> (a) the claimant's capability for work-related activity is limited by their physical or mental condition, and
>
> (b) the limitation is such that it is not reasonable to require the claimant to undertake work-related activity".

12. Accordingly, a LCWRA payment shall only be made in circumstances where a physical or mental condition renders it unreasonable for the individual to undertake work-related activity. Whilst expressed with different language, that is plainly analogous to "disablement" in terms of Art. 52(3) of the 2006 Order.

Justification for abatement

13. Having regard to the above, it is clear that the Secretary of State was entitled to abate the claimant's pension. Each of the three ingredients in the definition of "compensation" for the purposes of Reg. 52(3) have been met:

> I. The pursuer receives a periodical payment: the LCWRA component of Universal Credit;

> II. It is "in respect of disablement" as a result of a physical or mental condition which renders it unreasonable for him to undertake work-related activities: s. 37(2) of the 2012 Act; and
>
> III. It is a payment for which provision is made under an enactment: the 2012 Act.

14. Those elements having been met, the decision to abate was one for the Secretary of State to consider "as he thinks fit". The Secretary of State had regard to the policy justification of avoiding double-compensation. His decision was rational. He had a reasonable basis to conclude that the claimant ought not to receive overlapping payments from both the Department for Work and Pensions and the Ministry of Defence in respect of his unemployability, as a result of his physical conditions. The Secretary of State was entitled to abate the claimant's pension by reference to Art. 52 of the 2006 Order. The appeal ought to be refused.

Art 12(10) of the Order

15. Having regard to the above reasoning, it was not necessary for the PAT to engage in the analysis of Art. 12(10) of the 2006 Order which it did. Abatement for the LCWRA component of Universal Credit clearly falls within the scope of the statutory language in Art. 52, without having to read any principles across from Art. 12(10). Nonetheless, the PAT's analysis is consistent with the conclusion that Art. 52 allows for abatement in these circumstances.

Art 56 of the Order

16. In her decision granting permission to appeal, the President of the PAT suggests that Art. 56 of the Order may be the correct vehicle through which to abate the claimant's pension. The Secretary of State submits, respectfully, that such an analysis is misconceived.

17. Art. 56 provides:

> "(1) Where a pension is awarded to or in respect of a person for any past period for which benefit under an Act referred to in paragraph (3) has also been paid to or in respect of that person ("the relevant period"), the amount of pension awarded may be abated by an amount calculated in accordance with paragraph (2)".

18. As noted by the President, Universal Credit falls within the scope of para. 3 of Art. 56. However, Art. 56 is directed at a separate, distinct context. Art. 56 bites "where a pension is awarded for any past period". The decision subject to

> appeal related to a decision as to abatement of pension payments going forward. In such circumstances, for the reasons set out above, Art. 52 provides the correct vehicle for abatement of pension payments.
>
> 19. *Esto* Art. 56 is the correct vehicle for abatement, any error of law on the part of the PAT has been immaterial. Art. 56(2) prescribes the method of abatement:
>
> > "(2) The amount referred to in paragraph (1) is the amount by which the amount of benefit paid during the relevant period exceeds the amount of benefit which would have been payable if the pension had been paid at the same time as the benefit".
>
> 20. That is substantively the approach which was adopted by the Secretary of State. Any error was immaterial.
>
> **Conclusions**
> 21. For the reasons set out above, the Secretary of State invites the Upper Tribunal to refuse the appeal."

The Claimant's Submission

8. Although the claimant was acting in person, he had the benefit of a submission written on his behalf by Mr Glyn Tucker of the Royal British Legion, which was before me at the hearing. The claimant in essence submitted that the Tribunal erred in considering Article 52 and not Article 56. Under Article 56 the Department for Work and Pensions determined whether there had been any duplication and abated awards of social security benefits accordingly. Where that was not done because, for example, war pension was awarded for a past period, the Secretary of State for Defence (in the form of Veterans UK) could abate the award, but only to the extent that it exceeded the amount which would otherwise have been paid. In the present case there would be no abatement in respect of the UnSupp because the Department for Work and Pensions had determined that it did not overlap with UC. The question then arose whether Article 56 provided the only route to the abatement of awards of social security benefits. A similar question arose in relation to the recovery of overpayments of social security benefits in the attached case of ***CPAG v SSWP*** [2010] UKSC 54 regarding s.71 of the Social Security Benefits Act 1992. Could recovery be made under the common law if it could not be under s.71? The Supreme Court confirmed that it could not be

