IN THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER) **Appeal No. UA-2024-001032-WP**

[2025] UKUT 289 (AAC)

BETWEEN

THE SECRETARY OF STATE FOR DEFENCE

Appellant

and

CJP

Respondent

BEFORE UPPER TRIBUNAL JUDGE WEST

Hearing Date: 21 August 2025

Decision Date: 21 August 2025

Representation: Mr Will Hays, counsel, for the Appellant (instructed by the Government Legal Department)

The Respondent in person

ON APPEAL FROM

Tribunal:	First-tier Tribunal (War Pensions and Armed Forces Compensation Chamber)
Tribunal Venue:	By CVP
Tribunal Case No:	AFCS/00248/2023
Tribunal Hearing Date:	31/10/2023 & 13/3/2024

Summary of Decision Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 - Articles 2 and 8 - Respondent discharged from armed forces in May 2020 but serving a custodial sentence at a military prison where he subsequently sustained injury in November 2020 - whether Respondent in service as a member of the armed forces and whether injury caused by service – - Armed Forces Act 2006 Sch 15 Part 1 para 3(1): civilians subject to service discipline

Keyword Name **56 War pensions and armed forces compensation**

56.5 Armed Forces Compensation Scheme

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

DECISION

The decision of the First-tier Tribunal (War Pensions and Armed Forces Compensation Chamber) dated 13 March 2024 under file reference AFCS/00248/2023 contains an error on a point of law. The appeal against that decision is allowed and the decision of the Tribunal is set aside. The decision of the Tribunal is remade. The injury to the Respondent's left hand was not caused by service.

This decision is made under section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007.

REASONS

Introduction

1. This is an appeal, with the permission of Judge Fiona Monk, the President of the War Pensions and Armed Forces Compensation Chamber, against the decision of the First-tier Tribunal (consisting of her and two other members) which sat on 31 October 2023 and 13 March 2024.

2. The issue in this appeal is the interpretation of Article 8 of the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 ("the AFCS") and in particular the meaning of "caused by service".

3. The unanimous decision of the Tribunal was that the injury to the Respondent's left hand was caused by service and his appeal was upheld.

Background

4. The factual background to the dispute is not in issue and I can take it from the decision of the Tribunal, as set out in its statement of reasons dated 21 March 2024, anonymising the Respondent's name where it appears in the narrative:

> "2. The Respondent served in the Royal Air Force from January 2008 to 29 May 2020. He was discharged at his request. He injured his hand on 6 November 202[0] whilst deemed no longer 'in service' but whilst he was serving a custodial sentence at the Military Corrective Training Centre (MCTC). So, the question for us to determine was whether the injury could be said to have been caused by service.
>
> ...
>
> 5. The Respondent served in the Royal Air Force from 23 January 2008 until 29 May 2020. He had completed his 12 years' engagement and was still serving when he took premature voluntary release; he gave short notice and was discharged. He retains a Reserve liability for 6 years from the date his Regular service ended but has not been recalled and thinks it very unlikely that he will be. Prior to his discharge, court martial proceedings had started against him and on 15 October 2020 he was Court Martialled. He pleaded guilty to the charge of 'fraud by abuse of position' and was sentenced to an immediate custodial sentence. The extract from the sentencing remarks stated
>
> > "We considered very carefully whether we could dispose of this matter other than by way of an immediate custodial sentence but unfortunately on the evidence presented to us we do not consider there to be sufficient grounds such as to justify a community

> disposal nor do we consider there to be a basis which could properly lead us to the conclusion that a suspended sentence would be appropriate in this case. We fully acknowledge the impact that custody will inevitably have upon you and we have taken on board what we have already described as very positive character references but having considered the matter with care we have concluded that this offence Is so serious that only an immediate custodial sentence can be justified And the least possible sentence we can impose, having regard to the seriousness of these offences, adopting a proportional approach and applying the principle of totality, is one of 27 months custody on each of charges one, two and three each to run concurrently with another.
>
> Taking into account Your guilty plea and giving you full credit for the same we reduce that to 18 months and because it is less than two years, we are going to direct the sentence will be served In MCTC Colchester ...
>
> As I stated, this sentence will be served in MCTC Colchester where, aside from being a benign environment than that that you would otherwise encounter in the civilian prison system, it has in place robust systems for dealing with those who suffer from mental health issues and overall we do consider that there is some limited scope here for rehabilitation, which is an important principle in sentencing. But the Board is firmly of the view that this would be best served by you being given the opportunity to effectively reboot and press the reset button Whilst under close supervision and with the support of the team in Colchester."

The sentence passed did not dismiss the Respondent from service.

6. The Military Corrective Training Centre (MCTC) is located at Colchester, Essex. The guide explaining the role of MCTC states:

> "The principal function of MCTC is to detain personnel both male and female, of the three services and civilians subject to service discipline acts, in accordance with the service custody and service of relevant sentencing rules 2009. The MCTC can hold up to 284 service personnel who have been

> sentenced to periods of detention up to two years or those in safe custody. There are three categories of detainee:
>
> A Company – Service Personnel under Sentence (DUS) serving a sentence on completion of which they will remain in the Services …
>
> D company - Service Personnel under Sentence (DUS) serving a sentence on completion of which they will be discharged from the Services.
>
> Service Custody Platoon (SCP) - Safe Custody Personnel (SCP)
> • Whilst under investigation.
> • Awaiting trial
> • Awaiting transfer to HM Prison, having been sentences to imprisonment by Courts-Martial.
> • DUS undergoing periods of punishment (Close Confinement) as awarded by the Commandant (Comdt) MCTC.
>
> FUNCTIONS
> D Company
> To instruct and guide DUS in order that they develop their potential for self-sufficiency and responsible citizenship, by providing the appropriate rehabilitation training as directed by the I of ME (A) by:
> - Trade training courses
> - Project work in the local and wider community
> - Farm Husbandry
> - Resettlement
> - Literacy and numeracy remediation as required
> - Vocational training.

7. MCTC falls under the jurisdiction of the Provost Marshal (Army) in Army HQ and sits under the Field army. It is staffed by the military and all staff wear uniform.

8. The Respondent was allocated to D Company as a DUS – a detainee under sentence. It was accepted that, in accordance with the Armed Forces Act 2006, he was a Civilian Subject to Service Discipline (CSSD). That meant that whilst at MCTC he was subject to the full Armed Forces Discipline standards and sanctions. He had to obey orders and any infringement would be punished. In common with all DUS, his period of detention did not count towards a period of service so did not add on to his 12

years 4 months already served and was not treated as pensionable service.

9. Upon being sentenced on 15 October 2020, he was immediately detained, he was kept in a cell overnight at the Army Camp at Bulford where his Court Martial had taken place. He was required to report to MCTC in uniform and so had to wait whilst RAF Odiham, his former base, provided him with uniform and kit. He was taken to MCTC on 16 October where he started his sentence. The Final report from MCTC confirmed both those dates and noted his release date as 30 July 2021. He earned the maximum possible remission for very good conduct and attitude during his sentence. His details were recorded against his Service Number which he confirmed was the same as when he had been serving.

10. The Final Report recorded [94]

> "[the Respondent] is already discharged from HM Forces and was sentenced to 18 Months detention at Court Martial for three charges of fraud by abuse of position. Upon admission to MCTC he received instructions on the establishment and orders for all categories of detainees. He was placed in D Company, for those discharged from the Service post detention. During his employment in D Company, he was subject to daily kit inspections, offered full welfare and medical support, access to MCTC farm as well as the Education Centre.

11. He was required to wear his uniform at all times. He was told on his first day at MCTC that he was required to follow standing orders. He described being in uniform and being ordered to do something by someone else in uniform which was exactly the same as his experience whilst in service. He understood that as a civilian subject to service discipline (CSSD), he, alongside all those serving sentences at MCTC, were subject to military discipline. Any infringement was subject to the full range of Service disciplinary sanctions – he told us that any transgression would start with a penalty at the lowest end with being 'red penned' and being unable to earn remission for that week up to the potential for a further Court Martial.

12. For the first few weeks of his sentence, he was given a period to settle in an could not earn remission but then he described his treatment as the same as being back in basic training. He described his daily routine as having daily bed and kit inspections exactly as would have been the case

whilst serving. He was required to present in uniform with his kit and bed presented as it was when he was in the RAF. At 8 am the Duty Sergeant would come to carry out an inspection and they would all have to come to attention.

