[2017] AACR 33

**(EP v Secretary of State for Defence (AFCS)
[2017] UKUT 129 (AAC))**

Judge Knowles QC **CAF/3551/2015**
17 March 2017

Armed Forces Compensation Scheme – correct approach to definition of "downgraded" in article 2(1) of the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011

Tribunal procedure and practice – evidence – need to consider everything

Following her enlistment in the Army in 2004 the appellant was found to have bilateral pes cavus in both feet and dysplasia in her right hip. In 2008 she claimed compensation under the Armed Forces Compensation Scheme (AFCS) which was rejected on the basis that both conditions were due to developmental abnormalities not service. The appellant was found to be fit only for limited duties on a number of occasions and in September 2009 a Medical Board examined the appellant and graded her P3 on a PULHHEEMS assessment by reason of bilateral foot pain and right hip impingement and her Medical Employment Standard (MES) was downgraded to L3, which meant that she was fit for limited duties but retained rank and pay. (PULHHEEMS is a functional assessment to determine an individual's fitness for service within the Army and their subsequent grading for duty.) The appellant's downgrading continued for the reminder of her service, except for a period in 2010 of less than two months when she was temporally upgraded. In 2010 the appellant's claim for compensation for the pain in her feet was rejected by a First-tier Tribunal (F-tT), holding that her first claim concerned the same matter and any appeal was out of time. In 2013 the appellant left the service and in April 2014 she claimed compensation a third time for the pain in her hip. That claim was rejected by the Secretary of State who concluded that the appellant did not qualify for compensation under article 9 of the AFCS. The F-tT upheld that decision, holding that the worsening of the hip injury in 2012 had not been the cause of the downgrading as required under article 9(3)(d) and had not been the cause of being downgraded on all occasions. The appellant applied for permission to appeal on the grounds that she had a permanent P3 PULHHEEMS grading from 8 September 2009 until her service ended on 17 December 2013.

Held, allowing the appeal, that:

1. the definition of "downgraded" focuses not simply on whether a person has been downgraded but more specifically on the result of the downgrading, namely whether a person did, as a matter of fact, undertake a reduced range of duties. Additionally downgrading could not be determined by reference to the duties which a person might be called upon to undertake but which are not part of the ordinary duties of their role (paragraphs 43, and 48 to 49);

2. the F-tT's approach was in error of law because it failed to consider the medical evidence in detail, specifically (a) the restrictions on the appellant's duties put in place following a PULHHEEMS assessment and (b) the restrictions set out in her MES. The tribunal determining the appeal had none of the detailed records about the various Medical Boards which considered the appellant's fitness available to it and erred by failing to adjourn to obtain them, as all of this material should have been scrutinised alongside the appellant's own evidence about what she thought her duties were (paragraphs 50 to 54);

3. the UT provided guidance as to how a tribunal should approach the question of whether the appellant was continually downgraded within article 9(3)(c): *JN v Secretary of State for Defence (AFCS)* [2012] UKUT 479 (AAC) followed (paragraphs 58 to 59).

The judge set aside the decision of the F-tT and remitted the appeal to a differently constituted tribunal to be re-decided in accordance with her directions.

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to allow the appeal by the appellant.

The decision of the First-tier Tribunal on 17 September 2015 under reference AFCS/00325/2015 involved an error on a material point of law and is accordingly set aside.

The appeal is remitted for re-hearing by a differently constituted First-tier Tribunal before a differently constituted tribunal in accordance with the directions set out at the conclusion of these Reasons.

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

REASONS

Introduction

1. This appeal considers the correct approach to the definition of "*downgraded*" in article 2(1) of the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 (SI 2011/517) ("AFCS") which should be taken by the First-tier Tribunal ["the tribunal"]. It also addresses the information about that issue which should properly be before the tribunal at a hearing.

2. I have concluded that the definition of "*downgraded*" focuses not simply on whether a person has been downgraded but more specifically on the result of the downgrading, namely whether a person did, as a matter of fact, undertake a reduced range of duties. Additionally downgrading cannot be determined by reference to the duties which a person might be called upon to undertake but which are not part of the ordinary duties of their role.

