



Neutral Citation Number [2025] UKUT 032 (AAC)

Appeal No. UA-2023-001282-AFCS

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Between:

AK

Appellant

- v -

The Secretary of State for Defence

Respondent

**Before: Upper Tribunal Judge Church
Decided on consideration of the papers**

Representation:

Appellant: Not represented

Respondent: Daisy Beck and David Snape of Veterans UK

On [appeal from]/[judicial review of]:

Tribunal: First-tier Tribunal (WPAFCC)

Tribunal Case No: AFCS/00457/2022

Tribunal Venue: Manchester Piccadilly, Exchange Plaza

Decision Date: 9 May 2023 (issued 15 May 2023)

SUMMARY OF DECISION

WAR PENSIONS AND ARMED FORCES COMPENSATION (56)

56.5 Armed Forces Compensation Scheme

Judicial summary – AK was a soldier with autism. He claimed compensation for mental health problems that he said were caused by his experiences serving in the British Army.

While it found that AK had been subjected to “inappropriate”, unprofessional” and offensive” behaviour from colleagues that had caused him stress, the First-tier Tribunal decided that AK’s autism was the predominant cause of his mental health problems, rather than the treatment to which he was subjected.

AK’s appeal was allowed. The Tribunal had erred in its approach to assessing causation.

It may be that AK was particularly sensitive to anxiety and stress, and it may be that this was because of his autism. It may be that he experienced as persecution incidents that others might have interpreted as “horseplay”. However, for the purposes of the Armed Forces Compensation Scheme, the “thin skull” approach means AK shouldn’t be denied compensation just because another soldier, who did not have autism and who experienced the same events as AK, might not have developed the same mental health condition or symptoms that he did, or experienced the same intensity of degree.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal involved an error of law. Under section 12(2)(a), (b)(i) and (3) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with this.

REASONS FOR DECISION

Introduction

1. This appeal is about the Appellant (to whom I shall refer as the “**AK**”) who joined the British Army in 2014, at the age of 19, and served until his discharge almost five years later. AK has autism, although this was only identified recently in adulthood.
2. During his service the claimant made several service complaints about unfair treatment, bullying, harassment, discrimination, biased behaviour, less favourable treatment and assault. These complaints were not upheld for the most part. It was accepted by the Respondent (to whom I shall refer as the “**Secretary of State**”) that AK had been subjected to “inappropriate behaviour within his unit”, although the Respondent didn’t accept that this behaviour constituted bullying or harassment.
3. AK experienced mental health difficulties. On 11 July 2019 he made a claim for compensation under the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 (the “**2011 Order**”) on the basis that his claimed condition of ‘Mental Health Issues’ had been worsened since 2014 by service. In particular, he wrote in his claim form:

“I was assaulted by a military Police Officer at Catterick Garrison. This triggered my mental health issues. In Canada 2016 I was made to sleep on an active tank track, I was made to drive over a mine field. I was also injured when the driver deliberately slammed on the brakes again in Canada. This was part of me being bullied.”
4. His claim was refused by the Secretary of State on 23 September 2020 (the “**SoS Decision**”), and the SoS Decision was confirmed on reconsideration on 4 March 2022. AK disagreed with this outcome and appealed to the First-tier Tribunal.

5. A panel of the First-tier Tribunal convened in Manchester to hear the appeal on 9 May 2023 (the “**Tribunal**”). The Tribunal dismissed the appeal and confirmed the SoS Decision because it found that the claimant’s military service “provided the setting for [his] symptoms of the condition of Autism...to be amplified” and “the condition of Autism was the predominant cause for the development and deterioration in the [claimant]’s symptoms of Mental Health issues” (see the Tribunal’s brief reasons given on the day of the hearing) (the “**FtT Decision**”).
6. AK applied to the First-tier Tribunal for permission to appeal. On 8 August 2023 District Tribunal Judge Siddique of the First-tier Tribunal granted permission to appeal to the Upper Tribunal.

Legal framework

7. The scheme for compensating members or former members of the armed forces is operated according to the terms of the 2011 Order. To the extent relevant to the issues in this appeal, the 2011 Order provides:

“Article 2 – Interpretation

In this Order-

“predominant” means more than 50%

...

Article 8 – Injury caused by service

1.-(1) Subject to articles 11 and 12, benefit is payable to or in respect of a member or former member of the forces by reason of an injury which is caused (wholly or partly) by service where the cause of the injury occurred on or after 6th April 2005.

