



DECISION OF

THE HON. LORD FAIRLEY

in the appeal of

LK

Appellant

- against -

Social Security Scotland

Respondent

FTS Case Reference: FTS/SSC/AE/23/00244

(Appeal decided on the papers)

24 January 2024

Decision

The appeal is allowed and the decision of the First Tier Tribunal dated 15 March 2024 (as amended) is set aside.

Whether the appeal should be remitted to a different tribunal or determined by this tribunal on the basis of the findings in fact made by the FTS will be decided on the basis of further written submissions or, if requested by one or both parties, at an oral hearing on a date to be fixed.

Reasons

Introduction

1. The appellant's child, E, is deaf. The appellant applied for Child Disability Payment ("CDF") for E. The respondent ultimately determined that the appellant was entitled to the care component of Child Disability Payment at the lowest rate in terms of regulation 11(5)(c) of the Disability Assistance for Children and Young People (Scotland)



Regulations, 2021. The appellant appealed against that decision to the First Tier Tribunal (“FTS”). She submitted that the care component ought instead to be paid at the middle rate in terms of regulations 11(1)(c)(i) and 11(5)(b). The FTS concluded that the appellant was entitled to the care component only at the lower rate for the period 8 July 2022 to 8 April 2025. It therefore refused her appeal. An application for review and leave to appeal were both refused by the FTS. The appellant sought and obtained leave to appeal from this tribunal against the decision of the FTS.

2. Parties agreed that the merits of the appeal should be determined on the papers, without a hearing. The respondent accepts that the FTS erred and agrees that its decision should be set aside. As noted below, however, the respondent’s position is that unless the consequence of that is a remit to a different tribunal, it wishes an oral hearing on the issue of further procedure.

The 2021 Regulations

3. Regulation 11 of the 2021 Regulations states, *inter alia*:

“11.—(1) An individual satisfies the care component criterion in respect of any period throughout which at least one of the following conditions is satisfied—

(a) the individual is so severely disabled physically or mentally that they require in connection with their bodily functions attention from another person for a significant portion of the day (whether during a single period or a number of periods)...

...(c) the individual is so severely disabled physically or mentally that they require from another person—

(i) frequent attention throughout the day in connection with their bodily functions”

...

(2) No condition mentioned in paragraph (1) is to be taken to be satisfied unless—

(a) the individual has requirements of a description mentioned in the condition substantially in excess of the normal requirements of a person of the same age, or

(b) the individual has substantial requirements of such a description which younger persons in normal physical and mental health may also have but which persons of the individual’s age and in normal physical and mental health would not have.

4. Regulation 11(3) contains further conditions as to the duration over which the regulation 11(1) and (2) conditions must be satisfied. In E’s case, these were met.
5. The care component is payable at the lower rate if the condition in regulation 11(1)(a) is satisfied and at the middle rate if qualification is through regulation 11(1)(c)(i).



The FTS's reasons

6. The reasons of the FTS are, in places, difficult to understand. They frequently depart from accepted conventions of grammar and syntax. To the extent that it is possible to identify a core reason for its decision, that seems to be found in paragraphs 17 and 21. Paragraph 17 states:

"17. In the event the tribunal concluded that E needed the care / input referred to, and concluded that this was 'even more care' than the norm, and that this could be described as, and was 'substantially in excess'. This for a significant portion of the day. not, in the view of the tribunal, enough to justify the middle rate re frequent attention, which, although this can be more than once or twice, these occasions had to be of some moment - not *de minimis*, not too small to count. However, the care / input required over and again, although each individual occasion might be small, overall amount to a significant portion of the day."

Paragraph 21 then states:

"...the tribunal took the view looking at the 'big picture' all the small things E needed amount to a significant portion of the day."

7. In its decision and reasons on the appellant's application for review / leave to appeal the FTS also stated:

"13. The very fact that parliament provided for two different amounts or kinds of attention makes it clear that 'significant portion' of the day and 'frequent attention thought (*sic*) the day' are not the same thing, are, indeed mutually exclusive" (*sic*)

14. The tribunal as a matter of fact decided that the various 'small things' that the child needed amounted to a significant portion of the day but not to frequent attention throughout the day. The tribunal was bound to consider the age of the child and whether the input in question was 'substantially in excess...' This was a matter for the discretion of the tribunal, in the view of the tribunal."

The ground of appeal and response

8. The short point taken by the appellant is that regulation 11(1)(a) looks only at the aggregate amount of time for which the child requires attention each day. By contrast regulation 11(1)(c)(i) looks at the frequency of the provision of such attention. The fact that the regulation 11(1)(a) condition may have been met is not a bar to qualification through regulation 11(1)(c)(i) provided that the "frequency" requirement in the latter is satisfied. On the findings made by the FTS, it clearly concluded that E required frequent periods of attention which, in combination, amounted to a substantial portion of each day. It is therefore difficult to understand why the FTS concluded that eligibility arose only through regulation 11(1)(a).



9. In a written submission, the respondent accepts that the appeal is well founded. It invites this tribunal to set aside the decision of the FTS and remit the appeal to a differently constituted tribunal. If, in allowing the appeal, a different disposal is contemplated (such as this tribunal substituting a decision based upon the findings of the FTS), the respondent seeks an oral hearing before further procedure is determined.

Analysis

10. The FTS erred in concluding that the conditions in regulations 11(1)(a) and (c) are always mutually exclusive. Whilst there may be cases in which only one or other condition is satisfied, there may also be circumstances where both are met. That would be the case where a child required frequent attention throughout the day in connection with their bodily functions such that the aggregate period of attention amounted to a significant portion of the day.
11. One of the many problems with the reasons of the FTS is that it makes no clear findings in fact about what 'small things' E requires or the frequency at which such 'small things' have to be provided to her on a daily basis. Its reference to its decision being discretionary also suggests that it may have understood its role, which was to simply to determine the facts and apply the law. Taking the reasons of the FTS at face value, however, it is difficult to understand how the provision of 'small things' to E could cumulatively account for a significant proportion of each day unless as a product of frequent attention.
12. I will therefore allow the appeal and set aside the decision of the FTS of 15 March 2024. On the question of further procedure, it is at least arguable that the findings in fact made by the FTS, though sparse, may be sufficient to allow a conclusion to be reached by this tribunal as to the decision that the FTS should have reached. I will therefore allow parties an opportunity to make further submissions on that point. If parties agree, that issue could be dealt with on the basis of written submissions alone. If, however, either party wishes an oral hearing, that will be arranged.

Lord Fairley

Member of the Upper Tribunal for Scotland

*A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within **30 days** of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.*