13. The Respondent's Electronic Service Medical Records (EMIS) continued to be completed post his discharge and appear to be unbroken. There are two entries for 26 May 2020, 3 days before discharge, which noted that he was about to leave service and then entries for June, July and August which noted some follow up contact about his mental health issues. When he transferred to MCTC he underwent a new patient screen at the Medical Reception Station (MRS) at Colchester on 19 October 2020 recorded on his EMIS by the Lieutenant Corporal he saw. It was noted that he was 'already a civilian' and needed his fitness for duties reviewing.

14. Whilst at MCTC the Respondent was on what was called a 'light duty chit' which meant that because of various medical issues he was excused certain duties; for the majority of his time there he was not required to march and did not do group Physical training but did his own routine in the gym. He would be given occasional details to move equipment/furniture, to sweep up and to clean and he would volunteer for extra jobs as he was keen to earn points for remission and did not want to be seen as a shirker.

15. The injury which is the subject of the appeal occurred on Friday 6 November 2020. On Fridays his work usually finished at lunchtime. They had been on parade and were instructed that 4 or 5 DUS were required to move tables and chairs from the table tennis room to an empty bedroom. He along with 3 or 4 others were marched to the room and under supervision of an Orderly were directed to move the tables and chairs. He moved a table and then came back to move a stack of chairs, as he reached down to pick them up, he misjudged the depth and his little finger and ring finger on his left hand impacted on the metal frame of one of the chairs. He described feeling as if he had 'crunched' his left hand and being in immediate and excruciating pain.

16. As the incident happened on a Friday afternoon, medical cover was relatively light as the GP does not routinely attend MCTC Medical Centre on Friday afternoons and he was not considered to be in need of emergency treatment. He took painkillers over the weekend and then went to see the doctor at the Medical Centre first thing on

> the Monday morning, 9 November. He was marked as fit for limited duties for 14 days. He was sent to hospital for an Xray, accompanied by 2 members of uniformed staff and was, in effect, guarded whilst there. It was diagnosed as a soft tissue injury. He was seen again the next day by the doctor at the medical centre and the EMIS entry noted that his left 4th and 5th fingers were strapped. By 19 [November] he was advised that even with the hand injury he could go to the gym and do bike/trainer work and low impact cardiovascular activity.
>
> 17. The Respondent made a claim for another injury, his Achilles tendon, which he said occurred during his time at MCTC. We did not have the EMIS records for that injury as it apparently occurred in May 2021 but in a decision dated 3 September 2021 the Secretary of State accepted that 'on the balance of probabilities that the pain in (your) left calcaneal bursa was wholly caused by service.' He was made an award at Table 9 item 35A, Level 15 on the AFCS Tariff. The Medical Adviser's reasons are not complete in the version with which we have been provided as the Respondent supplied them to the Tribunal on the last occasion and, somewhat surprisingly, Veterans UK have chosen not to provide the complete paperwork from that decision. But from this we see that the facts established by the Secretary of State are all taken from the EMIS and refer to entries from 18 May 2021 to 21 July 2021, the period whilst the Respondent was still serving his sentence at MCTC.
>
> 18. The decision maker sought verbal medical advice and mentions only the extracts from the EMIS records as showing that although he was thought at an early stage to have Achilles tendonitis on examination the main pain was from the calcaneal bursa. The Medical Adviser considered it to be an overuse type injury and that is the award that is made 'Overuse injury of foot or heel which has not required operative treatment.'
>
> 19. The Respondent made a claim for his left hand/arm injury on 18 January 2022. He described the injury as occurring on 6 November 2020 when he was 'asked to move furniture within MCTC during sentence there.' In the further information section he set out the details of how the injury occurred which are consistent with his oral evidence to the Tribunal.
>
> 20. On 24 February 2022 the Secretary of State made a decision to reject the claim and stated, 'after looking at all of the appropriate evidence you are not entitled to

compensation under the Scheme as your injury/illness is not due to Service.' The reasons for the Decision were stated as 'You have claimed for an injury to your left arm/hand which you state occurred on 6 November 2020 whilst moving furniture during your sentence at MCTC Colchester. CAPS record confirms you were discharged from the Army on 29 May 2020. Electronic service medical records confirm your injury occurred in November 2020. The injury to your hand occurred after you were discharged from the Army (sic) whilst incarcerated at MCTC. The Secretary of State does not accept on the balance of probabilities that service wholly or partly caused the injury to your left hand.'

21. The Respondent appealed that decision by an appeal form received at Veterans UK on 9 March 2022. He stated on his appeal that firstly he had had a successful claim for his Achilles dated 3 September 2021 and was unclear as to why the claim for his hand had been treated differently, Secondly, he stated that 'MCTC is a fully uniformed service establishment and I myself was in uniform for the entirety of my time there. If the service isn't responsible for this injury, then who is? There weren't any civilian staff members dictating to me to move furniture around and everything else for that matter.'

22. There was a reconsideration decision made on 19 May 2023 which maintained the original decision. The reasons for that were given as follows:

> 'We are unable to revise the existing decision which rejected impact injury left hand/arm as not caused by service on or after 6th April 2005.
>
> Your initial claim attributed your impact injury left hand/arm to moving furniture on 6 November 2020 whilst under sentence at MCTC. All documents and electronic records available to us state that you were discharged from service on 29 May 2020 ... MCTC also confirmed that you were in D Company 9 those to be released to civilian life post sentence), you were classified as a CSSD (a civilian subject to service discipline and were bound by the Armed Forces Act 2006. The reason for your discharge is consistently recorded as PVR/own request.
>
> An individual has to be a member of the forces at the time of the injury in order to be eligible for an injury award Article 8 of AFCS provides that benefits are payable to a member/former member by reason of an

> injury caused (wholly or partly) by service. Article 2 defines "service" as "service as a member of the forces" and "forces" as the "armed forces and reserve forces". Accordingly, if an injury occurs after service has ended, it cannot be caused by service and AFCS therefore does not cover it.
>
> We note your contentions that your injury was caused because whilst you were under sentence you were required to undertake training and follow military orders. However, MCTC have confirmed that there were no MoD 510 accident Reporting forms submitted for the impact injury left hand/arm. Whilst there is evidence of a hand injury in the electronic medical record, there is no reports as to how this injury happened and no MoD 510. On the balance of probabilities we are satisfied that we would not be accepting a service cause even if we were able to consider your hand/arm injury under AFCS.'

They go on to state that, in the light of their decision, they will be reviewing the award for the calcaneal bursa."

The Law

5. So far as material, the Armed Forces Act 2006 ("the 2006 Act") provides that

> **"370 Civilians subject to service discipline**
> (1) In this Act "civilian subject to service discipline" means a person who—
>
> (a) is not subject to service law; and
>
> (b) is within any paragraph of Part 1 of Schedule 15.
>
> ...
>
> **Schedule 15**
>
> *Civilians subject to service discipline*
>
> **Part 1**
>
> *Civilians subject to service discipline*
>
> ...
>
> *Persons in service custody etc*

> 3(1) A person is within this paragraph if—
>
> (a) he is in service custody; and
>
> (b) his being in service custody is lawful by virtue of any provision of or made under this Act.
>
> (2) A person is also within this paragraph if he is in the course of being arrested, or of having an attempted arrest made of him, by a person who has a duty under service law to apprehend him".

6. Again so far as material, the AFCS provides that

> **"Article 2**
>
> **Interpretation**
>
> 2. In this Order—
>
> "forces" means the armed forces and the reserve forces;
>
> "service" means service as a member of the forces:
>
> ...
>
> **Article 8**
>
> **Injury caused by service**
>
> 8(1) Subject to articles 11 and 12, benefit is payable to or in respect of a member or former member by reason of an injury which is caused (wholly or partly) by service where the cause of the injury occurred on or after 6 April 2005.
>
> (2) Where injury is partly caused by service, benefit is only payable if service is the predominant cause of the injury".

7. The Service Custody and Service of Relevant Sentences Rules 2009 ("the 2009 Rules") provide, again so far as material:

> **"Breaches of discipline**
> 43. A detainee commits a breach of discipline under these Rules if he—
>
> ...

(n) without reasonable excuse fails to perform a task or negligently performs any such task ...