3. The tribunal's approach was in error of law because it failed to consider the medical evidence in detail, specifically (a) the restrictions on a person's duties put in place following a PULHHEEMS assessment and (b) the restrictions set out in a person's MES ("Medical Employment Standard"). The tribunal determining the appeal had none of the detailed records about the various Medical Boards considering the appellant's fitness available to it and erred by failing to adjourn to obtain these. All of this material should have been scrutinised alongside the appellant's own evidence about what she thought her duties were.

4. I provide some guidance as to how the tribunal should approach the question of whether the appellant was continually downgraded within article 9(3)(c) and rely on the analysis of Upper Tribunal Judge Mesher in *JN v Secretary of State for Defence (AFCS)* [2012] UKUT 479 (AAC) which imports a degree of flexibility into that factual assessment.

5. I set the tribunal's decision aside and remitted it for re-hearing by a freshly constituted tribunal. I rejected the submission by the respondent Secretary of State that the tribunal's error of law was not material because the appellant could not meet the requirements of article 9 in relation to her hip condition. I did so because that submission rested both on facts found by the tribunal as the result of an erroneous process and on a view of the medical evidence uninformed by the input of the specialist members of the tribunal

Background

6. The factual background pertinent to this appeal is summarised as follows. The appellant before the Upper Tribunal was a former member of the King's Troop and the respondent was the Secretary of State for Defence. I will refer to the parties as "the appellant" and "the respondent" respectively.

7. The appellant enlisted in the Army on 9 December 2004 and joined the King's Troop, a ceremonial troop based in London. Her trade within the King's Troop was that of a specialist horsewoman. She left the Army on 17 December 2013 having taken voluntary redundancy.

8. The appellant has developmental abnormalities in both her feet (bilateral pes cavus) and her right hip (dysplasia). She first reported pain in her feet during initial training and this was found to be due to the abnormalities in her feet. At one stage it was suggested that her hip pain might be linked to that in her feet but it was subsequently found to be due to a separate condition.

9. There were a number of occasions between 2005 and 2013 when the appellant was found to be fit for limited rather than full duties. The first occasion on which this was attributed to hip pain was on 3 July 2008 when she was certified as unfit for work for 21 days. On 8 January 2009 she was found to be unfit due to hip pain for 11 days. On 7 November 2012 she was found to be fit for limited duties for 21 days thereafter. She was also found to be unfit for duty for a day on 6 February 2013.

10. The appellant's MES was the key indicator of her fitness for duty within the requirements of her trade as a soldier. On 8 September 2009 a Medical Board examined the appellant and graded her P3 on a PULHHEEMS assessment. The reason for that grade was bilateral foot pain following a foot operation in June 2009 and right hip impingement following a right hip arthroscopy in December 2008 (page 265). The Board said that she was restricted in carrying out her general military duties and the duties of her trade. Specific restrictions were noted, namely that she was unfit for combat field training, battlefield training, field exercises, all runs, and heavy lifting. She was permitted to wear trainers. Her MES was grade L3 which meant that she was fit for limited duties as specified by the Board. Her P3 and L3 grading was described as permanent with a review after 12 months (reverse of page 153).

11. Subsequently the appellant remained downgraded at P3 and L3 (apparently permanently) until 4 October 2012. The cause of this continued downgrading was recorded to be foot pain. On 4 October 2012 the appellant was upgraded to P2 and L1 in order to go on a leadership course with the aim of being promoted. The appellant reported that she was told she would be temporarily upgraded but would be downgraded if things did not work out on the leadership course (page 130). There is some support for the appellant's account in the medical records. On 15 October 2012 the medical records revealed the appellant to be suffering from hip pain which had been aggravated by her leadership course (reverse of page 177). On 22 November 2012, on account of hip pain, the appellant was regraded P3 and L3. She was found not to be fit for mucking out, sweeping or guard duty and was unable to stand for more than 30 minutes without a ten minute break. She remained downgraded for the rest of her time in service.

12. The appellant made two claims for compensation under the AFCS during her period of service. The first was made in September 2008 and concerned both foot and hip pain. It was rejected on 1 December 2008 on the grounds that the problems were due to underlying developmental abnormalities and so were not caused by service.

