Neutral Citation Number: [2024] EWCA Civ 150

Case No: CA 2023 001072

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER
HH Judge Najib sitting as a Deputy Upper Tribunal Judge
UA 2021 001017 WP

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/02/2024

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
LORD JUSTICE HOLROYDE
LADY JUSTICE MACUR
and
LORD JUSTICE WILLIAM DAVIS

- -

Between:

CHRISTOPHER PEARSON	**Appellant**
- and -	
THE SECRETARY OF STATE FOR DEFENCE	**Respondent**

- -
- -

Tom Webb (instructed by **Parker Bullen LLP**) for the **Appellant**
David Manknell (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 31st January, 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 23 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Holroyde:

1. The appellant, Mr Christopher Pearson, was formerly a consultant ear, nose and throat surgeon. He served in the Royal Navy for many years, attaining the rank of Surgeon Commander. Sadly, he suffered episodes of work-related stress and was diagnosed as suffering from a mental disorder.

2. Under the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011, SI 2011/517 ("the Order"), compensation is payable to those who have suffered a relevant injury attributable to their service in HM Forces. The respondent, the Secretary of State for Defence, accepts that the appellant has suffered such an injury, namely permanent mental disorder as defined in the Order. Compensation has been awarded to him on the basis that the permanent disorder causes moderate functional limitation or restriction.

3. The appellant believes that he is entitled to receive a higher award on the basis that the disorder causes severe functional limitation or restriction. His argument to that effect was rejected by the First-tier Tribunal, War Pensions and Armed Forces Compensation Chamber ("the FtT") and, on appeal, by the Upper Tribunal, Administrative Appeals Chamber ("the UT"). With permission granted by Dingemans LJ, the appellant now appeals against the decision of the UT.

4. The central issue in the appeal is whether the UT, and the FtT before it, erred in the interpretation of the Order.

The facts:

5. For present purposes, a brief summary of the relevant facts is sufficient.

6. The appellant served in the Royal Navy from 28 August 1990 until 13 November 2017. During his service, he continued for many years to practise as a consultant ENT surgeon, both privately and in the National Health Service. He also held an occupational clinic at the Institute for Naval Medicine. In addition to all his clinical work, he had extensive other responsibilities: he engaged in research, sat on a number of medical committees at senior levels, and was a Defence Consultant Adviser responsible for training consultant ENT surgeons in the Service.

7. From about 2006 the appellant began to experience episodes of work-related stress. His condition deteriorated. In 2009 he sought specialist advice and was diagnosed as suffering from recurrent depressive adjustment disorder.

8. From that point on, the appellant gradually decreased his workload. He reduced his private, NHS locum and occupational clinic work. In 2013 he was appointed a fee-paid medical member in the Social Entitlement Chamber of the First-tier Tribunal. In that capacity, he sat from time to time as one of a panel of three members determining benefits appeals. In 2014 he was advised to stop his NHS work altogether because of his mental health problems, and did so in 2015, although he continued to conduct his occupational clinic. Also in 2015, he was medically downgraded, a measure which imposed occupational restrictions upon his work in the Service. He has not carried out any surgery since 2015. He made two attempts to return gradually to his work in

the Service, but neither was successful. In 2017 he was medically discharged from the Royal Navy because of his mental health problems.

9. Since leaving the Service, the appellant has continued to sit as a medical member in the First-tier Tribunal. His minimum commitment is to sit for 15 days each year, but he has generally made himself available to sit one day each week, around 48 days each year. Because of a shortage of medical members, there would be opportunities for him to sit more frequently if he felt able to do so; but he has not. In the summer of 2018 his exposure to confrontation and complaints in the course of that work triggered a deterioration of his mental health condition. He was advised to take three months off. He did not do so, but made adjustments in order to reduce the delay and stress he experienced in travelling to more distant hearing centres. He also chose not to apply for additional roles or responsibilities within the First tier Tribunal.

The compensation scheme and the Order:

10. The no-fault compensation scheme governed by the Order was established pursuant to the Armed Forces (Pension and Compensation) Act 2004, replacing a scheme which was previously in force under earlier legislation. It was updated following a Review led by Lord Boyce in 2010-11. An important feature of the current scheme is that service personnel can apply for, and receive, compensation whilst they are still serving. Applications for compensation under the scheme are in practice determined by Veterans UK on behalf of the Secretary of State. An appeal lies to the First-tier Tribunal.