...

Company commander's punishments
49(1) If he finds a charge under rule 43 proved, a company commander with delegated powers may, subject to paragraph (2), impose one or both of the following punishments—

(a) admonition;

(b) extra military instruction not exceeding three periods of forty-five minutes each.

(2) If the person charged is a civilian subject to service discipline, he may not impose extra military instruction as a punishment.

(3) If more than one charge is found at the same hearing to have been proved, punishments under this rule may be ordered to run consecutively.

Commandant's punishments
50(1) If he finds a charge under rule 45 proved, the commandant may, subject to paragraphs (2) to (4), impose one or more of the following punishments—

(a) admonition;

(b) cellular confinement for a period not exceeding ten days;

(c) extra military instruction.
(2) The commandant may not impose cellular confinement along with any other punishment.

(3) If the person charged is a civilian subject to service discipline, he may not impose extra military instruction as a punishment.

(4) If more than one charge is found at the same hearing to have been proved, punishments under this rule may be ordered to run consecutively, but the total period of cellular confinement shall not exceed ten days".

The Decision of the Tribunal

8. Having set out the factual background to the appeal and the applicable law, the Tribunal considered the decisions in ***JM v Secretary of State for Defence (AFCS)*** [2015] UKUT 332 (AAC) at [80-96 and 118], ***NJ v Secretary of State for Defence (AFCS)*** [2018] UKUT 211 (AAC) at [22] and [24.3] and summarised the parties' positions:

> "26. For the Secretary of State, Ms Gibson relied on the reasoning given for the decision and for upholding the decision at the post appeal reconsideration stage set out at paragraphs 21 and 23 above. In essence, a very simple proposition is advanced by the SSD that the injury has to occur in service for it to be service caused and the Respondent was not in service at the time of the injury, he was a civilian.
>
> 27. In respect of the 3/9/21 decision which gave him an AFCS award for the overuse injury which also occurred post service and whilst he was at MCTC, Ms Gibson could only say that she 'surmised' that was a mistake because only verbal advice was given by the Medical adviser who had not seen the first hand evidence and the decision maker had simply relied on the EMIS records being continuous. She confirmed that decision would be revisited but was awaiting the outcome of this appeal.
>
> 28. On behalf of the Respondent, Mr Evans pointed to the award for the overuse injury as confirmation that Article 8 was satisfied. He argued that the Respondent was still subject to the Armed Forces Act and having been recalled and court martialled and sentenced to custody at MCTC he was part of the Field Army Adjutant General Corps. Service provided the setting, he was on military land, he had to wear uniform and was subject to service discipline and the injury was therefore service related."

9. The Tribunal concluded that

> "29. The Respondent's appeal raises an interesting question about what is meant by 'caused by service' under Article 8 and whether the Scheme can apply to a veteran who, at the date when the injury occurs, is no longer in service? To answer this question, we have gone back to the basics of the statute and the case law from both the test

of attributability under the Service Pensions Order and on service cause under the AFCS as both set out important principles to guide us.

30. Article 8 provides that benefit can be payable to both serving and former members of the Armed Forces. But the injury has to be caused by service which Article 2 tells us means service as a member of the Armed forces.

31. The SPO case law tells us that an injury which occurs in the course of service is not necessarily attributable to service (*Horsfall v Minister of Pensions* (1944) 1 WPAR 7) but can the reverse proposition be right – can an injury which did not occur in service be caused by service? It is accepted that whether a claimant suffers injury whilst on or off duty is not conclusive but there must be a sufficiently close causal connection between the injury and some factor of service. So, if the claimant is engaged on some activity in their personal sphere and the incident 'did not occur in any way by reason of any duty or compulsion of service' (*Richards v the Minister of Pensions and National Insurance* (1956) 5 WPAR 445) then it may not be attributable to service. It is not argued by the Secretary of State that the Respondent's injury occurred whilst he was undertaking some activity of a personal nature and we consider below whether there was the element of duty or compulsion of service.

32. Considering the first stage of the *JM* test what are the potential process causes of the events or processes which caused the injury? The immediate cause of the impact injury was the moving of the chairs at MCTC. That was an action carried out under instruction and was followed because the Respondent was acting under orders and was subject to service discipline. Moving up the chain of events – he was at MCTC because he was sentenced by Court Martial to serve his sentence there. His offence had been committed whilst he was in service and related to abuse of his position as a serving member of the Armed Forces. He was not tried or sentenced by the civilian criminal courts and he was only sentenced to serve his sentence at a military correctional institution by virtue of his service.

33. We do not consider that any of those potential causes are too remote or uncertain to warrant disregarding them as relevant causes. So, we then have to consider whether the circumstances in which each operated were service or non-service causes. He was following an order to move furniture and that in our view, is properly categorised as by virtue of a compulsion of service.

34. We consider that there is an unbroken chain of causation which leads from his service to his offence committed in service, to his sentencing by Court Martial to his being in the setting of MCTC all of which could only occur because he was in service, to his being compelled to follow an order to move furniture which caused the injury. If he had been detained in custody whilst still in service, so in A Company rather than D Company, we would have no hesitation in concluding that the injury was service caused. We do not accept the SSD's contention that because no accident report was filled out the injury cannot be service caused. This is a no-fault scheme and it cannot be right that filling in the right form denotes whether something is service related or not.

35. So, if the only distinction is that he had left service at the date of the injury, does that mean the injury is not caused by service? Applying the words of Article 8 there is no temporal limit placed on the injury – it does not have to occur in service but rather be caused by service. The fundamental test, as set out by Upper Tribunal Judge Mesher in *EW v SSD* [2011] UKUT 186 (AAC) Paragraph 16, is 'In my view the key lies in the essential test of entitlement being in terms of causation by service, with service being the predominant cause. The test is not whether the claimant was to be regarded as *in service (whatever that might mean)* at the time of the incident causing the injury or as on or off duty. The test was reiterated by him and summarised thus in *SV v SSD (AFCS)* [2013] UKUT 541(AAC) paragraph 12 'the fundamental test under the AFCS Order 2005 was not whether the claimant *was in service* or was on duty at the time of the incident in question but whether the injury was caused and predominantly caused by service' (our emphasis). That envisages the possibility that a claimant might not be in service at the time of the injury which is precisely the situation here.

36. *NJ* tells us we can rely on the traditional 'but for' test and it follows from our conclusion above that we are satisfied that, without service, this injury would not have occurred. Had it not been for his service the Respondent would not have been at MCTC and would not have been obliged to follow the order to move the furniture and would not have injured his hand. There was a specific service compulsion/obligation, service not only provided the context and setting but the cause and given that every link in the chain of causation is service related we conclude that all the causes we have identified are service causes.

> 37. We have not identified any non-service causes and so do not have to consider applying the predominancy test – this injury was caused by service and the appeal succeeds."

The Appeal

10. Judge Monk gave permission to appeal on 31 May 2024, stating that

> "3. Our Tribunal recognised that the appeal raised an interesting question about whether the AFCS can apply to a claimant who, at the date of the injury was no longer in service. The test is not a temporal one – it does not require a beneficiary under the Scheme to be in service at the time of the injury but rather there has to be a causative link to service. I naturally consider that our Tribunal correctly identified and applied the statutory causative test. However, the test for giving permission to appeal to the Upper Tribunal is whether it is arguable the Tribunal erred in law, not whether I am satisfied that our Tribunal erred in law.
>
> 4. The Secretary of State argues that the Appellant's discharge broke the chain of causation and the fact that he was in MCTC and injured himself whilst there under service discipline does not amount to a service cause. It is submitted that our Tribunal misapplied *JM v Secretary of State for Defence (AFCS)* [2015] UKUT 332 (AAC).
>
> 5. The Chamber would doubtless benefit from the Upper Tribunal's guidance on the proper approach to Article 8. Whilst these particular circumstances may be rare clarification on whether a claimant has to be in service at the date of injury for the injury to be service caused would be welcome. I consider it is arguable therefore that our Tribunal erred in law.
>
> 6. I note that it is also argued by the SoSD that both the crime and subsequent discharge broke the casual link. To be clear there was no argument before the Tribunal that his crime broke the causal link and insofar as the SOSD now seeks to advance some form of argument that a criminal act unrelated to the index incident, prevents there being a legitimate claim under the AFCS I do not give permission on that ground."