(2) Where injury is partly caused by service, benefit is only payable if service is the predominant cause of the injury.

...

“Article 9 – Injury made worse by service

1.-(1) Subject to articles 11 and 12, benefit is payable to or in respect of a former member of the forces by reason of an injury made worse by service if the injury-

(a) was sustained before the member entered service and was recorded in the report of the medical examination when the member entered service,

(b) was sustained before the member entered service but without the member's knowledge and the injury was not found at that examination, or

(c) arose during service but was not caused by service,

and in each case service on or after 6th April 2005 was the predominant cause of the worsening of the injury.

(2) Benefit is only payable under paragraph (1) if the injury has been worsened by service and remains worsened by service on-

(i) the day on which the member of the forces' service ends; or

(ii) the date of claim if that date is later.

(3) Subject to paragraph (4), in the case of paragraph (1)(a) and (b), benefit is only payable if-

(a) the member of the forces or former member of the forces was downgraded within the period of 5 years starting on the day on which the member entered service;

(b) the downgrading lasted for a period of at least 6 months (except where the member of the forces was discharged on medical grounds within that period);

(c) the member or former member of the forces remains continually downgraded until service ends; and

(d) the worsening was the predominant cause of the downgrading.

(4) In the case of paragraph 1(a) or 1(b), benefit is not payable if the injurt is worsened –

(a) within 6 months of the day service commenced; or

(b) 5 years or more after that day.

(5) In the case of paragraph (1)(c), benefit is only payable if the member of the forces-

(a) was downgraded within the period of 5 years starting on the day on which the member sustained the injury and remains continually downgraded until service ends; and

(b) the worsening was the predominant cause of the downgrading.

Article 60 – Burden of proof

1.-(1) Subject to the provisions of this article, the burden of proving any issue is on the claimant.

(2) Where paragraph (3) applies there is a presumption in favour of the claimant unless the Secretary of State proves to the contrary.

(3) This paragraph applies where-

(a) a contemporary official record relating to a material fact which is relevant to deciding a condition for payment of benefit under Part 2 is missing; and

(b) there is other reliable evidence to determine the material fact.

(4) For the purposes of paragraph (3)-

(a) “a contemporary official record” means a record, including an electronic record, held by the Secretary of State for Defence or the Defence Council;

(b) “a material fact” need not be a decisive fact for the purpose of determining a claim under Part 2;

(c) a record is missing where it has been-

(i) lost and cannot be found after a diligent search; or

(ii) destroyed.

...

Article 61 – Standard of proof

The standard of proof applicable in any decision which is required to be made under this Order is the balance of probabilities.”

The First-tier Tribunal’s decision

8. The Tribunal identified the task before it as “to decide whether the claimed condition of Mental Health Issues was predominantly caused by or predominantly made worse by service in accordance with the AFCS.”

9. AK’s case was that his mental health issues were due to service because he had no issues before he enlisted and because the issues arose after a sustained

period of bullying during his service. He had lodged service complaints but was told that the behaviour did not amount to bullying.

10. The Secretary of State maintained that AK's mental health issues were partly but not predominantly caused or worsened by his service. He accepted that AK was subjected to inappropriate behaviour during the course of his service but did not accept that there was any bullying, harassment or assault that was service caused.
11. The Tribunal said that in approaching its task of assessing whether AK's mental health issues were predominantly caused by or predominantly worsened by service it followed the guidance given by the Upper Tribunal in *JM v SSD (AFCS)* [2015] UKUT 332 (AAC), and it quoted extensively from that decision as to the steps that should be taken when assessing this issue:

“The steps to be taken in the application of the AFCS test

118. The analysis we have set out finds the conclusion that the correct approach to the issues of cause and predominant cause under the AFCS is:

- i) First identify the potential process cause or causes (i.e. the events or processes operating on the body or mind that have caused the injury);
- ii) Secondly, discount potential process causes that are too remote or uncertain to be regarded as a relevant process cause;
- iii) Thirdly, categorise the relevant process cause or causes by deciding whether the circumstances in which each process cause operated were service or non-service causes. It is at this stage that a consideration of those circumstances comes into play and the old cases on the identification of a service cause applying the old attributability test provide guidance.
- iv) Fourthly, if all of the relevant process causes are not categorised as service causes, apply the predominancy test.”

12. The Tribunal went on to cite the Upper Tribunal's discussion of how a claimant's 'constitutional weakness' should be accounted for:

“132 In this context we do not see any sign that the intention behind the AFCS is to deprive those with constitutional weaknesses from the protection usually regarded as appropriate in other compensation schemes, that is to say the “thin skull” approach.