13. The second claim was made in February 2010 and limited to the appellant's problems with her feet. This was rejected in 6 May 2010 because it related to the same problems which had previously been the subject of the first claim. The tribunal determined that it had no jurisdiction to hear the appellant's appeal as this was, in substance, an appeal against the decision dated 1 December 2008 and was therefore outside the absolute 12 month time limit provided for

in rule 21(4) of the Tribunal Procedure (First-tier Tribunal) (War Pensions and Armed Forces Compensation Chamber) Rules 2008 (SI 2008/2686).

14. The third and current claim was made in April 2014 and related to the appellant's hip pain only. The respondent considered whether the appellant qualified for compensation under article 9 of the AFCS due to worsening of her hip condition but concluded that any worsening was not due to service. The claim was rejected on 8 July 2014 and that decision was maintained on reconsideration.

The tribunal decision

15. The hearing took place on 17 September 2015 and the appellant gave oral evidence. The tribunal upheld the respondent's conclusion that the worsening of the appellant's hip injury was not made worse by service.

16. The tribunal noted that both parties accepted that service did not cause the condition for which the appellant had made a claim. That position was grounded in the medical evidence which showed that her hip condition (dysplasia) was a developmental structural abnormality of the appellant's hip which had been present before service started. The appeal would only succeed if the appellant could show that this condition was made worse by service.

17. The tribunal analysed article 9 of the AFCS and excluded articles 9(1)(a) and 9(1)(c) as applying to the appellant's circumstances. It found that article 9(1)(b) applied, as the appellant's hip condition was present before the appellant entered service but she was not aware that she had such a condition and it was not revealed at the entry medical examination.

18. The tribunal referred to the definition of "*downgraded*" in article 2(1) and went on to consider the appellant's service record. That scrutiny encompassed both the duties undertaken by a member of the King's Troop and the periods during which the appellant had been downgraded for various reasons (paragraphs 13–18). In summary the tribunal found that the appellant had long periods of many months when she undertook full duties.

19. It concluded in paragraph 19 as follows:

> "The worsening of the hip injury in 2012 was not the problem that was the cause of the previous downgradings as is required to be shown by article 9(3)(d) because her hip condition was not the cause of being downgraded on all occasions. She was mostly downgraded because of treatment and operations to her feet. In 2008 she had an arthroscopy of her right hip and some shaving done for the dysplasia. She was therefore downgraded for the period of the operation and recovery but returned to full duties thereafter. Most of the downgrading was because of the feet problem. In 2012 [the appellant] sought advice regarding her right hip as it had starting aching again especially when lying on it at night and after runs. She was still doing full duties as at 4 October 2012. After October 2012 she was downgraded and stayed downgraded until discharge from the service. This was because of her hip. She was not therefore downgraded for her hip condition within five years of starting service."

20. Thus the tribunal decided that the appellant did not satisfy article 9 on a number of grounds and it dismissed her appeal.

The appeal to the Upper Tribunal

21. The appellant applied for permission to appeal on the grounds that she had a permanent P3 PULHHEEMS grading from 8 September 2009 until her service ended on 17 December 2013. Thus the tribunal had been in error in deciding that she did not fulfil the definition of downgraded throughout this period as, in addition to their ceremonial duties, King's Troop men and women were trained and required to be medically fully deployable as fighting soldiers and, in order to be medically deployable as such, they required a P2 PULHHEEMS grading.

22. Permission to appeal was refused by the tribunal on the basis that the tribunal had been correct to treat downgrading as a question of fact not determined by PULHHEEMS grading. I granted permission to appeal on 5 February 2016, noting that, given the wording of article 2(1), a PULHHEEMS grading could not be determinative of whether and for how long the appellant was downgraded. However I sought submissions on the following matters:

a) the correct approach to the definition of "*downgraded*" in article 2(1) of the AFCS;

b) the relevance of the duties for which the appellant was found to be fit or unfit;

c) the adequacy of the tribunal's findings of fact in relation to whether the appellant's downgrading was "*continual*";

d) the adequacy of the tribunal's findings of fact about whether the appellant's hip condition was the predominant cause of her downgrading; and

e) the appropriate disposal of the appeal.

