IN THE UPPER TRIBUNAL **Neutral Citation Number: [2025] UKUT 290 (AAC)**
ADMINISTRATIVE APPEALS CHAMBER **Appeal No. UA-2024-001650-AFCS**

Between:

DA-B

Appellant

- v -

Secretary of State for Defence

Respondent

Before: Upper Tribunal Judge Wright

Decided on the papers

On appeal from:

Tribunal:	First-tier Tribunal (War Pensions and Armed Forces Compensation Chamber)
Tribunal Case No:	AFCS/00539/2023
Tribunal Venue:	Remote telephone hearing
Decision Date:	19 January 2024

SUMMARY OF DECISION

This decision is about the deciding the most appropriate descriptor in relation to the mental disorders found in Table 3 of Schedule 3 to the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011.

It summarises the Court of Appeal's decision in Christopher Pearson v Secretary of State for Defence [2024] EWCA Civ 150.

The FTT's decision is set aside for inadequately reasoning out why the appellant did not more appropriately come within Item 1 in Table 3 instead of Item 2. The FTT's narrative explanation of the appellant's history provided no adequate evaluation of the comparative applications of Item 1 and Item 2 in relation to that evidence. Moreover, and as a necessary precursor to that comparative exercise, the FTT had failed to make any clear findings which identified the necessary base line about the level of work which was appropriate to the experience, qualifications and skills held by the appellant at the onset of his PTSD, so as to compare that with the nature and level of work which the appellant had been capable of undertaking since the onset of his PTSD.

KEYWORD NAME (Keyword Number) War pensions and armed forces compensation (56); Armed Forces Compensation Scheme (56.5)

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 judges follow.

DECISION

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

The decision of the First-tier Tribunal made on 19 January 2024 under case number AFCS/00539/2023 was made in error of law.

Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007, that decision is set and the appeal is remitted to an entirely differently constituted First-tier Tribunal to be redecided, after an oral hearing, and in accordance with the law set out in this decision.

REASONS FOR DECISION

1. I am satisfied on the arguments before me that that the First-Tier Tribunal ("FTT") erred in law in the decision to which it came on 19 January 2024 and that its decision should be set aside as a result.

2. The appeal concerned the application of the relevant mental disorders under Article 15(2) and Table 3 in Schedule 3 to the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 ("the AFCS"). At the time relevant to the appellant's appeal he had been assessed as satisfying Item 2 (and so Level 8) in Table 3. His argument was that his PTSD warranted him being at Item 1 (and so (the higher) Level 6) in Table 3.

3. Item 2 in Table 3 of Schedule 3 to the AFCS is about "*Permanent mental disorder, causing moderate functional limitation or restriction*", whereas Item 1 is about "*Permanent mental disorder, causing severe functional limitation or restriction*". There was no dispute before the FTT that the appellant's PTSD was permanent. In terms of the wording of Items 2 and 1 in Table 3, taking that wording in isolation, the issue to be decided by the FTT was therefore whether the appellant's PTSD caused him either *moderate* or *severe* functional limitation or restriction.

4. That, however, is not the end of the statutory story because each of Items 2 and 1 are subject to footnotes: (b) in the case of Item 2 and (a) in the case of Item 1. These provide as follows:

> "(b) Functional limitation or restriction is moderate where the claimant is unable to undertake work appropriate to experience, qualifications and skills at the time of onset of the illness but able to work regularly in a less demanding job.

> [(a)] Functional limitation or restriction is severe where the claimant is unable to undertake work appropriate to experience, qualifications and skills at the time of onset of the illness and over time able to work only in less demanding jobs."

5. Without recourse to case law, the use of the word "is" in both footnotes indicates that they are defining the circumstances in which a functional limitation or restriction is either moderate or severe. Moreover, in both the cases of moderate and severe functional limitation or restriction the opening qualifying words are the same: the claimant is unable to undertake work appropriate to experience, qualifications and skills at the time of onset of the illness. On the statutory wording alone, the difference therefore is not the inability to undertake work which is appropriate at the time onset of the illness. Rather, the difference is whether the claimant is able to work regularly in a less demanding job at the onset of the illness (in which case their functional limitation or restriction is moderate), or whether the claimant is, over time (so, after the date of onset of the illness), able to work only in less demanding jobs (in which case their functional limitation or restriction is severe).

6. Even with this, the statutory distinction might be thought to be somewhat elusive or refined as the focus remains in both cases on the ability to work in a less demanding job or less demanding jobs. The key distinguishing features are, however, for moderate functional limitation or restriction that the ability is to work regularly in *a* less demanding job and to have that ability at the time of the onset of the illness, whereas for severe limitation or restriction the ability is to work only in such jobs and where that ability arises over time. But, as the *Pearson* case, to which I come immediately below shows, the border between "moderate" and "severe" in this statutory context is not hermetically sealed, and a claimant's condition might meet either. What is needed, per paragraph [16] of *Pearson*, and paragraph [56] of *Secretary of State for Defence v Duncan and McWilliams* [2009] EWCA Civ 1043, is "*a careful analysis of the facts and then consideration of which descriptor is the most appropriate*".