133. We acknowledge that, in exercising the judgment between process causes that have been categorised into service and non-service causes of the injury, a literal approach to the language of the test in the 2005 and 2011 Orders could, in an equivalent case to *Marshall*, found the view expressed by Denning J with the result that the claimant would not get an award because the predominant cause of the injury was the constitutional weakness and the cough was a lesser cause.

134. But in our view the width of the language permits a more sophisticated approach to deciding whether, as the Secretary of State put it, conceptually the service cause contributes more than one half of the causative stimulus for the injury claimed, and thus whether service is the predominant cause in a case where (after the categorisation process) the only competing causes are service and constitutional or other pre-existing weaknesses. In such a case the decision-maker generally should firstly consider whether without the “service cause”, the injury would:

- (a) have occurred at all, or
- (b) have been less than half as serious.

135. If the answer to the first question is that the injury would not have occurred at all in the absence of the service cause, we consider that this can and generally should found a conclusion that the service cause is the predominant cause of the relevant injury.”

13. The Tribunal said that it adopted this approach and also the rather leaner formulation in *NJ v SSD* [2018] UKUT 211 (AAC) that:

“The question has to be asked, but for an event or process, would the injury have happened? If the answer is that the injury would not have happened without a particular event, then the event is a cause” (see *NJ v SSD* at [22]).

14. The Tribunal found that AK has autism (see paragraphs [14]-[15] of its statement of reasons). It also accepts that AK has diagnoses of dyslexia, anxiety and depression (see paragraph [16] of its statement of reasons). It doesn’t appear to have accepted that he has post-traumatic stress disorder. While the Tribunal found that service was not a cause of AK’s Autism, it found that:

“exposure to military service provided the setting for ... [AK’s] symptoms of the condition of Autism, now diagnosed, to be amplified. The tribunal found that the condition of Autism was the predominant cause for the development and deterioration in [AK]’s symptoms of Mental Health issues” (see paragraph 18 of the statement of reasons).

15. The Tribunal explained its reasons for these conclusions as follows:

“In reaching its decision the tribunal has borne in mind that it is not uncommon for people to be diagnosed with Autism later in life following stressful events which trigger anxiety and demonstrably autistic behaviour. The tribunal accepts that some of the events and incidents of service would have caused stress for [AK] which in turn lead to him showing autistic behaviour. However those incidents did not cause the Autism and did not make the Autism worse. Those incidents were the triggers for the symptoms to become more apparent and obvious leading to ultimate diagnosis. It is the view of the tribunal that the symptoms would have become apparent in any event without service at some time in [AK]’s life at any point when he experienced some event out of the ordinary which was challenging” (paragraph 22 of the statement of reasons).

16. The Tribunal said that it “attached weight to” the Appeal Body Determination of [AK]’s service complaints of 17 July 2020 and “found it significant that after extensive enquiries and investigations the Appeal Body Determination found that [AK]’s service complaints of unfair treatment, bullying, harassment, discrimination, biased behaviour, less favourable treatment, and assault were not upheld”.

17. The Tribunal said it was medically accepted that difficulty in interpreting social situations and understanding the body language and communications of others and understanding normal social interactions is a common feature of Autism (see paragraph 21 of the statement of reasons) and found it “more likely than not” that AK’s autism

“meant that the events that occurred were interpreted by him in a way which led him to believe he was being unfairly treated, bullied, harassed discriminated against and treated less favourably [sic]. It was the condition of Autism and his reaction to events as a consequence of that condition which were the predominant cause in precipitating the Mental Health Issues and not the service events in themselves.”

The grounds of appeal and the parties’ submissions

18. Permission was granted by the First-tier Tribunal on four grounds:

- a. the concept of “worsening” under the scheme encompasses the term “amplified”, as used by the Tribunal,
- b. the Tribunal’s approach in respect of a claimant’s “constitutional weakness” was wrong in law,

- c. the Tribunal's conclusion that the claimant was subjected to "usual", "minor" or "expected" events is arguably irrational given its findings that the claimant was subjected to "inappropriate and unprofessional behaviour", "offensive behaviour" and "maladministration",
 - d. the Tribunal erred by failing to recognise the "no fault" nature of the armed forces compensation scheme.
19. I made Case Management Directions for the Secretary of State to make submissions on the appeal.
20. The Secretary of State made submissions resisting the appeal, arguing that the Tribunal made no error of law, and inviting me to dismiss the appeal.
21. AK responded to say that he had nothing further to say and he relied on the arguments he had made in his application for permission and on the grounds identified by Judge Siddique in the grant of permission to appeal.