because s.71 provided an exclusive code for recovery. As Lord Dyson SCJ stated in paragraph 35 "the co-existence of two systems, overlapping but varying in matters of detail … would be a recipe for chaos". It could not have been intended by Parliament that Veterans UK could revisit recovery under Article 52 where Article 56, specifically applying to social security benefits, did not allow it.

The Hearing of the Appeal

9. On 17 August 2023 I directed an oral hearing of the appeal, which I heard by video on the morning of 19 December 2023. The claimant appeared in person. The Secretary of State was represented by Mr David Blair of Axiom Advocates.

10. I reserved my judgment until the New Year.

Discussion

Article 12(10)

11. Article 12(10) of the SPO 2006 provides that

> "Where—
>
> (a) a person to whom a personal allowance may be or has been awarded under the foregoing provisions of this article is eligible for—
>
> (i) a category A or B retirement pension, as provided for by regulation 18 of the Social Security (Widow's Benefit, Retirement Pensions and Other Benefits) Transitional Regulations 1979, or by corresponding regulations made in Northern Ireland, or
>
> (ii) a widow's pension under Part II of the Social Security Contributions and Benefits Act 1992, or the corresponding provisions of the Social Security (Northern Ireland) Contributions and Benefits Act 1992; or
>
> (iii) a state pension under Part 1 of the Pensions Act 2014; or
>
> (b) a person to or in respect of whom a personal allowance or an additional allowance may be or has been so awarded is eligible for benefit payable out of public funds under the law of any place outside the United Kingdom being benefit

> which, in the opinion of the Secretary of State, is analogous to benefit under Chapters I or II of Part II of the Social Security Act 1975
>
> the Secretary of State may take into account any pension referred to in subparagraph (a) against the personal allowance and any benefit referred to in subparagraph (b) against the personal allowance and the additional allowance in such manner and to such extent as he may think appropriate having regard, in the case of such benefit, to any adjustment which would be made if the person were eligible for the analogous benefit under Chapters I or II of Part II of the Social Security Act 1975".

12. Sub-paragraph (a) is obviously inapplicable to the present situation. The Tribunal sought to rely on Article 12(10(b), but that provision is equally obviously inapplicable because it only applies where a claimant "is eligible for benefit payable out of public funds under the law of any place outside the United Kingdom". The claimant in this case, however, was not eligible for payment of benefit out of public funds under the law of any place outside the UK. The question of whether the UK benefit which he was being paid was or was not analogous to benefit under Chapters I or II of Part II of the Social Security Act 1975 did not therefore arise. To the extent that the Tribunal relied on the terms of Article 12(10)(b) its decision was erroneous and the Secretary of State rightly did not seek to uphold its decision on that basis. (I should add that it was never part of the Secretary of State's case before the Tribunal that Article 12(10)(b) applied to the case in any event.)

Article 52

13. In addition, the Tribunal reached its decision of the basis of Article 52 and in my judgment it was right to rely on that provision.

14. Article 52, so far as material, provides that

> "(1) Where the Secretary of State is satisfied that—
>
> (a) compensation has been or will be paid to or in respect of a person to or in respect of whom a pension or gratuity is being or may be paid; or …

> the Secretary of State may take the compensation into account against the pension or gratuity in such manner and to such extent as he thinks fit and may withhold or reduce the pension or gratuity accordingly"

and "compensation" is defined in Article 52(3) to include:

> "any periodical … payment in respect of the disablement … of any person, … or in respect of any incapacity sustained or suffered by any person, being a payment for which provision is made by or under any enactment".