7. The leading, and binding, authority in this area is the Court of Appeal's decision in *Christopher Pearson v Secretary of State for Defence* [2024] EWCA Civ 150, which was decided on 23 February 2024. Although this is after the date of the FTT's decision, *Pearson* is setting out the law as it should have been understood and applied by the FTT.

8. *Pearson* is authority for the following:

   (i) footnotes (a) and (b) differ in the following respects. Footnote (a) refers to a claimant who <u>over time</u> is able to work <u>only</u> in less demanding job<u>s</u>; whereas footnote (b) refers to a claimant who is able to work <u>regularly</u> in <u>a</u> less demanding <u>job</u> (paragraph [45] of *Pearson*);

   (ii) the task of the decision maker or, here, the FTT was to identify which of the two descriptors in issue on the appeal, Item 1 and Item 2, "best describes the injury and its effects". This requires an appraisal of all relevant evidence and an evaluation of which of the descriptors is the most appropriate in all the circumstances (para. [46] of *Pearson*);

(iii) given how closely the terms of footnotes (a)m and (b) coincide, there is clearly an overlap between them, and they are not mutually exclusive. It is therefore inappropriate to adopt a rigid approach to the footnotes (*Pearson* at para. [46]);

(iv) where a claimant's circumstances may be said to come within both footnotes, and an evaluation has to be made of which of the two footnotes is the most appropriate, the footnotes should be read as indicative of circumstances which would place a claimant in a particular category, rather than as definitive statements of circumstances which inevitably place a claimant into a particular category (para. [47] of *Pearson*);

(v) depending on the facts of the case, the FTT may decide which of two relevant considerations is the more significant in deciding which descriptor is the most appropriate. Those two relevant considerations are: (a) the course or trajectory of claimant's ability to work since the onset of their mental disorder (here, PTSD), and (b) their ability to work regularly in a less-demanding job (para. [47] of *Pearson*);

(vi) a capacity to work regularly is a relevant factor in considering which is the appropriate descriptor, but it is wrong to proceed on the basis that the focus must solely be on whether a claimant can be said to work "regularly". This is because a claimant may come within footnote (a) even though each of the regular jobs they are able to undertake may be regular work (para. [48] of *Pearson*);

(vii) both the Item 1 and Item 2 descriptors require the FTT to take as a base line the level of work which is appropriate to the experience, qualifications and skills held by the claimant at the onset of the relevant mental disorder; to contrast that with the nature and level of work which the claimant has been capable of undertaking since the onset of the disorder; and to determine which is the appropriate descriptor as at the time of the decision (*Pearson* at para. [49];

(viii) an important, but not determinative, distinction between the Item 1 and Item 2 mental disorder descriptors is a distinction between:

(a) a clamant who over the period of time since the onset of the mental disorder has only been able to work in a series of lees and less demanding jobs, and whose capacity for work has accordingly been diminishing over time, even if the claimant could fairly be described as having worked regularly in one or more of those less demanding jobs; and

(b) a claimant who throughout the period of time since the onset of the mental disorder has been able to work regularly at a consistent level (para. [49] of Pearson); and

(ix) it is therefore wrong to treat the question of whether a claimant's work could properly be described as "regular" as being determinative of the appropriate categorisation of the severity of the mental disorder, and consideration should also be given to whether (and if so how) the claimant's ability to work has diminished over time (para. 50 of *Pearson*).

9. I am satisfied that the FTT's reasons do not show that it properly applied these (admittedly somewhat fluid) considerations to the appellant's appeal, in circumstances where it was the appellant's case that the effects of his PTSD more appropriately brought him within Item 1 in Table 3 of Schedule 3 to the AFCS.