23. I held an oral hearing of this appeal on 28 October 2016. At the hearing the appellant was represented by Mr Glynn Tucker of the Royal British Legion and the respondent by Miss Galina Ward of counsel. During the course of the hearing it became apparent that further submissions were required to address (a) how the tribunal should approach its task when considering the question of downgrading and (b) the adequacy of the information before the tribunal hearing this appeal. Both parties made further written submissions on these issues following the hearing.

24. As a result of the additional submissions made, it has not been necessary for me to undertake an individual analysis of each of the matters set out in [22] above. With one exception, all are subsumed in what I have to say both about the tribunal's approach to downgrading and about the disposal of this appeal.

25. I am very grateful to both representatives for their very helpful written and oral submissions.

The relevant legal framework

26. The AFCS came into force on 9 May 2011, replacing an earlier version of the Scheme. Article 9 is entitled "**Injury made worse by service**" and reads as follows:

> "(1) Subject to articles 11 and 12, benefit is payable to or in respect of former member of the forces by reason of an injury made worse by service if the injury –
>
> > (a) was sustained before the member entered service and was recorded in the report of the medical examination when the member entered service,

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) 5 years or more after that day.

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

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

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

27. "*Downgraded*" is defined in Article 2(1) as meaning "downgraded for medical reasons as a result of which the person downgraded undertakes a reduced range of duties but retains rank and pay".

Other relevant matters

28. The MES is associated with the PULHHEEMS system of assessment used within the Army to determine fitness for service. I have been provided with the PULHHEEMS

Administrative Pamphlet 2010 ("the Pamphlet") which gives details of the system. As paragraph 0104 of the Pamphlet makes plain, this system is designed to:

> "a) Provide a functional assessment of the individual's capacity for work;
>
> b) Assist in expressing the physical and mental attributes appropriate to the individual's employment and fitness for deployment on operations within the Army;
>
> c) Assist in assigning people to the employment for which they are most suited in light of their physical, intellectual and emotional make-up allowing efficient use of manpower; and
>
> d) Provide a system which is administratively simple to apply."

29. Medical classification under the PULHHEEMS system is considered and recorded under the following categories:

> Physical capacity (P)
> Upper Limbs (U)
> Locomotion (L)
> Hearing (HH)
> Eyesight (EE)
> Mental Capacity (M) and
> Stability (S).

30. Following a PULHHEEMS assessment, a service man or woman is graded as follows:

> P2: medically fit for unrestricted service worldwide;
> P3: medically fit for duty with minor employment limitations;
> P4: medically fit for duty within the limitations of pregnancy;
> P7: medically fit for duty with major employment limitations;
> P8: medically unfit for service; and
> P0: medically unfit for duty and under medical care.

Grades P5 and P6 are no longer in use. It should be noted that an individual's P grade may be either permanent or temporary, the latter being annotated by a T suffix.

31. The P3 grade is described as being used for an individual who has a medical condition that prevents him/her from undertaking the full range of military duties. Such individuals are able to perform useful duties in barracks but may not be able to carry out all aspects of their employment and may require medication or medical follow-up. A P2 grade by contrast denotes the absence of a medical condition or physical limitation that would prevent the soldier undertaking all aspects of his/her military duties (paragraphs 0107–0108, the Pamphlet).

32. Associated with the PULHHEEMS assessment is the award of a Joint Medical Employment Standard ("JMES") grading in order to inform commanders and career managers about the employability and deployability of service personnel. Paragraph 0123 of the Pamphlet sets out the Medical Deployment Standard which consists of three categories as follows:

> a) MFD: medically fully deployable, awarded when the P category is P2;

b) MLD: medically limited deployable, awarded when P category is P3 or exceptionally P7;

c) MND: medically not deployable, awarded when P category is P0, P4, P7 and P8.

33. The Medical Deployment Standard is complemented by the MES which relates an individual's PULHHEEMS profile to the requirements of their branch/trade in the air, land and maritime environments. The appellant was a specialist equestrian soldier and as such fell to be categorised in the Land ("L") environment. This has five grades as follows:

L1: fit for unrestricted duty; equating to P2;
L2: fit for unrestricted duties but with a medical risk marker, equating to P2;
L3: fit for limited duties but with some restriction subject to medical risk assessment, equating to P3 or P7;
L4: fit for specific limited duties within branch/trade, equating to P4 or P7;
L5: unfit for service in the land environment, equating to P0 or P8.