11. On 21 August 2024 I extended time for the lodging of the notice of appeal until 17 July 2024 under rule 5(3)(a) of the Tribunal Procedure (Upper Tribunal) Rules ("the 2008 Rules").

12. I noted that the issue for the appeal (identified in the judgment granting permission to appeal at [2]) was whether the Tribunal erred in law by holding that the Respondent's injury was caused by service.

13. In the Observations sent to the Secretary of State on 14 November 2024, the Respondent indicated that the appeal was contested. At [4], the Respondent raised a specific issue, namely whether the Secretary of State was seeking to advance an argument for which the Tribunal had refused permission, namely whether his crime "broke the causal link". The Respondent asked whether the Upper Tribunal was proposing to consider that argument and, if so, asked for an opportunity to respond to that point.

14. The Secretary of State anticipated that point in the Grounds of Appeal. At [11(1)] of the Grounds of Appeal, he took issue with the Tribunal's conclusion that the Respondent's service was the "cause" of "the offence committed in service". That did not appear to be the same as an argument that the offence "broke the causal link", which the Tribunal refused permission to argue. However, even if it were an argument for which he required permission, the Secretary of State submitted that the Upper Tribunal should grant permission to argue it because (i) the question for the Upper Tribunal was whether the Tribunal below erred in law in finding that the injury to the Respondent's hand was caused by service (ii) in this appeal, it would be artificial, and potentially counter-productive, for the Upper Tribunal to be constrained to consider only parts of the Tribunal's reasoning; proceeding in that way had the potential to reduce the value of the guidance to be given by the Upper Tribunal, from which the Tribunal said that it would benefit (judgment on permission to appeal at [6]) (iii) proceeding in that way need not cause any prejudice to the Respondent. The Secretary of State was content for the Respondent to be given a further opportunity to respond to any of the points made in the Ground of Appeal.

15. On 3 January 2025 I accepted the Secretary of State's submissions and directed accordingly. To the extent that he did not already have permission to do so, he had permission to advance all of the arguments in the Grounds of Appeal dated 15 July 2024.

16. On 25 March 2025 I directed an oral hearing of the appeal, which I heard on the morning of 21 August 2025 when the Secretary of State was represented by Mr Will Hay of counsel. The Respondent appeared in person (although at earlier stages and at first instance he had been represented by the Royal British Legion). I reserved my decision.

The Secretary of State's Submissions

17. For the Secretary of State Mr Hay submitted that the Tribunal erred in law in deciding that the injury was caused by service.

Causation at common law

18. The law of causation involves a search for the distinction between causes that are legally relevant and irrelevant. This was explained by Lord Hughes and Lord Toulson JJSC in a passage under the heading "'But for' cause and legal cause" in ***R v Hughes*** [2013] 1 WLR 2461 at [23]

> "The law has frequently to confront the distinction between "cause" in the sense of a sine qua non without which the consequence would not have occurred, and "cause" in the sense of something which was a legally effective cause of that consequence. The former, which is often conveniently referred to as a "but for" event, is not necessarily enough to be a legally effective cause. If it were, the woman who asked her neighbour to go to the station in his car to collect her husband would be held to have caused her husband's death if he perished in a fatal road accident on the way home. In the case law there is a well-recognised distinction between conduct which sets the stage for an occurrence and conduct which on a common sense view is regarded as instrumental in bringing about the occurrence. There is a helpful review of this topic in the judgment of Glidewell LJ in *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360.

> Amongst a number of English and Commonwealth cases of high authority, he cited at pp 1373—1374 the judgment of the High Court of Australia in *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506, 515, in which Mason CJ emphasised that it is wrong to place too much weight on the "but for" test to the exclusion of the "common sense" approach which the common law has always favoured, and that ultimately the common law approach is not susceptible to a formula."

19. In its "helpful review" of the topic in ***Galoo Ltd v Bright Grahame Murray*** [1994] 1 WLR 1360, the Court of Appeal referred to the following authorities:

(i) ***Monarch Steamship Co. Ltd. v. Q Karlshamns Oljefabriker (A/B)*** [1949] AC 1, where defective boilers caused a vessel to arrive late at the Suez Canal, by which time the Second World War had broken out and the Admiralty had made an order which prevented the vessel from reaching its destination. The question was whether the defective boilers were the effective cause of the diversion, or merely provided the factual setting in which the operative cause (the order of the Admiralty) could take effect. In answering that question, Lord Wright said, at pp. 227-228:

> "There is, however, in this case a contention of a more general nature, which is that the delay which resulted from the defective boilers did not in any legal sense cause the diversion of the vessel. It is said that the relation of cause and effect cannot be postulated here between the unseaworthiness and the restraints of princes or the delay. As to such a contention it may be said at once that all the judges below have rejected it ... If a man is too late to catch a train, because his car broke down on the way to the station, we should all naturally say, that he lost the train because of the car breaking down. We recognise that the two things or events are causally connected. Causation is a mental concept, generally based on inference or induction from uniformity of sequence as between two events that there is a causal connection between them ... The common law however is not concerned with philosophic speculation, but is only concerned with ordinary everyday life and thoughts and expressions, and would not hesitate to think and say that, because it caused the delay, unseaworthiness caused the Admiralty order diverting the vessel. I think the common law would be right in picking out

> unseaworthiness from the whole complex of circumstances as the dominant cause."

(ii) ***Quinn v. Burch Bros. (Builders) Ltd.*** [1966] 2 QB 370. In that case the claimant had a contract with the defendant to carry out plastering work. The claimant asked the defendant for a step ladder, which, in breach of their contractual duty, they did not supply. Instead, the claimant used a trestle table, upon which he slipped and injured his ankle. The issue was whether the defendant had caused the injury by breaching its contractual obligation to supply the claimant with the proper equipment. Danckwerts LJ expressed his reasoning at p. 391, in four propositions, of which the third and fourth were:

> "(3) The cause of the plaintiff's accident was the choice by the plaintiff to use the unsuitable equipment.
>
> (4) The failure of the defendants to provide the equipment required may have been the occasion of the accident but was not the cause of the accident."

Salmon LJ said, at pp. 394-395:

> "the defendants realised that, if there were a breach of contract on their part to supply the step-ladder, that breach would afford the plaintiff the opportunity of acting negligently, and that he might take it and thereby suffer injury. But it seems to me quite impossible to say that in reality the plaintiff's injury was caused by the breach of contract. The breach of contract merely gave the plaintiff the opportunity to injure himself and was the occasion of the injury. There is always a temptation to fall into the fallacy of post hoc ergo propter hoc; and that is no less a fallacy even if what happens afterwards could have been foreseen before it occurred."

(iii) ***Alexander v. Cambridge Credit Corporation Ltd.*** (1987) 9 NSWLR 310. In that case auditors had failed to notice certain aspects of the trading of a company which, had they noticed them, would have led to the appointment of a receiver over the company during the relevant period. The company made losses during that period which it sought to re-claim from the auditor on the basis that the auditor's negligence had allowed the company to continue to trade, as a

result of which losses were sustained. The Court of Appeal of New South Wales rejected the argument. Mahoney JA explained:

> "In the present case, the company's loss resulted from the defendants' breach in the sense that the course of events vis-à-vis the company would have gone in a different direction had it not been for that breach. But that, I think, is not, or is not necessarily, sufficient. Thus, the breach allowed the company to continue in business. If its net worth had fallen because, for example, the main buildings it owned had been destroyed by an earthquake, I do not think that that loss would have been causally related to the breach which let the company continue in business ... It may sometimes be argued that a breach exposes the plaintiff to particular dangers and that if what happens subsequent to the breach is loss from a danger of that kind, the loss may be seen as a result of the breach: see, for example, the reference to arguments of this kind in the preface to the second edition of Hart & Honore [Causation in the Law, 2nd ed. (1985), p.lviii]. But, again, I do not think that this argument is open to the company. To allow the company to continue in existence is, in a sense, to expose it to all the dangers of being in existence. But allowing the company to remain in existence does not, without more, cause losses from anything which is, in that sense, a danger incident to existing. There are some dangers loss from which will raise causal considerations and some will not … But the basis of the plaintiffs' claim has been such that no inquiry is to be or has been pursued, for this purpose, into what in fact happened, why and the relationship of what happened to the breach. I do not think that that is enough to establish a causal relationship."