11. The operation of the scheme was considered in detail by this court in *Secretary of State for Defence v Duncan and McWilliams* [2009] EWCA Civ 1043. At [3]-[4], Elias LJ said:

> "3. Three important elements of the scheme are to be noted. First, the initial decision on the claims is taken by lay persons appointed by the Secretary of State. It is important, therefore, that the scheme should be relatively simple. Second, in making decisions under the scheme, a vitally important element is the medical information relating to the claimant. It would be impossible for any sensible decision to be taken without such information in a scheme of this nature.
>
> 4. Third, appeals from the Secretary of State go to what is now the War Pensions and Armed Forces Compensation Chamber of the First Tier Tribunal … . This is a specialist tribunal with medical members. It has built up extensive specialist experience and expertise in handling service pension claims under the previous scheme. Appeals from that Tribunal lie now to the Upper Tribunal, whose decision is under challenge in this appeal. The appeal is on a point of law only. I agree with the judgment of Carnwath LJ that the specialist experience of the First Tier Tribunal is an important factor to bear in mind when considering the proper role of the appellate courts when reviewing decisions of the First Tier Tribunal."

12. Schedule 4 to the Order includes nine Tables listing the categories of injury for which compensation may be awarded. Each of those Tables identifies descending levels of seriousness of the category of illness concerned. For each level, the Table contains a short "Description of injury and its effects ('descriptor')". For each level the Order specifies a tariff lump sum payment, the amount of which differs significantly as between the different levels of injury. The difference between levels may also make a substantial difference to the amount which a claimant who has suffered severe injury may receive by way of annual Guaranteed Income Payment.

The relevant provisions of the Order:

13. Article 5 of the Order provides for the interpretation of descriptors. So far as is material for present purposes, it states:

> "…
>
> (3) The term 'functional limitation or restriction' in relation to a descriptor means that, as a result of an impairment arising from the primary injury or its effects, a person –
>
> (a) has difficulty in executing a task or action; or
>
> (b) is required to avoid a task or action because of the risk of recurrence, delayed recovery or injury to self or others.
>
> (4) Subject to paragraph (5), a reference in a descriptor to duration of effects means from the date of injury.
>
> (5) In Tables 3 and 4 of the tariff a reference in a descriptor to duration of effects means from the date the claimant first sought medical advice in respect of the mental or physical disorder.
>
> (6) Functional limitation or restriction is to be assessed by –
>
> (a) taking account of the primary injury and its effects; and
>
> (b) making a comparison between the limitation and restriction of the claimant and the capacity of a healthy person of the same age and sex who is not injured or suffering a health condition.
> …"

14. Article 16 contains general provisions as to injury benefit. It includes the following:

> "(1) Subject to Articles 25 and 26 –
>
> a) benefit for injury is payable only in respect of an injury for which there is a descriptor;
>
> (b) where an injury may be described by more than one descriptor, the descriptor is that which best describes the injury and its effects for which benefit has been claimed; and

(c) more than one injury may be described by one descriptor."

15. Articles 25 and 26 are not relevant for present purposes.

16. No doubt with Article 16 in mind, Elias LJ in *Secretary of State for Defence v Duncan and McWilliams* at [56] accepted a submission that the object of the exercise was "to find the appropriate descriptor or descriptors which most fully and fairly reflect the various features of the injury or illness". He also approved a statement by the Upper Tribunal in that case that the objective was to identify "the single descriptor most accurately describing the injury". This, he said, required a careful analysis of the facts and then a consideration of which descriptor is the most appropriate.

17. The effect of Articles 60 and 61 is that a claimant bears the burden of proving any issue, the standard of proof being the balance of probabilities.

18. Table 3, "Mental disorders", is the relevant table in this appeal. It identifies seven levels of mental disorder, the first three of which – items A1, 1 and 2 – are described as permanent. The parties agree, rightly, that the appellant's mental disorder is properly described as permanent for this purpose. It is therefore unnecessary to say more about the definition of that term.