15. It Is not in dispute that the claimant is in receipt of UC with a LCWRA component. It is the LCWRA component which was the reason for abatement of the claimant's UnSupp payments.

16. UC is provided for in terms of Part 1 of the 2012 Act. The definition of limited capability for work-related activity is set out in s. 37(2) of the 2012 Act:

> "(2) For the purposes of this Part a claimant has limited capability for work-related activity if—
>
> (a) the claimant's capability for work-related activity is limited by their physical or mental condition, and
>
> (b) the limitation is such that it is not reasonable to require the claimant to undertake work-related activity".

17. It follows from this definition that a LCWRA payment is only made in circumstances where a physical or mental condition renders it unreasonable for the claimant to undertake work-related activity. Although expressed in different language, I am satisfied that such a payment is one made in respect of the claimant's "disablement" in the terms of Article 52(3) of the SPO. Although the Secretary of State did not make this point, it seems to me that it could equally be said that such a payment is made in respect of the claimant's "incapacity" within the terms of Article 52(3).

18. In that event, each of the three elements of the definition of "compensation" for the purposes of Article 52(3) has been made out. In the first place the claimant receives a periodical payment, namely the LCWRA component of UC. Secondly,

that payment is "in respect of disablement" (or "incapacity") as a result of a physical or mental condition which renders it unreasonable for him to undertake work-related activities by virtue of s. 37(2) of the 2012 Act. Thirdly, it is a payment for which provision is made under an enactment, namely the 2012 Act. Accordingly, the Secretary of State was afforded a discretionary power to withhold or abate the UnSupp payment "as he thinks fit".

19. That result accords with the underlying policy of preventing double-compensation. If the claimant is compensated for his inability to engage in work-related activity from another source (in this case the LCWRA element of UC), it is not appropriate for the state also to make a further payment via a war pension payment in the form of UnSupp.

20. That is because a payment of an unemployability allowance in the form of UnSupp under Article 12(1) of the SPO 2006 is paid in respect of disablement so serious as to render the claimant unemployable:

> "Subject to the provisions of this article, 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, being—
>
> (a) a personal unemployability allowance at the appropriate rate specified in paragraph 5(a) of Part IV of Schedule 1 …".

21. There is a clear overlap between a payment in respect of disablement so serious as to render the claimant unemployable and a payment made because the capability for work-related activity is limited by a claimant's physical or mental condition and the limitation is such that it is not reasonable to require the claimant to undertake work-related activity.

22. The claimant sought to rely on his conversation with the Department of Work and Pensions on or about 3 February 202 to the effect that "you will see that he has called UC explaining his WP and they have said there is no cross over with UC except ESA and he is not on ESA". What may or may not have been said in a

telephone conversation cannot override the correct interpretation of the statutory scheme.

23. What the Department in fact said in his UC journal entry for that date was that war disablement pension did not affect his UC, but that under war pension rules the LCWRA element of UC did overlap with war pension UnSupp:

> "I am answering your email because I think I need to try to explain about Universal Credit and War Pension Unemployability Supplement.
>
> Under Universal Credit rules, War Pension Unemployability Supplement does not overlap.
>
> However, under War Pension rules, the health allowance component of Universal Credit (LCWRA) overlaps with War Pension Unemployability Supplement.
>
> This is why we have had to reduce your UnSupp by the amount you received for UC LCWRA".

24. The Secretary of State repeated his position in a statement dated 7 February 2023:

> "… War Pension Payments are not taken into account when calculating eligibility to Universal Credit.
>
> However, under the War Pension Scheme, the Secretary of State considers that the health allowance component of Universal Credit overlaps with Unemployability Supplement because it is paid for thew same contingency i.e. financial support for people unable to work on the grounds of incapacity.
>
> As there is no provision within the overlapping benefit regulations which can prevent an award of allowances under both schemes, Article 52 of the SPO is used to abate the award of Unemployability Supplement".