Causation in the present context

20. The leading authority is ***JM***. In that case, the Upper Tribunal identified at [118] a four-stage test for determining whether an injury was caused by service:

(i) identify the potential process cause or causes (i.e. the events or processes operating on the body or mind that might have caused the injury);

(ii) discount potential process causes which are too remote or uncertain to be regarded as a relevant process cause;

(iii) categorise the relevant process cause or causes by deciding whether the circumstances in which the process causes operated were service or non-service causes. It is at this stage that the earlier authority on the identification of a service cause may offer guidance;

(iv) if all the relevant process causes are not categorised as service causes, apply the predominancy test.

21. In terms of the earlier authority, the Secretary of State referred to:

(i) ***Horsfall v Minister of Pensions*** (1944) 1 WPAR 7 to the effect that the concept of causation embraced "only acts or conditions or events performed or undergone owing to and in compliance with the general or special conditions of service, together with all acts and obligations necessarily or reasonably incidental to those obligations as distinct from acts and conditions or events normally incidental to civil life".

(ii) ***Wedderspoon v Minister of Pensions*** [1947] KB 562. In that case a military doctor had prescribed himself an excessive dose of chloral hydrate which caused him to die. The High Court (Denning J) concluded that his death was not attributable to his service:

> "The dose was taken by Lieutenant Wedderspoon in his personal capacity. It is not a case of a ship's doctor prescribing for himself, but the case of a man, who happened to be a doctor, taking too large a sleeping draught in his personal capacity. The consequences of such an action are no more attributable to war service than the consequences of drinking too much or smoking too much or playing a game of squash. The cases show that when the cause of the death or disablement lies in the man's own personal or domestic sphere, and the war service does no more than provide the circumstances in which the cause operated, it is not attributable to war service."

(iii) ***Monaghan v Minister of Pensions*** (1947) 1 WPAR 971, where it was held that injury or death is not attributable to service if it does not more than provide the opportunity for the act which caused injury or death to take place.

(iv) ***NJ***. In that case the claimant was deployed as an Army ski coach. While on duty as head coach at a championship a civilian skier collided with her. The Upper Tribunal held that the injury was caused by service on the basis that skiing was an aspect of service and the claimant was actively engaged in that service at the time of the injury. Service would often provide the "setting", whether or not the case was one of "service cause", and assessing whether service provided the "setting" was of limited use as a touchstone of causation.

Argument

22. At stage 1 of the ***JM*** analysis, the Tribunal identified the following causes:

(i) the moving of the chairs at MCTC;

(ii) the fact that the Respondent was in MCTC because he had been sentenced to detention there;

(iii) the Respondent was serving a sentence because he had abused his position as a serving member of the armed forces.

23. Contrary to the Tribunal's conclusion, none of these was a "service cause". Taking them in reverse order:

(i) the fact that the Respondent had committed an offence in service did not mean that service caused the offence. The decision to commit an offence was a personal choice, and it just so happened that he was in service: ***Wedderspoon***. Put another way, the Respondent's service may have provided the setting for him to commit the offence, but it cannot be said that service caused the offence.

(ii) the fact that the Respondent was sentenced to detention at MCTC for committing an offence was likewise not an event which was caused by service, for the same reason that the offence itself was not caused by service.

(iii) nor was the immediate cause (moving chairs at MCTC) a service cause. The Respondent was not in service at the time.

24. The Tribunal suggested at [34] that whether any cause was a service cause depended on whether that cause "could only occur because he was in service". That approach is legally erroneous. It elides the concept of (a) the setting in which the cause occurs with (b) the cause. As noted in ***NJ***, care is needed before using "service as setting" as the touchstone of causation. Nevertheless, the concept runs through the authorities and is helpful as part of the search for legally relevant causes. Those authorities show that all sorts of conduct can only occur in the way it occurs because of the factual setting in which the conduct arises, but it does not follow that the factual setting is a cause of the conduct. For example, the injury to the contractor in ***Quinn*** could not have happened but for the failure to provide the stepladder, but it did not follow that the failure to provide the stepladder was the cause of the injury Hence, as explained in ***Monaghan***, it is important to distinguish between, on the one hand, an injury for which service merely provided the "opportunity" and, on the other hand, an injury for which service is the cause.

25. The Tribunal considered that the Respondent's injury arose "by virtue of a compulsion of service". This appears to be a reference to the analysis of Tucker J in ***Horsfall***, but here, the Respondent's injury was not sustained owing to an act or event performed in compliance with the conditions of service: he was not in service. Nor was the injury attributable to an act or obligation "necessarily or reasonably incidental" to such conditions of service. Rather, the Respondent's obligations were not incidental to his service (again, he was not in service), but arose because he was a civilian subject to service discipline who, because he was serving a sentence of detention, was required to perform any tasks given to him or risk committing a disciplinary offence. This was not a compulsion of

service, but a compulsion arising from the fact that he was a civilian serving a sentence of detention. Finally, the purpose of any training which the Respondent was doing at MCTC had nothing to with “service” (he was not in service), but was instead to try to make him a more responsible citizen.

26. In the final analysis, the objective meaning of “caused by service” in Article 8 does not include a situation where the injury is sustained by a person who is:

(i) not in “service”;

(ii) serving a sentence of detention not as a serviceman but as a civilian;

(iii) following a direction in compliance with the rules of the detention establishment.

27. The fact that the Respondent *once* served in the armed forces is part of the background and is legally irrelevant. The injury to the Respondent’s hand was not, in law, caused by his service. The Upper Tribunal was accordingly invited to allow the appeal, reverse the decision of the Tribunal and dismiss the Respondent’s application for compensation.

The Respondent’s Submissions

28. For his part the Respondent submitted that the effect of s.370 and Schedule 15 Part 1 paragraph 3 of the 2005 Act was that a civilian subject to service discipline held in MCTC was expressly subject to service law while in custody.

29. Rules 43, 49 and 50 of the 2009 Rules presuppose that civilians subject to service discipline in MCTC are governed by service law.

30. The Tribunal found in [8] that

> 'That meant that whilst at MCTC he was subject to the full Armed Forces discipline standards and sanctions. He had to obey orders and any infringement would be punished.'

31. He sustained an injury to his left hand while undertaking a compulsory task at MCTC.

32. This was not a civilian activity, but a duty imposed under service law; refusal could have led to punishment under the 2009 Rules.

33. The injury persisted for at least a year, with treatment records from both MCTC and the NHS (which the Secretary of State UK holds). It later developed into nerve complications diagnosed as carpal tunnel syndrome.

34. The injury fits within Level 13 of the AFCS tariff. The most appropriate descriptors are:

(a) descriptor 20: “Muscle or tendon unit injury short of full thickness rupture, which has caused, or is expected to cause, significant functional limitation or restriction beyond 26 weeks”.

(b) descriptor 23: “Ligament injury short of full thickness rupture, to one wrist, which has caused, or is expected to cause, significant functional limitation or restriction at 26 weeks with substantial recovery beyond that date”.

35. His injury, initially an impact injury to the left hand, caused dysfunction well beyond 26 weeks. It later developed into nerve complications diagnosed as carpal tunnel syndrome. On either descriptor, the criteria were satisfied.

36. The statutory framework, the 2009 Rules and the Tribunal’s prior findings all confirm that civilians subject to service discipline detained in MCTC are subject to service law. His injury arose directly from service obligations and met the Level 13 tariff descriptors 20 and 23 and should be compensated accordingly.

Analysis

37. The Respondent served in the Royal Air Force from January 2008 to 29 May 2020. He was then discharged from the service at his own request. Thereafter he was not a member of the forces, whether the armed forces or the reserve forces. He injured his hand on 6 November 2020 when he was no longer a member of the forces, but was instead a civilian subject to service discipline. When the injury occurred, some 5 months after he ceased to be a member of the forces, he was serving a custodial sentence, as a civilian subject to service discipline, at the Military Corrective Training Centre (MCTC). In those circumstances the injury which he sustained, months after he had ceased to be a member of the forces, could not be said to have been caused by service, since by article 8(1) of AFCS benefit is payable to or in respect of a member (or former member) of the forces by reason of an injury which was caused by service after the relevant date and by article 2 "service" means service as a member of the forces, which the Respondent had not been for more than 5 months before the injury.