19. Although the issue between the parties relates to only two of the three levels of permanent mental disorder, I think it necessary to cite the terms of Table 3 in relation to all three. It was amended with effect from 8 April 2019, after the decision in this case, by adding Item A1; but it is common ground that that amendment does not affect the outcome of this appeal. The appropriate levels for applying the correct amount of compensation, and the relevant descriptors, are now as follows:

> "Item A1: level 4: permanent mental disorder causing very severe functional limitation or restriction (note aa).
>
> Item 1: level 6: permanent mental disorder causing severe functional limitation or restriction (note a).
>
> Item 2: level 8: permanent mental disorder causing moderate functional limitation or restriction (note b)."

20. The footnotes referred to in those descriptors are as follows:

> "(aa) Functional limitation or restriction is very severe where the claimant's residual functional impairment after undertaking adequate courses of best practice treatment, including specialist tertiary interventions, is judged by the senior treating consultant psychiatrist to remain incompatible with any paid employment until state pension age.
>
> (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.

> (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."

The original decision:

21. By letter dated 7 July 2018, the appellant was informed that it was accepted that he suffered from a recurrent depressive adjustment disorder, and that the descriptor awarded was Table 3, Item 2, Level 8 - permanent mental disorder causing moderate functional limitation or restriction. The letter went on to note that the onset of the appellant's condition had been in approximately 2009, that it was likely to be permanent and that he had been medically discharged because of his mental health disorder.

22. The appellant appealed to the FtT, contending that the more appropriate descriptor was Table 3, Item 1, Level 6 - permanent mental disorder causing severe functional limitation or restriction. He and his wife gave evidence at a hearing in March 2021. On 24 March 2021 the FtT issued its written reasons for dismissing the appeal.

23. The FtT noted that the appellant had had an "impressive" career and is "highly intelligent and very well qualified". In view of the respondent's acceptance that the appellant's condition is permanent, and that he was working "in a less demanding role than that appropriate to his considerable experience, skills and qualifications", the FtT stated at [14] that –

> "The only issue for us to consider, therefore, is whether in fact, as at the date of decision, his illness caused severe functional limitation or restriction and to determine that we have to focus on whether he is able to work regularly in a less demanding job or rather whether, over time since the onset of his ill health, he is able to work only in less demanding jobs."

24. The FtT observed, at [27], that it did not find the wording of the footnotes to Table 3 very easy to interpret, and felt that those notes did not provide particularly clear guidance in drawing a distinction between severe or moderate functional limitation. At [28]-[30] it posed questions, and reached conclusions, as follows:

> "28. Mr Pearson is undoubtedly working in a less demanding job; indeed the Secretary of State accepts as much. Is he working regularly in a less demanding job or has he, over time, been able to work only in less demanding jobs? In the period since 2017 Mr Pearson has worked in one job, can that work be said to be regular?
>
> 29. Based on the evidence before us we conclude that the work is regular in the sense that it is not intermittent, but it is steady and reasonably frequent, and it tends to be at uniform intervals; that is once a week. There is no requirement to work full time. The distinction between the two descriptors appears best described as the difference between being able to work in a

> steady regular fashion, albeit in a much lower-level job than the one the appellant is qualified for. Or the ability only to work in less demanding roles with an implication that the work will not be regular and there may be a series of intermittent roles.
>
> 30. Whilst we accept Mr Pearson's submission that the descriptors are not mutually exclusive we do have to consider, in accordance with Article 16(1), which is the most appropriate. Having looked at the detailed evidence before us and considered the matter carefully we conclude that the most appropriate descriptor is the one currently awarded, namely Item 2, Level 8 of Table 3. Mr Pearson has demonstrated that he is able to work regularly in a less demanding job. He has not demonstrated that since his discharge he has worked in a series of less demanding jobs and his pattern of work is better described as regular. His ability to work since discharge has remained relatively consistent and stable."

25. The appellant appealed to the UT. In a decision dated 12 August 2022 HH Judge Najib, sitting as a Deputy Upper Tribunal Judge, held that the decision of the FtT did not involve any material error of law and dismissed the appeal.

26. The judge held, at [19], that Article 16(1)(b) of the Order clearly allows for the possibility that a claimant's circumstances may be described by more than one descriptor; but Table 3 describes different levels of disability, and the functional limitation or restriction cannot be both moderate and severe at the same time. The judge added that the task of the decision-maker or Tribunal was, therefore, to consider all relevant evidence and to decide which of the two descriptors most accurately described the functional limitation or restriction and was accordingly most appropriate. The judge was satisfied that the FtT had approached its task in that manner, had asked itself the correct question, and had not erred.