Analysis

22. The first thing I observe about the Tribunal's reasons for its decision is that they don't explain clearly what facts the Tribunal found in relation to AK's allegations about his experiences during his service in the British Army.
23. The Tribunal makes clear that it gave substantial weight to the Appeal Body Determination, which largely dismissed AK's claims but accepted that there was maladministration. It is unclear whether the Tribunal accepted only what the Appeal Body accepted, and it is unclear whether it carried out its own assessment of the allegations. These important omissions make it very difficult for a reader of its reasons to understand whether the Tribunal was entitled to make the decision it did.
24. The Tribunal found that AK's autism wasn't caused by his treatment during his service in the British Army. This is an uncontroversial conclusion, given that autism is a neurological and developmental condition which is believed to be present from birth, but while AK did raise his autism in his appeal, he wasn't arguing that his autism was caused by service.

Ground a: “worsening” encompasses “amplified”?

25. I turn now to the first ground for which Judge Siddique gave permission: whether the word “worsening” as it appears in the 2011 Order encompasses the term “amplified”, which the Tribunal used in its reasons.
26. The Tribunal accepted that “some of the events and incidents of service” would have caused AK stress. It is unhelpful that the Tribunal didn’t set out expressly which “events and incidents” it found to have occurred. The Tribunal said the experience of these stressful events and incidents would have resulted in AK “showing autistic behaviour”, or his autistic behaviours being “amplified”, but they didn’t actually worsen AK’s autism.
27. Aside from the lack of clarity as to what “events and incidents” the Tribunal was talking about, I have no difficulty with this conclusion either. However, the main thrust of AK’s case for compensation was neither that his experience of service caused his autism, nor that it “worsened” his autism. Rather, AK was arguing that his experiences in service caused him to experience mental health problems including stress and anxiety.
28. To the extent that the Tribunal was seeking to distinguish between a “worsening” of AK’s autism and the “amplification” of the symptoms of that condition, I am not clear what its intention was. The term used in the 2011 Order is “worsening”. In the context of a mental health or neurological condition the meaning of that word must be something like “deterioration” or perhaps “intensification”. It is difficult to see how an “amplification” of symptoms would not also amount to a “worsening”, except perhaps to the extent that the symptoms in question are not undesirable ones. That would not appear to be the case here.
29. In the circumstances, I am satisfied that the Tribunal did err to the extent that its reference to AK’s symptoms being “amplified” instead of “worsening” was intended to indicate that such amplification didn’t amount to a worsening, but this error wasn’t a material one because the findings about “amplification” were made in relation to AK’s autistic behaviours, and not the symptoms of his accepted anxiety and depression or his claimed post-traumatic stress disorder, which should have been the Tribunal’s focus as it was those conditions that was the real basis of his claim for compensation under the scheme.

Ground b: Tribunal's approach to "constitutional weakness" was wrong in law

30. While the Tribunal cited *JM v SSD* and *NJ v SSD*, and indeed it quoted at some length from *JM v SSD*, it doesn't appear to have followed either the "four step" approach that the Upper Tribunal said was the correct approach in *JM v SSD*, or the approach that the Upper Tribunal took to assessing causation in respect of a claimant with a "constitutional weakness".
31. Rather, having found that AK has autism (paragraph [15] of its statement of reasons) and that his autism was not caused by his service (paragraph 17] of its statement of reasons), in paragraph [18] it appears to have short-circuited the process, going straight to a finding that "the condition of Autism was the predominant cause for the development and deterioration in [AK]'s symptoms of Mental Health Issues".
32. While it considered the possibility that AK's military service was a process cause of AK's autism it doesn't appear to have considered whether it was a process cause of AK's anxiety or depression.
33. In paragraph [16] of its reasons the Tribunal had observed that it was "medically accepted" that autism "affects how people interact with others, communicate, learn and behave", that undiagnosed autism in adults "can lead to them finding it hard to hold down employment and cope with friendships and relationships" and that "it is often the case that ... people with Autism have dyslexia, anxiety and depression".
34. It would have been helpful had the Tribunal made findings of fact rather than observations of what it considered to be "medically accepted", but more importantly, an apparent correlation between the incidence of autism and other mental health conditions doesn't necessarily establish that one caused the other.
35. The Tribunal's explanation for its striking finding that AK's autism was the predominant process cause of his other mental health problems can be found in paragraph [25] of its statement of reasons:

"The Tribunal found it more likely than not that [AK]'s condition of Autism meant that the events that occurred were interpreted by him in a way which led him to believe he was being unfairly treated, bullied, harassed, discriminated against, and treated less favourable [sic]. It was the condition of Autism and his reaction to events as a consequence of that condition which were the

predominant cause in precipitating the Mental Health Issues and not the service events in themselves.”