38. The point is a short one, but it is conclusive of the appeal, which must succeed. There is no point in remitting the matter for rehearing since the facts are not in dispute and I can decide the matter for myself. The decision of the Tribunal is therefore set aside and remade. The injury to the Respondent's left hand was not caused by service.

39. Nothing in the decisions in ***JM*** or ***NJ*** militates against that conclusion. ***JM*** was a case of bullying. In the context of the investigation of an incident in which the claimant was the aggressor, he complained that he had been the victim of a campaign of bullying since February 2008 by other members of his troop on Operation Telic 12 and in barracks in Gütersloh. It was in that context that the three-judge panel made the remarks about causation cited by the Tribunal in the instant case, but the points which the panel was making were that

(1) the principles in the old case law relating to "attributable to service" remained relevant because they gave guidance on the link which was required between

the process cause and service to make it a service cause and so to satisfy the test that the injury be caused wholly or partly by service

(2) they provided assistance in the exercise of categorisation of process causes which was involved

(3) however and importantly, they did not address the new "predominacy test" under the AFCS

(4) the panel did not accept that the principles of *liability* in other areas of law (such as negligence and employment law) were of assistance in determining whether the test set by the AFCS was satisfied. That did not mean that changing views on what would be a fair and just result, having regard to the underlying purposes of the AFCS, were not relevant in difficult or borderline cases, but analogies with employment (or other) law were not necessary to introduce that approach to determining what, having regard to those purposes, the cause or predominant cause of an injury was.

40. The panel in ***JM*** was simply not considering the case of a claimant who had been discharged from the armed forces, and thus from service, months before sustaining the injury which was the cause of his claim.

41. In ***NJ*** a member of the forces was deployed as head ski coach at the Army Medical Services Ski Championships, representing the Royal Dental Corps. While she was coaching from the side of the piste, a civilian skier on a parallel piste lost control and collided with her, causing injuries. The issue was whether benefit was payable to her under the AFCS, which turned on the issue of whether there was a service cause for her injuries. Upper Tribunal Judge Poole QC decided that the Tribunal below erred in law in (i) failing to give adequate reasons, due to inconsistency between the decision notice and the statement of reasons and (ii) applying the law to the facts found by it. The decision was remade to the effect that the injuries were caused by service. Again, this was not the case of a claimant who had been discharged from the armed forces, and

thus from service, months before sustaining the injury which was the cause of his claim. On the contrary, when she was injured the appellant was on duty and acting in the course of her service as a coach at the Army Medical Services Ski Championships.

42. Similarly, I am satisfied that there is nothing in the decisions of Upper Tribunal Judge Mesher in ***EW*** or ***SV*** which militates against the conclusion which I have reached. In ***EW*** the claimant was serving as a member of the forces as a warrant officer in the Army who was injured whilst walking to his regular place of work at the Citadelle in Lille from his normal residence in the city. He was knocked down on a pedestrian crossing by a hit and run driver who was never traced. Judge Mesher held at [24-29] that there was a fundamental distinction between travel to and from work and travel as part of work and in the circumstances of the case before him the claimant could not be regarded as doing his job as a member of the armed forces whilst walking from his apartment in Lille to the Citadelle, as he was doing something which was necessary for him to carry out that job, but he was not yet doing it. The injury, being a manifestation of a risk run by the general public using the streets of Lille, could not properly be regarded as caused by the claimant's service.

43. In ***SV*** the claimant entered service with the Royal Marines and was still in service at the time of the hearing. The incident giving rise to the AFCS claim occurred when he was swimming off a beach in Gran Canaria. After wading into the water, he did a shallow dive and made direct impact with a sandbank just below the surface, of which he had been unaware, suffering very serious life-changing injuries. There was broad agreement as to the ways in which the Tribunal had erred in law and the matter was remitted for rehearing. (A subsequent appeal to the Court of Appeal was allowed because the claimant's civil claim for compensation failed and he no longer contended in the light of that judgment that his injuries were caused wholly or partly by his service in the Royal Marines, with the result that the outcome of the further appeal was now only of academic interest to him.)

44. In both cases of the cases before Judge Mesher the claimant was still serving as a member of the forces when the injury occurred, in contrast to this case where the claimant had ceased to be a member of the forces some months before he sustained the injury. It is in that context that one must read the remarks of Judge Mesher in ***EW*** at [16] and ***SV*** at [12]. He was not considering the case of a serviceman who was discharged from service in May and was not injured until November.

45. When in ***EW*** at [16] Judge Mesher said that

> "In my view the key lies in the essential test of entitlement being in terms of causation by service, with service being the predominant cause. The test is not whether the claimant was to be regarded as in service (whatever that might mean) at the time of the incident causing the injury or as on or off duty,"

he was dealing with the Secretary of State's submissions about Articles 7 (now 8) and 10 of AFCS, not Article 2, and what he said in full was that

> "The interaction of articles 7 and 10 is far from easy to work out. In my view the key lies in the essential test of entitlement being in terms of causation by service, with service being the predominant cause. The test is not whether the claimant was to be regarded as in service (whatever that might mean) at the time of the incident causing the injury or as on or off duty. Then that must be related to the particular drafting technique adopted in article 10."

46. He then went on to add at [17]

> "The starting point is the definition of service in article 2(1),"

thus recognising the essential starting point for eligibility under the AFCS, namely that under article 2 "service" means service as a member of the forces.

47. Similarly, when he said in ***SV*** at [12]

> "the fundamental test under the AFCS Order 2005 was not whether the claimant was in service or was on duty at the

> time of the incident in question but whether the injury was caused and predominantly caused by service,"

he was saying no more than he had said in the previous case and the actual context of his remarks was that

> "The President of the War Pensions and Armed Forces Compensation Chamber, Judge Stubbs, gave the claimant permission to appeal to the Upper Tribunal on the ground that it was arguable that the tribunal of 15 June 2012 had erred in law in approaching the case on the basis that the sole issue was whether the claimant was on or off duty at the time of the accident. He also drew attention to my decision in *EW v Secretary of State for Defence (AFCS)* [2011] UKUT 186 (AAC), now reported as [2012] AACR 3. There I held that the fundamental test under the AFCS Order 2005 was not whether a claimant was in service or was on duty at the time of the incident in question, but whether the injury was caused and predominantly caused by service. I also held that article 10 provided only for inclusions within the meaning of service, so that if the circumstances of a case concerned with travel or with sports or adventurous training courses or expeditions fell outside the terms of article 10, the claimant could nevertheless still succeed under the general test of causation in article 7."

47. I am therefore satisfied that the Tribunal in this case was wrong to conclude as it did at the end of paragraph 34 of its decision that

> "That [sc. The decisions of Judge Mesher] envisages the possibility that a claimant might not be in service at the time of the injury which is precisely the situation here."

Properly understood, the decisions in ***EW*** and ***SV*** were not dealing with the position of someone who had ceased to be a member of the forces before he had sustained the injury in question and they are not authority for any such proposition as advanced by the Respondent or as accepted by the Tribunal.

48. In ***JM*** the panel demonstrated that the earlier war pensions cases showed that not all injuries suffered by a serviceman when on duty were caused or sufficiently linked to (and so attributable to) service. On the other hand, they also

showed that some injuries suffered when the serviceman was off duty were so attributable and so were categorised as a service cause:

