IN THE UPPER TRIBUNAL **Ut ref: UA-2021-000795-AFCS**
ADMINISTRATIVE APPEALS CHAMBER **[2024] UKUT 92 (AAC)**

On appeal from First-tier Tribunal (War Pensions and Armed Forces Compensation Chamber)

Between:

GE

Appellant

- v –

The Secretary of State for Defence

Respondent

Before: Upper Tribunal Judge Wright

Decision date: 28 March 2024
Decided after an oral hearing on 6 October 2023

Representation: **Simon Cheetham KC** of counsel for the appellant
Jennifer Seaman of counsel for the respondent

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

REASONS FOR DECISION

Introduction

1. This is an appeal against the decision of the First-tier Tribunal of 19 July 2021 ("the FTT"). By that decision, the FTT dismissed the appellant's appeal from two specified decisions of the Secretary of State for Defence dated 11 February 2020. Those decisions were stated to be that: (i) the appellant's Guaranteed Income Payment was put into payment with effect from 13 July 2019, and (ii) the criteria to carry out an article 59 review were not met.

2. The essence of the appellant's case to the FTT, as it summarised in its decision, was that he should have been granted the Guaranteed Income Payment from the date of his claim in July 2015 as he had not been earning his full salary as reservist since that date. The appellant's argument was, and remains, that it was unfair that a regular member of the armed services who would have been discharged due to ill health was able to qualify for the Guaranteed Income Payment on discharge, whereas the appellant was not able to do so when his ill health had reduced his ability to earn his full salary as a reservist and as a civilian.

3. The FTT rejected the appellant's argument that he ought to have qualified for the Guaranteed Income Payment from July 2015. It relied on articles 16(10) and 64 of the Armed Forces and Reserve Forces Compensation Scheme Order 2011 ("the AFCS Order") and found in essence, that entitlement to the Guaranteed Income Payment could only arise after a service member's service in the armed forces had ended. As the appellant's service had not ended until 12 July 2019, he could not qualify for the Guaranteed Income Payment on or before that date and so he could not have qualified for that payment at the July 2015 date of claim. In so concluding, the FTT rejected the appellant's argument that article 64(1)(c) of the AFCS Order should be interpreted to mean that the appellant could receive the Guaranteed Income Payment.

4. I can identify no error of law in the FTT's construction of the relevant law. Indeed, in my judgment the construction the FTT adopted of the wording in the statutory scheme was the only correct one.

5. The Chamber President of the War Pensions and Armed Forces Compensation Chamber of the First-tier Tribunal, Judge Monk, when giving the appellant permission to appeal in order to obtain guidance from the Upper Tribunal "on the proper approach to Article 64 for appellants who have been members of the Reserve Forces", stated that she did not think the FTT had erred in law as it applied the provisions of article 64. I agree.

6. Arguments about whether the grounds for carrying out a review under article 59 of the AFCS Order as to the correct start date for payment of the Guaranteed Income Payment add nothing, as Mr Cheetham fairly accepted before me, and the ground relating to whether the FTT had erred in law in its decision on article 59 were not pursued at the hearing before me.

Relevant factual background

7. The appellant served as a regular member of the Army from around 1993 to 1998. He then joined the Army Reserve as a member of the reserve forces. At the same time as serving in the Amy Reserve, he worked as an anaesthetist in the NHS. The appellant rose to the rank of Colonel as a reservist doctor in the Defence Medical Services.

8. It is not disputed that appellant retired from the Armed Services on 12 July 2019.

9. On 15 February 2016, the appellant submitted a claim under the Armed Forces Compensation Scheme for Post Traumatic Stress Disorder ("PTSD"). An interim award was made to him for PTSD under the AFCS Order, at table 3, item 4, level 12, for two years. On 15 January 2019, the appellant was accepted as having a permanent mental disorder and was made a final award under the AFCS Order at table 3, item 2, level 8, which meant an increased award. This entitled the appellant to a lump sum of £61,800.

10. Under article 16(7) of the AFCS Order, an award at level 8 also entitled the appellant to a Guaranteed Income Payment, calculated under article 24 of the same Order. However, relying on article 64 of the AFCS Order, the respondent wrote to the appellant on 12 March 2019 and informed him that he was no yet eligible to receive a Guaranteed Income Payment because he was still serving and had not been discharged from service. On the ending of the appellant's service on 12 July 2019, the respondent wrote to the appellant on 14 August 2019 to confirm that a Guaranteed Income Payment of £54,751.61 would be payable with effect from 13 July 2019. It is

that decision, and the failure of the respondent to review it, which the appellant appealed to the FTT.