36. The Tribunal found that AK misinterpreted events due to a difficulty in understanding social interactions and social cues that was symptomatic of his autism. It decided that it was this misinterpretation on his part that caused his mental health issues to “precipitate”, rather than the behaviour to which he was subjected. I find this to be an erroneous approach, and one that is inconsistent with the approach taken by the Upper Tribunal in the cases to which the Tribunal referred.
37. Given the events that AK described, it is difficult to see how his experiencing stress and his developing mental health problems could be said to be due to his having “misinterpreted” the events and actions in question. Perhaps if the Tribunal had made clearer findings on what had actually occurred, that might explain it. But it didn’t. The Tribunal’s decision making in this regard sits uncomfortably with the Secretary of State’s admission that AK was “subjected to inappropriate behaviour” (see paragraph [8] of the statement of reasons) and with its own findings that AK was subjected to “inappropriate and unprofessional behaviour” (paragraph [29] of its statement of reasons) and “offensive behaviour” (see paragraph [29]) during service.
38. AK was a soldier with autism. It may be that he was particularly sensitive to anxiety and stress, and it may be that this was because of his autism. It may be that he experienced as persecution incidents that others might have interpreted as “horseplay”. However, for the purposes of the scheme, the “thin skull” approach adopted in *JM v SSD* means that AK shouldn’t be denied compensation just because another soldier, who did not have autism and who experienced the same events as AK, might not have developed the same mental health condition or symptoms that he did, or experienced the same intensity of degree.
39. To borrow a phrase from the Tribunal’s reasons, it appears more likely that AK’s autism “provided the setting” for the development of anxiety and depression (and possibly post-traumatic stress disorder), rather than causing it. It was his experience of incidents during his service that gave rise to the stress that he experienced. The Tribunal’s job was to assess whether that was the sole or predominant process cause of AK’s mental health issues.
40. For these reasons I am satisfied that the Tribunal took the wrong approach to causation and in doing so it erred materially in law

Ground c: Tribunal's conclusion that AK was subjected to "usual", "minor" or "expected" events is irrational given its findings that the claimant was subjected to "inappropriate and unprofessional behaviour", "offensive behaviour" and "maladministration",

41. As touched upon above in relation to Ground b, I find the Tribunal's findings about the events that AK experienced during his service to be contradictory. Had the Tribunal been clearer as to what it found had happened, perhaps it would be apparent how inappropriate, unprofessional and offensive behaviour and maladministration could properly be described as "usual", "minor" or "expected". Without such an explanation these descriptions read as inconsistent and irrational. As such, I am persuaded that the Tribunal erred in law in this regard too.

Ground d: Tribunal erred by failing to recognise "no fault" nature of the scheme

42. The Tribunal's reasons focus on the fact that AK didn't succeed in establishing that the treatment he experienced during service amounted to bullying, harassment, discrimination or less favourable treatment. However, they acknowledge that the incidents described "were not pleasant and would have caused some stress". It found that these were "minor events which are to be expected in service and communal life in the British Army". These passages raise the possibility that the Tribunal may have been under the misapprehension that AK needed to demonstrate that the British Army, or its soldiers, were at fault.

43. However, while the Tribunal's reasons could certainly have been clearer, I am not persuaded on the balance of probabilities that the Tribunal was under such a misapprehension. The absence of an express statement about no fault being required to succeed in a claim under the scheme does not establish that the panel wasn't aware of that fact. This ground therefore fails.

44. However, because I have decided that the Tribunal erred materially in the other ways explained above, the appeal is allowed.

Conclusion

45. I conclude that the decision of the First-tier Tribunal involves material errors of law. I allow the appeal and set aside the decision under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

46. Further facts need to be found. The First-tier Tribunal, with its expert members, is best placed to carry out that fact finding.
47. The case must (under section 12(2)(b)(i)) be remitted for re-hearing by a new tribunal.

Thomas Church
Judge of the Upper Tribunal

Authorised by the Judge for issue on 28 January 2025