> "98. The war pensions cases show that not all injuries suffered by a serviceman when he is on duty are caused or sufficiently linked to – and so attributable to – service. On the other hand, the case law also shows that some injuries suffered when the serviceman is off duty are so attributable and so are categorised as a service cause. Examples of the earlier cases are:
>
> i) *Horsfall*, where Tucker J considered that "attributable to" service has a different meaning to "in the course of" service. This led him to uphold a decision that a fatal heart attack that occurred during a squash game being played for his own amusement on Air Ministry property by an officer formerly responsible for service squash was not attributable to war service. The judge considered that the Pensions Appeal Tribunal had not misdirected itself in holding that the scope of the words "by service" or "attributable to service" embraced "*only acts or conditions or events performed or undergone owing to and in compliance with the general or special obligations of service, together with all acts and conditions or events necessarily or reasonably incidental to these obligations as distinct from acts and conditions or events normally incidental to civil life*". Tucker J stressed that: "*The words used are 'attributable to,' and I think they have a different significance from 'in the course of'*" and also stated unsurprisingly that it must often be extremely difficult to put a particular case on one side or other of the dividing line.
>
> ii) *Marshall*, where Denning J said: "*The essential justification for a finding of attributability is that war service should be one of the causes of the disease. As I explained in Chennell's case, however, it must be a cause as distinct from being part of the circumstances in or on which the cause operates. Cases often occur when the disease would have arisen in any event, war service or no war service. In such cases it is not attributable to war service. They can be best illustrated by a metaphor. If a rope is weak and on that account breaks when it is carrying a normal or less than normal load, the cause of the break is not the load but the weakness of the rope. If, however, the rope is weak and breaks when carrying an abnormal load when it might have stood a normal load, there are two causes, one the weakness of the rope and the other the abnormally heavy load.*" Denning J then distinguished the circumstances in

which a cause operates from the event or stressor itself. He said: "*The schizophrenia cases afford a good illustration. If schizophrenia arises in war service without any special stress or strain, it is not attributable to war service; but if there is severe war stress or strain immediately preceding the onset of symptoms, then it is. There are parallels in workmen's compensation cases, such as death in an epileptic fit in normal conditions – Lander' s case (1933) 102 LJ (KB) 768 – and in abnormal conditions – Wicks v. Dowell & Co., Ltd [1905] 2 KB 225*) *and Wilson v. Chatterton [1946] KB 360, 363.*"

iii) *Wedderspoon v Minister of Pensions* [1947] KB 562, (1947) 1 WPA 347, where Denning J held that a naval surgeon who had administered to himself an overdose of a drug had done so in his personal capacity. He said: "*The cases show that when the cause of the death or disablement lies in the man's own personal or domestic sphere, and the war service does no more than provide the circumstances in which the cause operated, it is not attributable to war service.*"

iv) *Monaghan v Minister of Pensions* (1947) 1 WPA 971, where Denning J similarly concluded, in a case where a serviceman on active service died as a result of inhaling his own vomit after drinking, with other servicemen, raw spirit abandoned by the enemy, that although war service gave the opportunity for the drinking the real cause of the death was entirely the personal action of the serviceman.

v) *Gaffney v Minister of Pensions* (1952) 5 WPA 97, where Ormerod J concluded that a soldier's claim based on epilepsy caused as a result of injuries to his head when he was attacked, probably on his way back to barracks after a night off, was not attributable to service because he was "on his own business". He followed *Horsfall* and rejected the argument that the Royal Warrant applied because the attack would not have happened if the victim had not been in service because he would not otherwise have been in the place where the attack took place.

vi) *Giles v Minister of Pensions and National Insurance* (1955) 5 WPA 445, where the appellant was on a day's leave but wearing his uniform, as he was under a duty to do, when, while sitting by a clump of trees, he was shot in the back by a wad of blank cartridge fired by a cadet on an exercise. Although the Minister conceded the appeal, his counsel invited Ormerod J to expand on what he said in *Gaffney.* Ormerod J said: "*I held in that case that the man was on leave and whatever had happened to him*

happened while he was in his own personal sphere of action, and that, I think, followed the decisions of Lord Justice Denning and Lord Justice Tucker (as he then was). That, of course is clearly the established rule and a rule which must prevail, but there may be circumstances – and each case, of course, depends upon its own circumstances – when it may be right to say that what happened to the man did not happen entirely 'within his own personal sphere', but happened to him for some reason due to the compulsion of his service, and, under those circumstances, it appears to me, as, indeed it has appeared to the Ministry in this case, that he should be entitled to a pension. It is impossible to lay down any rule as to where that line should be drawn because, quite clearly, each case must depend upon its own facts, but in this case, the Appellant was compelled to wear uniform, and, because he was wearing uniform at that particular time although he was on leave, it is highly probable that he was singled out by the cadets or one of them as the target. The cadet was probably under the impression that he was one of the opposing band concerned in the exercise. Therefore I am satisfied that this appeal should be allowed and that the Ministry have acted properly in conceding it, not because it is an injury which occurred to a man when he was 'within his own personal sphere', but because it was an accident which occurred due, in part at least, to the compulsions of his service."

vii) *Richards v Minister of Pensions and National Insurance* (1956) 5 WPA 631, where Ormerod J again approached the issue by considering whether on the whole of the facts the appellant was engaged on some personal enterprise unconnected with any duty or compulsion of service. He thereupon dismissed an appeal where the claimant was injured by putting his fist through a window after a fight with Private "A" in the latter's hut arising out of an argument between them following a dance. The exact way in which he so injured his hand and wrist after the incident in the hut was not established but Ormerod J concluded that: "*… it is quite impossible to disassociate it in any way from that incident; and, clearly, for the Appellant to go into the hut, as he did, where he had no authority to be at all, for no other reason than to attack Private "A" in the way that he did was a purely personal matter and something which in no way it could be said was due to any compulsion of service.*"

viii) *Blakemore v Secretary of State for Social Security* (14 March 1997, unreported) where Alliott J dismissed an appeal by a claimant who fell from a window and suffered injuries. The evidence was that he was sitting on the windowsill and urinating out of the window. He made no

attempt to get back in and fell forward. It was accepted that if that was how his accident happened, it would not be attributable to service, and that is what a tribunal found in 1963. In 1990 the claimant submitted further evidence that he had been pushed or thrown from the window by his platoon sergeant and a colleague. The tribunal rejected his claim again. The focus of the appeal was on their approach to the standard of proof and the appeal was dismissed on the basis that the tribunal had come to the only proper factual conclusion open to it. However, Alliott J went on to say: "*While it forms no part of my ratio decidendi I should deal briefly with one interesting point raised before me. If there was or might be substance in the appellant's later evidence, that is to say that if he was the subject of a revenge attack by someone he amongst others had reported for dereliction of duty, and who had subsequently been demoted, was the injury attributable to service? My provisional view, subject to argument in any case in which the point is more immediately at issue, is that it was. The attack was allegedly made on him as a result of what he had done, properly on his own account, as a soldier. In Mr Methuen's phrase: "An injury suffered by a soldier because he is a soldier or because of what he did as a soldier is attributable to service". See Giles v The Ministry of Pensions and National Insurance.*"

99. The principle (or *per* Ormerod J in *Giles* the established rule) to be derived from these cases is that a claim must fail where the injury was sustained while the claimant was engaged on some personal enterprise unconnected with any duty or compulsion of service; or (as Denning J put it in *Monaghan*) service only gave the opportunity, or provided the setting, for the injury to occur.

100. The approach taken in the cases under the war pensions instruments:

i) shows that the attributability test was construed and applied as a causation test,

ii) demonstrates that a cause is distinct from the circumstances in or on which the cause operates. Cases often occur where the injury or disease would have arisen in any event, service or no service. In such cases it is not attributable to service unless caused by some special or particular characteristic, stress or strain attributable to service.

iii) recognises that in some cases it will be very hard to draw the line between when an injury is sufficiently caused

> by or linked to service to be "attributable" to it and so a "service cause" and when it is not,
>
> iv) does not espouse a rule that a "one off incident" will not satisfy a causation test for payment, (and as we have mentioned this is recognized in the Secretary of State's statement of policy),
>
> v) demonstrates, as accepted before us, that the approach advanced by the Secretary of State before the F-tT in this case (see paragraph 67) is too narrow and is accordingly wrong,
>
> vi) whether a serviceman is on duty may be relevant but is not determinative, and
>
> vii) recognises that injuries caused by assaults, whether by civilians or by other servicemen, may be due to service or may not: it all depends on the circumstances.
>
> viii) However, because the test under the war pensions instruments did not include the concept of predominant cause, these cases do not address how a decision-maker should determine whether an injury (or death) was caused *wholly or partly* by service or what the *predominant cause* is.
>
> 102. Importantly they also confirm that there is no short cut to deciding the question whether an injury was caused by service by way of a simple formula that can be adopted in place of the statutory language. On the other hand, an appellate court or tribunal will not interfere with a finding of the F-tT that an injury was caused by service if it has applied the proper test and the F-tT has not in any other respect erred in law by, for instance, acting unfairly. These are points we made at [52]–[64]."

49. None of these cases, properly understood, provides any support for the extension of liability under the AFCS to a claimant who was not a member of the forces when the injury occurred because he had ceased to be a member of the forces months before.