27. At [26] the judge reiterated that Table 3 provides a hierarchy of different levels of disability, and continued –

> "This means that functional limitation or restriction which is 'moderate' is distinct from that which is 'severe' and footnotes (a) and (b) must be read as such. Footnote (b) uses the word 'regularly' to describe or qualify a claimant's ability to work in less demanding jobs, whereas footnote (a) does not. The use of the word 'regularly' in footnote (b) must be taken to have been deliberate and intentional. Footnote (a) must, therefore, be read as <u>not</u> including jobs that might fall within footnote (b) as being ones that a claimant is able to do 'regularly'. To read it otherwise is to ignore Parliament's deliberate use of the word 'regularly' in footnote (b) and to omit it in footnote (a)."

[emphasis in the original]

28. On that basis, the judge held at [29] that, once the FtT had determined that the appellant's work as a fee-paid medical member in the FtT was "regular",

> "… it was not only entitled, but was compelled, to conclude that Item 2 applied. "

29. The judge went on to hold, at [38], that

> "It was clearly open on the facts and the law for the FtT to conclude that the appellant working one day per week as a fee paid medical member in the First-tier Tribunal was sufficiently steady, reasonably frequent and at reasonably uniform intervals that it amounted to working 'regularly'."

30. At [46], the judge reiterated that once the FtT determined that the appellant was able to work "regularly" in a "less demanding job",

> "… it was entitled and, as previously stated, was compelled to conclude that Item 2 applied. Once it had determined that Item 2 applied, that was the end of the matter."

31. The judge also rejected the appellant's submission that the FtT had only considered the period since his discharge from the Royal Navy, when it should have considered the whole period from the time of the onset of his illness. The judge referred to section 5B(b) of the Pensions Appeals Tribunals Act 1943, which provides:

> "**5B Matters relevant on appeal**
>
> In deciding any appeal under the provisions of this Act, the appropriate tribunal –
>
> (a) need not consider any issue that is not raised by the appellant or the Minister in relation to the appeal; and
>
> (b) shall not take into account any circumstances not obtaining at the time when the decision appealed against was made."

The judge held that the effect of that section was that the tribunal must assess and determine the appellant's ability to work as at the date of the respondent's decision.

The appeal to this court:

32. The appellant now advances three grounds for his appeal to this court, namely that the UT (and the FtT before it) fell into error by –

i) Reading into Item 1 of Table 3 a requirement for work to be non-regular;

ii) In any event treating the concept of working "regularly" in a less demanding job as the sole distinguishing feature as between Items 1 and 2 of Table 3; and

iii) Adopting the wrong time period for consideration and failing to consider trajectory from the date of the onset of the illness.

33. On behalf of the appellant, Mr Webb submits that the descriptors do not easily flow from one to the next, but that the distinction between Items 1 and 2 is that Item 1

requires the capacity to work to diminish over time. Item 1 focuses, he submits, on what he refers to as the "trajectory of work". In support of his first ground, he submits that the UT (and before it the FtT) were wrong to read in a requirement of regularity: it was unnecessary and inappropriate to do so when the descriptors are measured by different factors, namely diminishing capacity for work in Item 1 and regularity of work in Item 2.

34. In the alternative, if regularity is held to be a relevant consideration within Item 1, Mr Webb argues that it is not the sole determinant. He submits by his second ground that there are two differences between Items 1 and 2, namely a declining capacity for work which merits the "severe" descriptor, and regularity of work which is referred to in the "moderate" descriptor. He submits that the UT was therefore wrong to identify regularity as the sole distinguishing feature and wrong to conclude that, once the appellant's work had been identified as "regular", he could not come within Item 1. By interpreting the Order in that way, he argues, the UT and FtT deprived the phrase "and over time" in footnote (a) of any meaning.

35. In his third ground, Mr Webb submits that the terms of the "severe" descriptor require consideration of the trajectory of a claimant's work from the onset of his illness to the date of the decision. He submits that the UT (and before it the FtT) were accordingly wrong to consider only the appellant's ability to work regularly since the date of his discharge from the Royal Navy.

36. Mr Webb invites the court's attention to one aspect of Lord Boyce's Review of the operation of the compensation scheme. An Independent Medical Experts Group ("the IMEG") made recommendations to that Review on medical aspects of the scheme. Mr Webb seeks to derive support for his second ground from the terms of the recommendation made by the IMEG in relation to the descriptor for severe functional limitation or restriction.