34. The allocation of a PULHHEEMS assessment is a medical responsibility and a change of MES will usually be determined by a Medical Board (see paragraph 0201 of the Pamphlet).

35. In this case the appellant was, at all times during her service in the Army, graded as either P2 or P3. A grading of P3 is not an automatic bar to deployment but will depend on an assessment of the individual's circumstances at the time of deployment (see paragraphs 0511–0512 of the Pamphlet).

Summary of the parties' positions

36. The appellant submitted that the primary duty of all soldiers was to be deployable for world-wide posting at any time and relied on paragraph 9.260 of the Queen's Regulations for the Army 1975 which states that:

> "The assignment of soldiers is based on the principle that a soldier must be available for world-wide posting at any time, this being one of the conditions of service he accepted on enlistment. If circumstances are such that a soldier cannot comply with this condition he will normally be terminated or transferred to the Reserve no matter how good a soldier he may be in other respects."

She submitted that the tribunal erred by failing to take account the primary duty to be available for world-wide posting at any time.

37. She also criticised the adequacy of the tribunal's fact finding in circumstances where the tribunal did not have available to it a complete set of records relating to the appellant's PULHHEEMS grading. She maintained that she had been continually downgraded from 8 September 2009 to the end of service.

38. Finally she maintained that, in circumstances where the respondent accepted that the tribunal had adopted an incorrect approach to the question of downgrading, the correct disposal should be to remit the appeal to the tribunal for re-hearing based on the correct approach to that issue.

39. Initially, the respondent maintained that the tribunal had adopted the correct approach to the issue of downgrading. The appellant did not meet that definition by reason of her hip injury save during very limited periods of time. There was no material difference between the terms "*continual*" and "*continuous*" for these purposes. The tribunal made no finding that the worsening of the appellant's hip condition was the predominant cause of her downgrading because it determined she was not entitled to benefit under article 9 in any event.

40. At the hearing I queried whether the tribunal's assessment was sufficiently holistic because it was based on the appellant's oral evidence and had not involved a detailed examination of her medical records, the reasons for her grading of P3 or what duties she had been medically assessed as being fit to undertake. In his final written submissions, the Secretary of State accepted that the tribunal had failed to take into account all of the material relevant to the question of downgrading.

41. However he maintained that the failure to do so was not a material error of law because the appellant was not downgraded predominantly because of her hip condition until November 2012 and thus could not satisfy the entitlement condition in article 9(3)(a) (downgrading within five years of the date she entered service).

The tribunal's approach to downgrading

42. This engages two distinct matters: first, the definition of "*downgraded*" in Article 2(1); and second, the scope of the tribunal's enquiry in order to establish whether a person has actually been downgraded so as to meet the entitlement criteria in article 9.

(a) Definition

43. The wording of article 2(1) – "*downgraded for medical reasons as a result of which the person downgraded undertakes a reduced range of duties but retains rank and pay*" – focuses not simply on whether a person has been downgraded but more specifically on the **result** of the downgrading: does the person as a matter of fact undertake a reduced range of duties? Further, the definition refers to the duties that the person **undertakes** and not the duties for which the person is fit.

44. The appellant submitted that downgrading should be determined by reference to the duties which a person might theoretically be called upon to carry out such as being deployed world-wide at any time. It was in that context she relied on paragraph 9.260 of the Queen's Regulations 1975. The respondent, in contrast, submitted that, if downgrading were to be determined by reference to duties a person might theoretically be called upon to do but which were not part of the ordinary duties of their role, then the definition would be deprived of practical meaning.

45. In the appellant's later submissions Mr Tucker refined his argument in the following manner. He accepted the Secretary of State's submissions that downgrading must consider the duties a person undertakes during the period of downgrading compared to the duties ordinarily expected of a person of the same rank in the same troop. However, he submitted that this must also include the duty of all serving soldiers to maintain the required levels of fitness to allow deployment at any time.