11. The appellant's case before the FTT was that he had been a reservist for 19 years with 2 Medical Brigade until he retired on 12 July 2019. He was 'called up' for service in 2013 and was released from his call out notice on 5 August 2014. The appellant continued as Commissioned Officer in the Army Reserve working as a consultant anaesthetist. He was then deployed to Afghanistan where he was diagnosed with PTSD. He do not earn a military salary between January 2017 and January 2018. The appellant returned to military service as a reservist in January 2018, but in a lower commitment role, until he retired from service some 18 months later on 12 July 2019.

12. The appellant's argument to the FTT was that the intention of the Guaranteed Income Payment was income replacement and that withholding that payment to him when his earning capacity (both military and civilian) had been reduced due to his ill-health defeated that intention. Article 64(2)(c) of the AFCS Order applied to him and allowed the Guaranteed Income Payment to be paid to him from the date of his claim in July 2015, even though he had remained in service after that date. The appellant further argued that not to make the Guaranteed Income Payment to him from July 2015 was unfair as, compared to his peers in the regular Armed Forces, his earnings fluctuated after that date whereas the equivalent regular member of the Armed Forces would have their (military) earnings preserved until they were discharged from service. So to treat him was contrary to the express terms of the policy found in the Armed Forces Covenant of establishing parity between the reserve and regular forces. In the alternative, the appellant argued that article 64(2)(b) of the AFCS Order should be construed to cover his service ending when he was released from call out for service on 5 August 2014.

13. The FTT rejected these arguments. It was article 64(2)(b) which applied to the appellant and that meant that Guaranteed Income Payment was only payable from when his service ended, which was on 12 July 2019. This, moreover, was reinforced by the terms of article 16(10) of the AFCES Order which did not allow the Guaranteed Income Payment to be payable before the end of service.

Relevant law

14. Section 1(1) of the Armed Forces and Pensions Act 2004 provides that:

> "The Secretary of State may by order establish schemes which, in respect of a person's service in the armed forces, provide-
>
> (a) for benefits, in the form of pensions or otherwise, to be payable to or in respect of him on termination of service or on death or retirement, or
>
> (b) for payments to be made towards the provision of such benefits.
>
> Such a scheme is referred to in this Act as an armed forces pension scheme."

15. Under Article 15(1)(c) of the AFCS Order a benefits payment for injury includes "a guaranteed income payment payable until death."

16. Crucially, however, Article 16(10) of the AFCS Order sets out that a:

> "Guaranteed income payment is not payable until the day after the day on which the service of the member to whom it was awarded ends, and no such payment is payable in respect of any period before that day."

17. Under Article 2(1) of the 2011 Order:

> "service" is defined as "service as a member of the forces".
>
> "member" means "a member of the forces"
>
> "forces" means "the armed forces and the reserve forces" (the underlining is mine and has bene added for emphasis).
>
> "guaranteed income payment" "is the payment referred to in article 15(1)(c) and determined in accordance with article 24.

18. Article 24 of the AFCS Order deals with how the amount of the Guaranteed Income Payment is to be calculated. The amount includes a calculation of the "relevant salary". Under Article 24(6)(b), the "relevant salary" is:

> "……the salary of a member on the day on which the member's service ends or in the case of a former member, the salary on that day up-rated for inflation to the date of claim." (again the underling is mine for emphasis)

19. Article 4(1) of the AFCIS Order, as modified for members of the reserve forces by Schedule 2, paragraph 2, defines 'salary' as (the underlining has again been added by me for emphasis):

> "(a) the basic pay payable at the rate of a regular member of the forces who is of equivalent substantive rank, or acting rank, as the case may be, and seniority;
>
> (b) an amount which represents any reservist's award to which the member is entitled on the day the member leaves the service by virtue of being in relevant service on that day;
>
> (c) where the member is not in relevant service on the day the member leaves service, an amount which represents any reservist's award to which there would have been an entitlement had the member been in relevant service on that day; and
>
> (d) any other amount if and to the extent that the Defence Council have determined that it is to be treated as salary."