37. The grounds of appeal are opposed by the respondent, on whose behalf Mr Manknell submits that the judges of the FtT and UT used their expertise to place the appellant's disorder into the most appropriate category, and reached an appropriate and lawful conclusion on that question of fact.

38. As to the first ground of appeal, Mr Manknell submits that the UT was correct to conclude that there must be a distinction between footnotes (a) and (b) and that footnote (a) must accordingly be read as excluding jobs which might fall within footnote (b). He argues that Table 3 must be read in a way which results in Item 1 covering cases of more serious functional limitation or restriction than Item 2. He submits that footnotes (a) and (b) are merely illustrative examples of the difference between "severe" and "moderate", the distinction being drawn between an applicant who is unable to work at all at the time of onset of his condition, but "over time" becomes able to work, albeit in less demanding jobs; and an applicant who at the time of onset is unable to work in his previous role but can immediately and "regularly" work in a less demanding role.

39. As to the second ground, Mr Manknell submits that the UT was correct to avoid a rigid interpretation of the word "regularly", correct to hold that in the circumstances of this case the FtT had been entitled to conclude that since 2017 the appellant had been working "regularly", and correct to hold that regularity was the key feature in

this case. He accepts that the wording of the judgment of the UT was "not perfect", but submits that its substance is clear.

40. As to the third ground, Mr Manknell submits that the appellant's ability to work was correctly assessed as at the date of the respondent's decision, taking into account all relevant evidence.

41. The respondent opposes any reference to the report of the IMEG. Mr Manknell submits that the report is not within the limited class of documents admissible as an external aid to statutory construction, and in any event is not capable of assisting the court on the issue in this appeal.

42. I am grateful to both counsel for their written and oral submissions. I have summarised them very briefly, but have taken all their points into account.

Analysis:

43. I begin by referring briefly to the appellant's wish to rely on the IMEG report. In my view, that report is irrelevant and inadmissible: even if it were permissible to consider such a report as an aid to statutory interpretation, which I doubt, the drawing of a contrast between what the IMEG recommended, and what the Order contains, cannot assist the court. The mere fact that there is a difference between the recommendation and the Report does not permit any safe inference as to the intention of Parliament: the difference might be explained by a Parliamentary desire to adopt the recommendation but express it differently, or by a Parliamentary desire to adopt an approach other than that which was recommended. The court must therefore derive the meaning of the Order from a consideration of its terms.

44. Turning to the substantial issue between the parties, I think it appropriate to begin by looking at the overall treatment in Table 3 of permanent mental disorders. This requires consideration of the entries in the several columns of Table 3 and the accompanying footnotes. Item A1 places into the "very severe" category those cases in which a claimant has been rendered unable to undertake any paid employment for the rest of his or her working life. Items 1 and 2 cover those cases in which a claimant has been rendered permanently unable to undertake work of a level appropriate to the experience, qualifications and skills which he or she held at the time of the onset of his illness, but retains a capacity for less demanding work. Cases which come within the "severe" category are, self-evidently, more serious than those which come within the "moderate" category.

45. It is in my view necessary to take note of the respects in which footnotes (a) and (b) differ. Both refer to the level of the retained capacity to undertake less demanding work. The differences are that footnote (a) refers to a claimant who over time is able to work only in less demanding jobs; whereas footnote (b) refers to a claimant who is able to work regularly in a less demanding job.

46. By Article 16(1)(b), the task of the decision-maker or Tribunal is to identify which of the descriptors of those two categories, Item 1 and Item 2, "best describes the injury and its effects for which benefit has been claimed". That requires an appraisal of all the relevant evidence and an evaluation of which of the descriptors is the most appropriate in all the circumstances. Given how closely the terms of footnotes (a) and

(b) coincide, there is clearly an overlap between them, and they are not mutually exclusive. For that reason, it is in my view inappropriate to adopt a rigid approach to the footnotes, and to view them as definitive of all cases which can come within Item 1 and all cases which can come within Item 2. Such an approach would inevitably lead to arbitrary and irrational results. It would, for example, assess a claimant, whose mental disorder had reduced him or her from a high-achieving role to a capacity for only a low level of menial work, as suffering no more than moderate functional limitation or restriction, merely because the menial work could fairly be described as "regular".