46. I do not find reliance on the Queen's Regulations persuasive. Those Regulations "*lay down the policy and procedure to be observed in the command and administration of the Army*" and "*provide commanding officers with direction on the command and administration of their units*" (paragraph 1, Queen's Regulations 1975). These Regulations, which I have perused, are largely concerned with organisational matters and matters of discipline. Moreover, the Regulations do not address procedures for medical grading and downgrading. The paragraph relied upon by Mr Tucker is located within **Part 5: Assignment of Soldiers** which concerns itself with where soldiers may be posted either at home or abroad. In that context, I doubt whether paragraph 9.260 can be relied upon to support Mr Tucker's argument about downgrading. I am of the opinion that it means simply that a soldier cannot as a matter of discipline make himself/herself unavailable for a particular posting – whether a person will be allocated to a particular posting will depend on a person's MES.

47. Mr Tucker's refined submission – that the duty of serving soldiers to maintain required levels of fitness to allow for deployment is a matter to which the tribunal should have had regard in this case – is one which carries some weight. The tribunal focussed on the ceremonial duties carried out by the appellant and not on other ordinary duties, one of which might well have been for the appellant to maintain basic fitness or even combat fitness. In this context I note that the September 2009 Medical Board Notice included restrictions applying to the appellant's basic fitness and combat fitness. Unfortunately the tribunal could not examine this aspect of the appellant's functioning and related duties properly since it lacked the material generated by the various Medical Boards which would have explained if and how the appellant's duties were restricted.

48. Though the medical records shed some light on this issue, I consider it possible that the tribunal may have been misled by the phrase which regularly appeared in the appellant's records – "*Fit for full duties within current MES*". In fact the appellant's MES was restricted following the Medical Board in September 2009 in the manner described in [10] above but the tribunal did not have available to it the MES generated by that Board and indeed subsequent Boards in order that it could make well-reasoned findings about what duties the appellant undertook at any given time whilst downgraded.

49. Taking into account the matters set out in [41] above, I find that this approach to the definition of downgrading is also consistent with the structure of PULHHEEMS. A person graded P3 may be deployed but this would depend on an assessment at the time of the proposed deployment. I agree with the respondent that the potential result of that hypothetical future assessment cannot determine whether a person is or is not downgraded for the purposes of the AFCS at any given time. It is furthermore important that a tribunal considers the broad range of duties – such as maintaining basic fitness – which a person has to carry out whilst downgraded rather than just those relevant to a person's trade within service. A clear, well-reasoned determination about **what those duties actually were** is a vital aspect of the tribunal's approach to the issue of downgrading.

(b) Scope of the tribunal's enquiry into downgrading

50. This enquiry has at its heart a factual assessment of the range of duties undertaken by a person during the period of downgrading. These duties are then to be compared to the duties ordinarily expected of a person of the same rank in the same troop. I find that the term "*downgrading*" self-evidently means that a person's PULHHEEMS grade and indeed their MES will be of key importance to that exercise.

51. In this case however, the tribunal's enquiry was flawed for a number of reasons as both parties now accept. Its enquiry was based largely on the appellant's oral evidence and some scrutiny of the medical records. Though the tribunal made reference to the PULHHEEMS gradings, what was not available to it was medical evidence relating to each and every occasion that the appellant had been downgraded – the details of all the PULHHEEMS assessments prior to November 2012 were missing as were the Medical Board records. Those records would have contained details of the restrictions on a person's ability to perform general military duties and their ability to perform the duties specific to their trade. I note that the form for notifying the outcome of a Medical Board to a person's unit made specific reference to limitations for Physical Training as well as for functional activities, suggesting that the maintenance of physical fitness is or may be an important aspect of a person's duties.

52. Examination of medical records containing details of occasions when the appellant had been downgraded; the reasons for that downgrading; and the duties from which a person was either restricted or which a person was assessed as medically fit to undertake were all matters which, I find, were relevant to the tribunal's enquiry into downgrading. If the duties for which a person had been found to be unfit at the time of the assessment of their MES formed part of their ordinary duties, that person would be downgraded within article 2 of the AFCS if they continued in the same employment with retained rank and pay but subject to the new MES.