20. Under Article 2 of the AFCS Order, as modified by Schedule 2, paragraph 1 for members of the reserve forces "relevant service" has the same meaning as in regulations made under sections 83 and 84 of the Reserve Forces Act 1996.

21. By regulation 2 of the Reserve Forces (Call-out and Recall) (Financial Assistance) Regulations 2005,, "relevant service" is defined as:

> "permanent service on or after 14th April 2005-
>
> (a) Under Part IV of the 1996 Act [Special agreements for call out];
>
> (b) Under a call-out or recall order;
>
> (c) By a person called out or recalled under the Reserve Forces Act 1980 or under any other call-out or recall obligations of an officer;

> But shall not include any period in which the reservist is serving a term of imprisonment or detention under the sentence of a court-martial or a court of law in the British Islands or any colony."

22. Along with Article 16(10), Article 64 of the AFCS Order is of central importance. It governs the date on which awards of benefit become payable, and provides insofar as relevant as follows (again, I have underlined parts for emphasis):

> "…(2) Subject to paragraphs (5) and (6) an award of guaranteed income payment becomes payable –
>
> (a) where a member is discharged from the forces on medical grounds and the award is for the injury which caused the member to be discharged on medical grounds, on the day after the discharge;
>
> (b) <u>where a member is awarded injury benefit which includes an award of guaranteed income payment, on the day after the day on which the member's service ends</u>;
>
> (c) in any case where sub-paragraph (a) or (b) does not apply, on the date of claim."
>
> …(5) <u>Subject to article 16(10)</u>, an award—
>
> (a) revised under article 53 becomes payable on the date of claim;
>
> (b) revised under article 55 becomes payable on the day after the member's service ends;
>
> (c) revised under article 56 or 57 becomes payable on the date the application for review is sent to the Secretary of State;
>
> (d) subject to paragraph (6), revised under 59 becomes payable—
>
> (i) on the date the application for review is sent to the Secretary of State; or
>
> (ii) where no application for review has been made, the date on which the decision in relation to the revised award is made."

23. I was also shown the Explanatory Notes to the AFCS Order. I am mindful of the limited value that such Explanatory Notes may have in interpreting the meaning of statutory provisions: per paragraph [30] of *R(O) v SSHD* [2022] UKSC 3; [2023] AC 255. As Lord Hodge pointed out at paragraphs [29] to [31]:

> "29. The courts in conducting statutory interpretation are "seeking the meaning of the words which Parliament used": *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid of Drem. More recently, Lord Nicholls of Birkenhead stated:
>
> > "Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context."
> >
> > (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] AC 349, 396).
>
> Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in

a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, 397:

> "Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament."

30. External aids to interpretation therefore must play a secondary role. Explanatory notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: Bennion, Bailey and Norbury on Statutory Interpretation, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. In this appeal the Page 11 parties did not refer the court to external aids, other than explanatory statements in statutory instruments, and statements in Parliament which I discuss below. Sir James Eadie QC for the Secretary of State submitted that the statutory scheme contained in the 1981 Act and the 2014 Act should be read as a whole.

31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in *Spath Holme*, 396, in an important passage stated:

> "The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. … Thus, when courts say that such-and-such a meaning 'cannot be what Parliament intended', they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning."

24. The Explanatory Notes to the AFCS Order state as follows:

> "…The Scheme provides for benefits to be payable to or in respect of a person by reason of illness or injury (whether physical or mental), or death, which is caused (wholly or partly) by service in the armed forces or the reserve forces. ….Guaranteed income payment is payable for more serious injuries. There are four bands - 100%, 75%, 50% and 30%. The payment commences when service ends, or from the date of claim, if later, and is payable for life. The amount of guaranteed income payment is calculated by means of a formula based on the age of the member of the forces when service ends or at the date of claim, if later." (underling once more added for emphasis)

Discussion and conclusion

25. The answer on this appeal, with respect, is obvious and can be stated quite shortly. It is the one the FTT gave.

26. The wording of the statutory scheme plainly and clearly provides that a Guaranteed Income Payment is only payable once service ends. That is what the words of article 16(10) of the AFCS Order say. To have awarded the appellant (that is, made payable to him) the Guaranteed Income Payment for the period before his service in the Armed Forces ended on 12 July 2019 would be contrary to article 16(10) and, accordingly, unlawful as having no statutory basis. No recourse is needed to the Explanatory Notes because, per *R(O)*, when considered on its own and in the context of the statutory scheme as a whole, the wording of article 16(10) is clear and unambiguous and does not create any statutory absurdity. For all members of the Armed Forces – regular as well as reserve members, see article 2(1)(c) of the AFCS Order – if they qualify for a Guaranteed Income Payment it can only become payable from when their service ends. All the Explanatory Notes do is to confirm the plain meaning of the statutory text.