47. On what basis, then, should a functional limitation or restriction consequent upon mental disorder be placed into one category rather than the other? The answer, in my view, is that the decision must be made on an assessment of all the relevant evidence. Sometimes the answer will be clear; sometimes it will be less clear, because of the overlap created by the terms of the footnotes. Where a claimant's circumstances can be said to come within the terms of more than one footnote, the decision-maker or Tribunal must make an evaluation of fact and degree to determine which category is the more appropriate. In such a situation, the footnotes should in my view 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. Depending on the facts of a particular case, the decision-maker or Tribunal may have to decide which of two relevant considerations – the course or trajectory of a claimant's ability to work since the onset of his or her mental disorder, and his or her ability to work regularly in a less demanding job – is the more significant in performing the task required by Article 16(1)(b).

48. A capacity to work regularly is plainly a relevant factor in considering which is the appropriate descriptor. I am, however, unable to agree with the UT's conclusion that the focus must solely be on whether a claimant can be said to be able to work "regularly". The principal reason why I cannot share that conclusion is that a claimant may come within the terms of footnote (a) even though each of the less demanding jobs which he or she is able to undertake may in itself be regular work.

49. Both Item 1 and Item 2 require the decision-maker or Tribunal to take as a base line the level of work which is appropriate to the experience, qualifications and skills held by a claimant at the time of 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 in the period since the onset of the disorder; and to determine which is the appropriate descriptor as at the time of the decision. In my judgement, an important distinction between Item 1 and Item 2 is a distinction between, on the one hand, a claimant who over that period of time has only been able to work in a series of less 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 on the other hand, a claimant who throughout that period has been able to work regularly at a consistent level. But for the reasons I have given, that distinction should not be regarded as determinative of whether Item 1 or Item 2 applies.

50. The FtT and the UT were therefore wrong, in my judgement, to treat the question of whether the appellant's work in the First-tier Tribunal could properly be described as "regular" as being determinative of the appropriate categorisation of the severity of

his mental disorder. I accept Mr Webb's submission that both the FtT and the UT asked themselves the correct question but, in answering it, wrongly looked only at the appellant's ability to work regularly and wrongly failed to consider how his ability to work had diminished over time.

51. It follows, in my judgement, that the FtT and UT were also wrong to consider only the period from the date of the appellant's discharge to the date of the respondent's decision. In focusing only on that period of a few months, the Tribunals overlooked the importance of the phrase "and over time" in footnote (a). The appellant had enjoyed an impressive career as a full time consultant surgeon with many clinical and non-clinical responsibilities. During the years between the diagnosis of his mental disorder in 2009, and the respondent's decision in 2018, the appellant's capacity for work followed an inexorably downward course: it passed through the reductions in some of his roles and responsibilities, the eventual cessation of his NHS practice, and his unsuccessful attempts at a managed return to more demanding work, to his discharge from the Royal Navy on medical grounds. At the time of his discharge, the only work he could undertake was about one day a week in a role which was far removed from his former employment, and which he could only manage by making adjustments suitable to his condition. All of that unhappy history was in my view clearly relevant when deciding whether Item 1 was the appropriate descriptor.

Conclusion:

52. Drawing these threads together, and with all respect to the FtT and the UT, I accept the appellant's submission that they approached their task on a basis which was wrong in law. They wrongly considered the appellant's capacity for work over a much shorter period of time than they should have done, and they wrongly treated the issue of whether the appellant's continuing work was "regular" as determinative of which descriptor was most appropriate. They should instead have considered also the downward course of the appellant's ability to work over the full period between the onset of his mental disorder and the respondent's decision, and should have taken both that and the feature of regularity of work as a medical member in the First-tier Tribunal into account in deciding which descriptor was the most appropriate.

53. The decision of the UT must therefore be set aside. Mindful of the specialist knowledge of the FtT in these matters, it seems to me that the appropriate course would be for the matter to be remitted to the FtT for a fresh decision, to be made in the light of the decision of this court.

54. I would therefore allow the appeal, set aside the decision of the UT, and remit the matter to the FtT, differently constituted, to decide afresh which descriptor, in all the circumstances of the appellant's case, best describes the injury and its effects for which benefit has been claimed.

Lady Justice Macur:

55. I agree.

Lord Justice William Davis:

56. I also agree.