53. Evidence relating to earlier periods of downgrading was not submitted to the tribunal by the respondent as it was asserted by him that the reason for downgrading prior to November 2012 was the appellant's foot condition and not her hip. It was, however, the case that the appellant remained graded at P3 following the surgery to relieve her foot pain and, in fact but not known to the tribunal because of the medical records missing from the bundle, the appellant was downgraded in 2009 in part because of hip pain. Despite this, the tribunal found that the appellant had not been downgraded for the purposes of the AFCS based on her oral evidence that she returned to full duties prior to November 2012. Mr Tucker submitted that, in these circumstances, the tribunal should have adjourned for the medical evidence about downgrading prior to November 2012 to be placed before it. I agree particularly as that material was necessary to establish the extent of the duties which the appellant was required to undertake within her MES.

54. In conclusion I find that the tribunal's enquiry into the facts surrounding the appellant's downgrading during service was materially inadequate for the reasons I have explained. I find it really surprising that it should have undertaken that enquiry in the absence of medical evidence (a) detailing the PULHHEEMS assessments and (b) providing the details of the restrictions placed upon the appellant's duties by the various Medical Boards. In particular its conclusion that, despite her P3 grade, the appellant had not been downgraded prior to November 2012 required reasoning based on the contents of the medical records to which I have referred. Its failure to adjourn to obtain those records was baffling.

The meaning of "*continual*" in article 9(3)(c) and 9(5)(a)

55. The appellant contended that I should hold that "*continual*" did not mean literally non-stop or uninterrupted, applying [28] of *MC v Secretary of State for Defence (WP)* [2009] UKUT 173 (AAC); [2010] AACR 20. This was a case which considered the meaning of the word "continual" contained in Article 8(5) of the Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions Order 2006 (SI 2006/606). With the agreement of the parties in that

case, Upper Tribunal Judge Levenson held that, for the purpose of article 8 which concerned itself with entitlement to constant attendance allowance, "*constant*" and "*continual*" did not mean literally non-stop or uninterrupted.

56. In contrast the respondent argued that "*continual*" should be given its ordinary dictionary meaning which was "*without interruption*". At the hearing Ms Ward argued that the meaning of *"continual"* in *MC* did not apply because (a) that meaning was specific to a care situation and (b) its meaning was heavily influenced by the meaning given to it in the entitlement criteria for disability living allowance and attendance allowance, namely something more like "*frequently recurring*". It will be apparent from what follows that I accept Ms Ward's submission that *MC* was situation specific and thus not widely applicable.

57. In my grant of permission I posed the question of whether there was any difference between "*continual*" as opposed to "*continuous*", the latter word being the one used by the tribunal when stating that the appellant had not been downgraded "*continuously*" from the point at which she was first found unfit to undertake full duties in December 2006 (paragraph 17, statement of reasons). The respondent provided two extracts from the Oxford Dictionary in relation to each word which identified that both words can mean "*without interruption*". However "*continuous*" was more prominent in that respect than "*continual*" which typically meant "*happening frequently with intervals between*" (page 310).

58. I must not read "*continual*" as it appears in article 9(3)(c) in isolation. That provision – "t*he member or former member remains continually downgraded until service ends*" – appears to describe, a continuing state of affairs, hence the use of the word "*remains*". However, as an aid to interpretation, I adopt the analysis of Upper Tribunal Judge Mesher contained in [38] of *JN v Secretary of State for Defence (AFCS)* [2012] UKUT 479 (AAC) where he considered the meaning of article 8(5) of the AFCS 2005. I note that article 8(5) in that Scheme is mirrored by article 9(5) in the 2011 AFCS. Both articles require downgrading within the period of five years starting on the day on which the member sustained the injury and (my emphasis) **remaining continually downgraded until service ends**. There is thus a direct comparison with the wording in article 9(3)(c) in the AFCS 2011 applicable to the appellant.

59. Applying the analysis of Upper Tribunal Judge Mesher, there seems no reason why the test of remaining continually downgraded should be satisfied only when the level of downgrading remains constant either in the sense of being unchanging or becoming more severe. It could lead to perverse or arbitrary results if a person were to be excluded from entitlement just because there were subsequent periods when the downgrading was less severe providing that some degree of downgrading remains continually in force until the end of service. What Upper Tribunal Judge Mesher's analysis helpfully does is to incorporate a degree of flexibility into the enquiry required by the tribunal. Whether downgrading was continual or not is a matter of fact for the tribunal – what in fact were the duties undertaken by the person and were they reduced in comparison to those undertaken by a person of the same rank in the same troop? The tribunal will be astute to examine what lies beneath fluctuations in grading; to grapple with exactly what duties the person actually performed; and to guard against the potentially perverse outcome outlined above.