27. Moreover, the context provided by the rest of the relevant provisions in the AFCS Order reinforce, and are obviously consistent with, the direction in which article 16(10) clearly points. No distinction is drawn by the AFCS Order in terms of 'service' between service as a regular member of the Armed Forces and service in the reserve forces: article 2(1)(c). Further, the calculation of the Guaranteed Income Payment is based on the service member's salary on the day when their service ends. If the Guaranteed Income Payment were to be payable before the end of service, it is unclear what the statutory basis would be for calculating the Guaranteed Income Payment for the period before the service in fact ends.

28. Nor does article 64(2)(c) of the AFCS Order point persuasively against the Guaranteed Income Payment only becoming payable from the point service in the Armed Forces ends. Firstly, the appellant's case came within article 64(2)(b) and, as a result, and for that reason alone, article 64(2)(c)'s opening words of "in any case where sub-paragraph (a)m or (b) does not apply", precluded sub-paragraph (c) from applying. Secondly, Article 64 must be read consistently with the rest of the provisions in the AFCS. So read, article 64(2)(c) cannot confer a right to be paid the Guaranteed Income Payment from a date of claim where that claim was made before the end of service as such a reading would plainly be inconsistent with article 16(10). What article 64(2)(c) is therefore addressing is cases not covered by sub-paragraphs (a) or (b), but this benign fact alone cannot mandate a reading of sub-paragraph (c) to confer payment of a Guaranteed Income Payment which is expressly precluded by the rest of the

statutory scheme. In fairness, Mr Cheetham accepted before me that the appellant's reliance on article 64(2)(c) was not sustainable given the terms of article 16(10) of the AFCS Order.

29. I may add, though I heard little or no argument on this, that it may be difficult to read the language of section 1(1)(a) of the Armed Forces and Pensions Act 2004 as providing the *vires* for an AFCS Order conferring a benefit to be payable in respect of a period before termination of service or retirement. However, it may be said that all section 1(1)(a) is concerned with is the point at which the benefit may be payable rather than from when it is payable.

30. Given the clear meaning of the wording in the statutory scheme, I do not consider general arguments about fairness assist in construing that wording. In any event, it may be thought fair that both regular and reserve members of the Armed Forces are treated in the same way in terms of when a Guaranteed Income Payment becomes payable.

31. Nor do I find the argument around the Guaranteed Income Payment being an 'income replacement' benefit of any great help in construing the statutory words of the AFCS Order. The intention as to how that income replacement was to be effected still has to depend on construing the words in their relevant statutory context. And the income replacement 'purpose' or 'intendment' is rationally consistent with the Guaranteed Income Payment being (i) calculated based on the service member's income, and (ii) compensating for the loss of income once that person has left, or had to leave, service.

32. Lastly, I do not consider the appellant's argument based on his being released from call out for service on 5 August 2014 assist him as he returned to service (including serving in Afghanistan) after this date. I pressed Mr Cheetham on this point at the hearing and about what 'service ends' means in the context of being released from call out. He (rightly) accepted it could not just mean when the call up ends, as the reservist may continue (and continue to be able to continue) to be in service as a reserve member of the Armed Forces long after this release date. The appellant's argument was that the release from call up would have to coincide with the reserve service member no longer being capable of carrying out their functions as a reserve forces member. However, that circumstance is covered by article 64(2)(a) of the AFCS Order and so removes the need to read article 64(2)(b) as also covering this situation. Given this, article 64(2)(b) of the AFCS Order must be covering a different situation, and that situation is where the (reserve) service member ends their service in the Armed Forces, here by the appellant retiring. Moreover, if the appellant's 'release from call up' situation was intended to allow the Guaranteed Income Payment to become payable the AFCS Order (i) could have said so, (ii) would need to be modified so as to explain how the Guaranteed Income Payment was to be calculated in such a circumstance.

Approved for issue by Stewart Wright
Judge of the Upper Tribunal
On 28 March 2024