25. It seems to me that what was said in those paragraphs was an accurate statement of the position, as was the ministerial statement of 14 September 2020 by Baroness Stedman-Scott on which the claimant also sought to rely, that

payments under the war pension scheme were not taken into consideration as income for the purposes of UC. In short, war pension payments are not taken into account when calculating eligibility to UC. However, under the SPO 2006, where the Secretary of State considers that the health allowance component (whether LCW or LCWRA) of UC overlaps with UnSupp because it is paid for the same contingency (i.e. financial support for people unable to work on the grounds of disablement or incapacity incapacity), he is entitled to use Article 52 to abate the award of UnSupp.

26. The claimant sought to rely on the details of a "Benefits Factsheet" produced by the Armed Services Advice Project ("ASAP") in conjunction with CPAG in August 2022 which set out in tabular form any particular allowance and the corresponding benefit overlap. In that table the UnSupp allowance is shown only as correspondingly overlapping with contributory ESA and category A or B retirement pension or state pension.

27. He also sought to rely on a statement of the gov.uk website that UnSupp could not be paid when ESA was in payment. He therefore argued that, since he was not in receipt of ESA, his UnSupp could not be abated by virtue of his receipt of UC.

28. However, in the first place statements in a benefits factsheet or on a website cannot override the applicable statutory provisions and do not assist the claimant. In the second place, the statement on the gov.uk website is not incompatible with the present situation. What it says is that UnSupp cannot be paid when ESA is in payment. It does not say that UnSupp cannot be abated when UC is in payment.

29. Thus I am satisfied the Tribunal was right to conclude that the Secretary of State was entitled to abate the award of UnSupp by virtue of Article 52 and therefore any reliance on Article 12(10)(b) was not material to the Tribunal's decision.

30. If the reliance on Article 12(10)(b) amounted to an error of law which was material to the decision, I would have remade the decision to the effect that the Secretary of State was entitled to abate the UnSupp payment in respect of the award of UC by virtue of Article 52 of the SPO alone and thereby have reached the same result.

Article 56

31. It is unfortunate that the President in granting permission to appeal, did not explain why she considered that it was Article 56 which applied rather than Article 52 nor how it would affect the outcome of the analysis to apply one provision rather than the other.

32. There is in fact no conflict between Article 52 and Article 56 which apply to two different situations.

33. Article 52 applies, in order to prevent duplication of benefits for the same injury, to give the Secretary of state power to take into account against any pension or gratuity "in such manner and to such extent as [he] thinks fit" any compensation (as defined in Article 52(3)) which has been or will be paid to a war pension beneficiary so as to extinguish or reduce the war pension benefits which would otherwise be payable. By contrast, Article 56 provides that where an award of a war pension is made for any past period during which social security benefits (i.e. contributory benefits, non-contributory benefits, increases for dependants, industrial injuries benefits, income-related benefits, jobseeker's allowance and employment and support allowance in Great Britain and Norther Ireland) have been paid, the amount of the pension may be abated by the amount by which the total of benefit paid during the period exceeds the amount which would have been paid if the social security benefit and the war pension had both been paid at the same time.

34. I therefore agree with the Secretary of State's submission that, whilst UC falls within the scope of Article 56(3), Article 56 is however directed at a separate, distinct context and that it bites "where a pension is awarded for any past period".

The decision which is the subject of the appeal in this case relates to a decision as to abatement of pension payments going forward. In those circumstances, for the reasons set out above, it is Article 52 which provides the correct vehicle for abatement of UnSupp payments.

35. It follows from this that the reliance on the ***CPAG*** decision does not assist the claimant. The situation is not one where a common law remedy was said to exist alongside the statutory regime or whether a common law remedy would be incompatible with the statutory scheme and could not therefore have been intended to co-exist with it. By contrast, this is a case where the statutory regime provides two different provisions for abatement, but they do not overlap because they deal with different situations and there is no room for any recipe for chaos as there potentially was in ***CPAG.***

Conclusion

36. For these reasons I am satisfied that the Tribunal did not make any error of law which was material to the decision and for that reason the decision of the Tribunal should be upheld and the appeal dismissed.

Mark West
Judge of the Upper Tribunal

Signed on the original on 3 January 2024