The impact on the tribunal's decision

60. What impact does the tribunal's erroneous approach to downgrading have on its decision in this appeal? The respondent submitted that the error was not material because, first, the

evidence showed that the downgrading had not been continual and, second, the appellant was not downgraded predominantly because of her hip condition until November 2012. In those circumstances the appeal should be dismissed. The appellant took issue with both of these submissions and invited me to remit the matter to the tribunal for a complete re-hearing.

61. In response to my direction at the conclusion of the oral hearing, the respondent produced documents detailing some but not all of the various PULHHEEMS gradings applied to the appellant during her service career and also the outcome of various Medical Boards. The assessment leading to a P3 grading dated 28 September 2011 cannot be found within the appellant's service records. This material was not before the tribunal.

62. Both the matters relied upon by the respondent are classic matters of fact ordinarily requiring a determination by the tribunal following an assessment of all the evidence in this appeal. In circumstances where the tribunal adopted an erroneous approach to downgrading based on incomplete oral and documentary evidence, I cannot see how I am in a position to rely on any of the facts found by the tribunal or indeed, without the benefit of sitting with a medical and a service member, to maintain the tribunal's decision and dismiss this appeal.

63. The respondent submitted that the appellant had not been continually downgraded because the evidence showed she had been assessed as P2 on 4 October 2012 until 22 November 2012. The appellant pointed out that the P2 grade had been given in order to allow the appellant to attempt to pass a combat fitness test and was thus nothing more than a temporary grading. The attempt failed within two weeks of 4 October 2012 (page 144). The status of the P2 grade within the context of the appellant's lengthy history of being downgraded and its effect on whether the appellant remained continually downgraded within the meaning of article 2(1) are matters of fact for the tribunal to determine, taking into account all of the evidence before it and in the light of my analysis of the meaning of the words "*continually downgraded*" in article 9(3)(b). I am in no position sitting alone to come to a conclusion on these issues of fact.

64. Likewise I find myself in difficulty in relying on the tribunal's finding that the appellant was not downgraded because of her hip condition but predominantly because of her foot condition. Those were findings it came to following a flawed approach to the issue of downgrading as I have already said. There is material in the medical records which indicates ongoing hip problems following the Medical Board in 2009 (see for example, the entry at 28 June 2011 which makes reference to deep hip joint discomfort and that of 29 September 2011 which gives a diagnosis of hip dysfunction with associated biomechanical involvement and associated weakness). It seems to me that the predominant cause of downgrading remains a matter for a tribunal re-hearing this matter to determine.

65. For all these reasons, I have come to the clear conclusion that the tribunal's erroneous approach to the issue of downgrading was a material error of law. It follows that I allow this appeal, set the tribunal's decision aside and remit the appeal for a complete re-hearing by a freshly constituted tribunal.

Conclusion

66. For the reasons explained above, I allow the appellant's appeal against the tribunal's decision and I set that decision aside. The appeal is remitted to a freshly constituted tribunal for a complete re-hearing.

DIRECTIONS

1. The re-hearing should be an oral hearing and should be arranged within a reasonable time scale.

2. The new First-tier Tribunal should not involve the tribunal judge and members who considered the appeal on 17 September 2015.

3. If the appellant has any further written evidence, particularly any evidence relevant to her medical condition whilst in service, to put before the tribunal, it should be sent to the tribunal office at Fox Court, 14 Grays Inn Road, London, WC1X 8HN within one month of the issue of this direction.

4. The new tribunal must deal with any procedural questions, as may arise, on their merits.

5. The tribunal must consider all aspects of the case, both fact and law, entirely afresh and is not bound in any way by the decision of the previous tribunal.

6. These directions may be supplemented by further directions by a Tribunal Judge in the War Pensions and Armed Forces Compensation Chamber of the First-tier Tribunal.