10. The FTT's reasons read, relevantly, as follows:

> "1. The appellant who was born on 17/11/80 served in the Army, in an Infantry role, from 21/10/07 to 18/10/13 when he was medically discharged with a heart condition. During his service, he had a short period of deployment to Afghanistan to which he relates many of his PTSD symptoms, and also to emergency hospitalisation during an exercise in Kenya after an exacerbation of his heart condition.
>
> 2. The appellants claim has had a lengthy genesis with various awards made at increasing levels after the expiry of interim awards, and requests for reconsiderations. [The appellant] is currently on Table 3 Item 2 level 8, the second highest on the version of Table 3 in force at the time of claim……
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> 4. <u>The Background</u>
>
> 4.1 [The appellant] was born in Ghana, and after leaving school studied for, and gained, a HND in accountancy. He had a bookkeeping type job for 3-4 years before moving to the UK to study for a post-graduate degree in accountancy (which he obtained). Whilst studying, he became attracted to the idea of joining the Army and did so in November 2007.
>
> 4.2 His early Army career was somewhat blighted by an impending court case relating to a pre-service assault, with a risk of imprisonment. As a result he was prevented from deploying to Aghanistan (sic) with the rest of his troop until this was resolved. He was then able to join his colleagues in Afghanistan for the last 6 weeks of the tour. This history is fully set out in the notes on P65. At the time he is recorded as drinking heavily (P60R and P61) and was also charged with drink driving. His low mood was assessed as due to these court cases and was expected to improve. There is no mention of the traumatic incident in Afghanistan which is now related to his PTSD.
>
> 4.3 First presentation with symptoms of PTSD appear to have been diagnosed in 2017. Since then, [the appellant] has undergone extensive therapy both for his PTSD and for his alcohol abuse as described on P11R. The SoS therefore accepted that the condition was permanent, which engaged Items 1 and 2 on Table 3.

5. The appellants qualifications and skills

5.1 [The appellant] has an HND and a post-graduate qualification in accountancy, and 3 years work experience in the field.

5.2 Whilst in the Army, he would have acquired military infantry skills as well as experience in leadership and teamwork. As part of his resettlement training he did an internet installation course.

5.3 After leaving the Army, he obtained a job in telephone installation with Kelly's/BT for about 6 months, but lost this, he says, through poor concentration.

5.4 He then found a driving job 3-4 days a week initially at night, but was dismissed from this because, he says, he was unable to concentrate after poor sleep due to nightmares. However, we note that it is otherwise recorded that he lost his job due to drink driving.

5.5 He then enrolled on an access course in health sciences which he attended 3 days a week before the pandemic turned this into online tuition, apart from lab work undertaken at the college. He was given extra time to do assignments and the (online) exams.

5.6 He is now in Year 3 of a law degree, but after failing to pass 2 modules, has had to re-take them. Again he is given extra time to complete assignments.

5.7 Domestically, the appellant lives at home with his wife and 2 children whom he takes to and from school if not at college.

6. The impact of alcohol consumption

There is no dispute that [the appellant] has a long history of excess alcohol consumption and dependency, in spite of several attempts at therapy through various courses to minimise this. He has come into conflict with officials (including on a train), as a result, and has lost at least one job. His record may well preclude him from success in finding other jobs which require concentration and a regular commitment. We remind ourselves of the provisions of Article 12 (b) AFCS 2011 which excludes 'the worsening of an injury' due to the consumption of alcohol.

7. Work opportunities

It is not our remit to speculate on the availability of potential jobs in Cardiff where the appellant lives. However, as we have described in Para 5 above, [the appellant] has an impressively diverse range of educational achievements and other skills, some of which admittedly he has acquired post diagnosis, or 'after the onset of the illness'. He has been able to engage with lengthy therapy programmes, which have given him the tools to cope with his PTSD symptoms. We consider that were it not for the impact on his functioning from his alcohol consumption he could hold down a range of remunerative and regular jobs, either for an employer, or could construct a portfolio of part-time jobs working for himself and at his own pace. Bookkeeping for a small business would seem a good starting point.

For these reasons, we conclude that [the appellant] is on the correct tariff."

11. Setting aside for one moment the issue of the appellant's alcohol consumption, this reasoning in my judgement fails to provide an adequate explanation for why, following the law as laid down by the Court of Appeal in *Pearson*, the FTT concluded on the evidence that the appellant was not at the time of the onset of his PTSD and over time able to work only in less-demanding jobs. Setting out the relevant footnotes, as the FTT did in paragraph 3 of its reasons for its decision, did not in itself provide a sufficient explanation for the correct placing of the appellant's PTSD. What remains lacking in my judgement is an adequate explanation for why the appellant's PTSD did not fall within Item1 in Table 3 and, more appropriately, fell within Item 2 in Table 3.

12. The FTT's conclusion that the appellant was correctly (i.e., by which I take it it meant most appropriately) placed at Item 2 is clear. However, its narrative explanation of the history in terms of the appellant's background and qualifications and skills provides, in my clear judgement, no adequate evaluation of the comparative applications of Item 1 and Item 2 in relation to that evidence. For example, there is no express or otherwise necessarily obvious consideration of the appellant's ability to work in less demanding jobs over time since the onset of his PTSD; albeit the narrative recital indicates there may have been such a history. Was that history (if it was such), for example, evidence of the appellant working regularly at a consistent level (in less demanding jobs)? That is not made clear or explained. Or does that history (if it is such) show a capability to work only in a series of less and less demanding jobs. Again, this is not addressed or explained? A difficulty in carrying out this comparative exercise is the lack of any clear findings by the FTT (per paragraph [49] of *Pearson*) which identified as the necessary base line the level of work which was appropriate to the experience, qualifications and skills held by the appellant at the onset of his PTSD, so as to compare that with the nature and level of work which the appellant had been capable of undertaking since the onset of the PTSD.