50. The Tribunal in this case cited the approach to the issues of causation and predominant cause under the AFCS as set out in ***JM***:

> "118. The analysis we have set out founds 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 (ie 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."

51. It then went on to apply those principles to the case before it:

> "32. Considering the first stage of the *JM* test what are the potential process causes of the events or processes which caused the injury? The immediate cause of the impact injury was the moving of the chairs at MCTC. That was an action carried out under instruction and was followed because the Respondent was acting under orders and was subject to service discipline. Moving up the chain of events – he was at MCTC because he was sentenced by Court Martial to serve his sentence there. His offence had been committed whilst he was in service and related to abuse of his position as a serving member of the Armed Forces. He was not tried or sentenced by the civilian criminal courts and he was only sentenced to serve his sentence at a military correctional institution by virtue of his service.
>
> 33. We do not consider that any of those potential causes are too remote or uncertain to warrant disregarding them as relevant causes. So, we then have to consider whether the circumstances in which each operated were service or non-service causes. He was following an order to move furniture and that in our view, is properly categorised as by virtue of a compulsion of service.

> 34. We consider that there is an unbroken chain of causation which leads from his service to his offence committed in service, to his sentencing by Court Martial to his being in the setting of MCTC all of which could only occur because he was in service, to his being compelled to follow an order to move furniture which caused the injury. If he had been detained in custody whilst still in service, so in A Company rather than D Company, we would have no hesitation in concluding that the injury was service caused ...
>
> 35. So, if the only distinction is that he had left service at the date of the injury, does that mean the injury is not caused by service? Applying the words of Article 8 there is no temporal limit placed on the injury – it does not have to occur in service but rather be caused by service. [It then set out Judge Mesher's remarks in *EW* and *SV* with which I have dealt above and continued] That envisages the possibility that a claimant might not be in service at the time of the injury which is precisely the situation here.
>
> 36. *NJ* tells us we can rely on the traditional 'but for' test and it follows from our conclusion above that we are satisfied that, without service, this injury would not have occurred. Had it not been for his service the Respondent would not have been at MCTC and would not have been obliged to follow the order to move the furniture and would not have injured his hand. There was a specific service compulsion/obligation, service not only provided the context and setting but the cause and given that every link in the chain of causation is service related we conclude that all the causes we have identified are service causes.
>
> 37. We have not identified any non-service causes and so do not have to consider applying the predominancy test – this injury was caused by service and the appeal succeeds."

52. This analysis misses the crucial point which I made in paragraph 37 above. The Respondent served in the Royal Air Force from January 2008 to 29 May 2020. He was then discharged from the service at his own request. Thereafter he was not a member of the forces, whether the armed forces or the reserve forces. He injured his hand on 6 November 2020 when he was no longer a member of the forces, but was instead a civilian subject to service discipline. When the injury occurred, some 5 months after he ceased to be a member of the forces, he was

serving a custodial sentence, as a civilian subject to service discipline, at the Military Corrective Training Centre (MCTC). In those circumstances the injury which he sustained, months after he had ceased to be a member of the forces, could not be said to have been caused by service, since by article 8(1) of AFCS benefit is payable to or in respect of a member (or former member) of the forces by reason of an injury which was caused by service after the relevant date and by article 2 "service" means service as a member of the forces, which the Respondent had not been for more than 5 months before the injury.

53. I do not accept the Tribunal's conclusion in paragraph 34 of its decision that the Respondent's service was the "cause" of the "offence committed in service". His service may have provided the setting for him to commit the offence, but it cannot sensibly be said that service *caused* the offence. In that context I agree with the Secretary of State's reliance on the decision of Denning J in ***Wedderspoon*** cited above.

54. Nor do I accept the suggestion in the same paragraph 34 that whether any cause was a service cause depended on whether that cause "could only occur because he was in service". That approach, as Mr Hay rightly submitted, elides the concept of (a) the *setting* in which the cause occurs with (b) the cause itself. All sorts of conduct can only occur in the way in which it occurs because of the factual setting in which the conduct arises, but it does not follow that the factual setting is a cause of the conduct. This is why, as explained in ***Monaghan*** (again cited above), it is important to distinguish between, on the one hand, an injury for which service merely provided the "opportunity" and, on the other hand, an injury for which service is the cause.

55. In paragraph 36 the Tribunal considered the Respondent's injury arose "by virtue of a compulsion of service". That appears to be a reference to the analysis of Tucker J in ***Horsfall*** above to the effect that the concept of causation embraced "only acts or conditions or events performed or undergone owing to and in compliance with the general or special conditions of service, together with

all acts and obligations necessarily or reasonably incidental to those obligations as distinct from acts and conditions or events normally incidental to civil life".

56. But here his injury was *not* sustained owing to an act or event performed in compliance with the conditions of service. He was not in service; he had been discharged from service more than 5 months previously. Nor was the injury attributable to an act or obligation "necessarily or reasonably incidental" to such conditions of service. Rather, his obligations were not incidental to his service: he was not in service, nor was he subject to service law, but was instead a civilian subject to service discipline who, because he was serving a sentence of detention, was required to perform any tasks given to him or risk committing a disciplinary offence under the relevant 2009 Rules.

57. That was not "a compulsion of service", but a compulsion arising from the fact that he was a civilian subject to service discipline and serving a sentence of detention. Moreover, the purpose of any training which the Respondent was doing at MCTC had nothing to with "service" (he was, again, not in service), but was instead to try to make him a more responsible citizen.

58. The Tribunal considered at paragraph 34 that, if the Respondent had been detained in custody whilst still in service (so in A Company rather than D Company), it would have no hesitation in concluding that the injury was service caused. That may or may not be the case in any given situation, although as the citation from ***JM*** at [98-100] above makes clear, the situation may not be as clear cut as that, but the crucial point is that he was *not* detained in custody whilst still in service. The Tribunal found that there was no distinction between that situation and one in which he had left service at the date of the injury, but that is the crucial distinction and it made all the difference.

59. The Respondent sought to argue that the effect of Schedule 15 Part 1 paragraph 3 of the 2005 Act was to make him subject to service law, but as I pointed out in argument that is not what the provision says and the proposition

for which he contended was directly contrary to s.370(1) which expressly provides that a

> "civilian subject to service discipline" means a person who—
>
> (a) is *not* subject to service law".

60. As Mr Hays rightly submitted, the Respondent was obliged to follow the 2009 Rules because he was in detention in MCTC Colchester, just as he would have been obliged to follow the relevant prison rules if he had been detained in a civilian prison at HMP Wandsworth. The precise location of the place where he was detained was happenstance, but the fact that he was a civilian subject to service *discipline* under the 2009 Rules did not mean that he was subject to service *law*, which s.370(1) expressly precluded given his now civilian status. Nor do the 2009 Rules presuppose that a detainee is subject to service law, as the Respondent also sought to argue, which would also be precluded by s.370(1).

61. For these reasons I am satisfied that the phrase "caused by service" in Article 8 of the AFCS does not include a situation where the injury is sustained by a person who is:

(a) not in "service"

(b) but is serving a sentence of detention, not as a serviceman but as a civilian subject to service discipline

(c) even if he is following a direction in compliance with the rules of the detention establishment.

62. The fact that the Respondent once served in the armed forces is part of the background of the case, but is legally irrelevant. The injury to the Respondent's hand was not, in law, caused by his service as a member of the forces.

63. To accept the Respondent's contention in this appeal would be to accept the proposition that a claimant was entitled to armed forces compensation for an injury which occurred when he was no longer a member of the armed forces and indeed had not been a member of the armed forces for some months when the injury occurred.

64. To adapt the phrase used by Alliott J in ***Blakemore***, an injury, suffered by someone who was no longer a soldier, only after he had ceased to be a soldier, albeit that he was serving a sentence of detention as a civilian subject to service discipline because of what he did as a soldier, is not attributable to service.

Conclusion

65. For these reasons I am satisfied that the decision of the First-tier Tribunal (War Pensions and Armed Forces Compensation Chamber) dated 13 March 2024 under file reference AFCS/00248/2023 contains an error on a point of law.

66. The appeal against that decision is allowed and the decision of the Tribunal is set aside.

67. The decision of the Tribunal is remade. The injury to the Respondent's left hand was not caused by service.

Mark West
Judge of the Upper Tribunal

Authorised for issue on 21 August 2025