13. The Secretary of State's submission on the appeal is, with respect, somewhat confusing. It refers to having sought further advice and remaining of the view, by reference to submissions made at an earlier stage in the proceedings, "*that a level 8 award remains appropriate*". The correct level of the award is not, however, an issue for the Upper Tribunal in deciding whether the FTT erred in law.

14. In his earlier submissions (on whether to admit the late application for permission to appeal), the Secretary of State had argued (in response to the grounds of appeal advanced on behalf of the appellant) as follows:

> "9. In Ground 1 of the appeal it is stated "It is contented that the FTT erred in law in failing to address its mind to the notes (a) and (b) of Table 3." Having read the Departmental Representative's report of the tribunal, [the appellant's]'s representative made it clear from the outset that they were specifically looking for an increased award from a Level 8 to a Level 6. Therefore, in essence, the entire hearing, from then on, was geared around thorough discussions and analysis of the two relevant descriptors and the footnotes in question. There

were no further requirements of the FTT other than to look at those descriptors and the footnotes in relation to the written and oral evidence.

10. On the Tribunal's Decision and Reasons noticed issued by Judge Horrocks, paragraph 3 under REASONS contains a full copy of footnotes (a) and (b) for reference in relation to their decision-making process. The Secretary of State would not agree that the FTT erred in law by failing to address its mind to the notes (a) and (b) of Table 3. These footnotes were referenced specifically, word for word in the reasons for decision.

11. In paragraph 5 of the FTT's REASONS. The tribunal list (5.3 – 5.6) [the appellant's] post-service qualifications and work. Including approximately 6 months working in telephone installation and then working at a job driving 3–4 days a week before enrolling in various courses, health science and law to obtain a degree. This chronology of employment / higher education post-service, could certainly be described as "working regularly in a less demanding job". At the time of the tribunal [the appellant] was in his 3rd year of a law degree. Showing, not only is he able to meet the timetables, deadlines and workload required of a higher education course, he is also able to gain further skills and qualifications since the onset of his accepted condition.

12. Having referenced the footnotes of Table 3 within the decision-making process. The FTT gave a summation of [the appellant's] history of excessive alcohol consumption. This has played a major impact on his employability, causing him to lose his driving job."

15. I would comment. in respect of paragraph 11 of that submission, that whether the appellant's job and educational history post-service *could* be described as working regularly in a less demanding job history, does not really advance matters in terms of whether the FTT erred in law. Moreover, as *Pearson* makes clear, the fact that the appellant may come within Item 2 in Table 3 of Schedule 3 to the AFCS does not preclude him from more appropriately coming within Item 1. And it is that which the FTT failed properly to decide.

16. The Secretary of State's submission then states *"[n]ow that permission to appeal has been granted the Secretary of State would request the appeal be remitted back to a new First Tier Tribunal for a fresh hearing*". Again, this involves a misstep. The mere grant of permission to appeal does not lead to an appeal being remitted to the FTT.

17. When I gave permission to appeal I commented that ground 2 of the grounds of appeal may have involved consideration of the relationship (if any) between Article 12(1)(b) of the AFCS and Article 15(1) and Table 3 in Schedule 3 to the same Order. I commented also, and on the other hand, that it may be that the FTT's reference to the impact on the appellant's functioning from his alcohol consumption was not about article 12(1)(b), despite the FTT's express reference to that article, but rather the extent to which the appellant's accepted injury/mental disorder (the PTSD), as opposed to his alcohol consumption, caused either moderate or severe functional limitation or restriction; though the two may come to the same point. I have not had any detailed argument on the second ground of appeal (see, for example, paragraph 12 in the Secretary of State's submission

set out in paragraph 14 above). Given this lack of argument, and given that the FTT's decision is already to be set aside for the reasons set out above, I will say no more on ground 2 other than it seems likely it will be an issue the new FTT will need to consider in redeciding the appellant's appeal.

18. For the reasons set out above, the appeal succeeds. The Upper Tribunal is not able to re-decide the first instance appeal. The appeal will therefore have to be re-decided afresh by a completely differently constituted FTT, after an oral hearing.

19. The appellant's success on this appeal to the Upper Tribunal on error of law says nothing one way or the other about whether his appeal will succeed on the facts before the new FTT, as that will be for that tribunal to assess in accordance with the law and once it has properly considered all the relevant evidence.

Stewart Wright
Judge of the Upper Tribunal

Authorised for issue on 20 August 2025