THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

Hearing at George House, Edinburgh on 20 November 2019
For the appellant: party
No appearance for the Secretary of State for Defence

DECISION OF THE JUDGE OF THE UPPER TRIBUNAL

The appeal is allowed. The decision of the Pensions Appeal Tribunal for Scotland dated 22 February 2019 following a hearing on 6 February 2019 is set aside. The case is referred to the Pensions Appeal Tribunal for Scotland for rehearing before a differently constituted tribunal in accordance with the directions set out at the end of this decision.

REASONS FOR DECISION

Background

1. This is a case about the correct rate of payment to the appellant (the "**claimant**") of an allowance for lowered standard of occupation ("**ALSO**"). ALSO is a type of award available to claimants who meet the necessary criteria for entitlement under Article 15 of the Naval, Military and Air Forces etc (Disablement and Death) Service Pensions Order 2006 ("**SPO**"). Veterans may be eligible for ALSO where the effects of certain service related disablements cause them to settle for a lower paid civilian job. It is paid to narrow the gap in earnings between the civilian job and what the veteran would have earned if still in the service occupation. The central question in this appeal is whether, on a review by the Secretary of State for Defence ("**SSD**") of an award of ALSO, pay rates at the date of original award or the date of review should be used in any recalculation. The answer to this question is that it depends on the ground on which the review proceeds. In this case, because there was official error, under the terms of the SPO the SSD should have used pay rates in force at the time of the original award.

2. The factual background is that the claimant served in the Army between 1981 and 1993. His rank was Sapper. He worked as a combat engineer, crane driver and driver. He was injured while in service and suffers from back problems. Since leaving the Army, the claimant has worked as a mobile crane operator and LGV driver.

3. On 4 July 2007 the claimant was awarded ALSO at the maximum rate, of £52.68 per week. The award was based on a comparison of earnings of a combat

engineer in service in the Army, and the actual earnings of the claimant as a civilian LGV driver.

4. On 12 January 2018, on a review carried out under Article 44 of the SPO, the SSD decided to reduce payment of the claimant's award. The SSD had discovered a mistake in the initial calculation of the award when carrying out the review. The SSD had used the earnings of a Level 9 salary in the Army when calculating the award in 2007. A lower rate should have been used for the service earnings, because the claimant as Sapper was entitled to a maximum salary at Level 7 and not Level 9. Using this lower rate of service pay reduced the differential between potential service earnings and actual civilian earnings, and therefore the level of the ALSO award.

5. The claimant appealed to the Pensions Appeal Tribunal (the "**tribunal**"). The tribunal disallowed the appeal after a hearing on 6 February 2019. The tribunal found that the SSD was entitled to review the decision and base the revised decision on actual pay rates in 2017/2018 for service and current employment. The claimant appealed to the Upper Tribunal, and permission to appeal was granted on 1 August 2019. An oral hearing was held on 20 November 2019. The claimant appeared in person. The SSD elected not to attend, instead relying on a written submission provided to the Upper Tribunal, and a further email response in relation to additional matters in respect of which the Upper Tribunal had requested further submissions.

Grounds

6. I summarise the claimant's grounds of appeal as follows:
   6.1 The tribunal wrongly found in Section 3 of its decision that the original award was made under Article 44 of the SPO, but it was made under Article 15 of the SPO.
   6.2 The tribunal erred by finding the SSD was entitled to use 2017/18 pay rates when re-calculating the award. The recalculation should have been based on the 2007 service pay rates applicable at the time of the original award.
   6.3 Given that 2007 pay rates should have been used, the tribunal also erred in failing to take into account a mistake by the SSD in the calculation of the claimant's civilian pay rates in 2007. Because the actual civilian earnings were lower than the figure initially used by the SSD, even though the comparison service earnings had reduced from Level 9 to Level 7, there was still a sufficient differential for entitlement to the maximum award.

7. I summarise the SSD's response to these grounds, contained in a written submission dated 5 September 2019, as follows:
   7.1 Although the original award was made under Article 15 of the SPO, the SSD was entitled to review it at any time on any ground under Article 44. The

SSD did so in pursuance of a policy to review every ten years. Read in context, the tribunal was referring to the review of the decision which was under Article 44. The rest of its decision shows that the tribunal clearly understood and applied the law.

7.2 Reviews under Article 44 are carried out on remunerative values as current at the time of execution of the review, not the time of the original award. The SPO makes provision for calculating ALSO on current rates (the SSD does not specify which particular provisions of the SPO are relied on to support this submission). The service occupation used in the calculation is the trade and rank on the date of injury.

7.3 Even if that was wrong, there was no error in calculation of the claimant's civilian pay. Remuneration for the purposes of calculating ALSO is in respect of gross earnings including bonus, overtime and shift pay.

8. On 18 November 2019, after previewing the papers, I requested submissions on Article 2(5), Article 44(7) and Schedule 3 paragraph 1(7) of the SPO, which it seemed to me might have a bearing on the appeal. The claimant, who is not legally trained, made no submissions directly on these provisions at the hearing. The SSD provided a written response by email to my request. This did little more than quote the terms of those provisions, and reiterated the SSD's reliance on the written submission of 5 September 2019.

Governing law

9. The key legal issue in this case is whether reviews of ALSO awards under the SPO are carried out on the basis of rates of remuneration at the time of review, or on rates of remuneration at the time the initial award was made. The SPO does not address this issue directly, and so the answer must be found from a construction of its provisions.

10. Under the SPO, there are various provisions under which claimants may be entitled to awards in respect of disablement. One of those is Article 15, which makes provision for ALSO. It provides, insofar as relevant:

> "(1) ...where a member of the armed forces is –
>
> (a) in receipt of retired pay or a pension in respect of disablement the degree of which is less than 100 per cent; and
>
> (b) the disablement is such as to render him incapable, and likely to remain permanently incapable, of following his regular occupation and incapable of following any other occupation with equivalent gross income which is suitable in his case taking into account his education, training and experience
>
> he shall, subject to paragraph (3), be awarded an allowance for lowered standard of occupation at a rate not exceeding the appropriate rate specified in paragraph 8 of Part IV of Schedule 1….
>
> (3) The aggregate rate of the member's retired pay or pension together with the allowance under this article shall not exceed the rate of retired pay or pension which

> would have been appropriate in his case if the degree of his disablement had been 100 per cent….
> (6) In this article "regular occupation" means….
> (b) …his trade or profession as a member of the armed forces on the date that he sustained the wound or injury, or was first removed from duty on account of the disease on which his award is based, or if there was not such occurrence, the date of termination of his service".

Paragraph 8 of Part IV of Schedule 1 (referred to in Article 44(1)) provides for a maximum amount payable as follows:

> "Allowance for lowered standard of occupation under Article 15:
> Groups 1-9 £3736 per annum Groups 10-15 £71.60 per week"

Article 15 gives sparse detail about how the allowance is to be calculated, other than providing ceilings in Article 15(3) and Schedule 1 Part IV paragraph 8. From Article 15(1)(b), it can be gleaned that a comparison is made of gross income in the civilian and services occupations; and in *R(AF) 4/07* it was held that meant actual income (so in that case a London weighting was taken into account). From Article 15(6), the trade to be used for the comparison is one the claimant was doing in the forces at the time the injury was sustained, or first removal from duty because of it, or if no such occurrence then the date of termination of service.

11. Article 44(2) of the SPO provides:

> "….(2) Subject to the provisions of paragraphs (4), (5), (8) and (9), any award under this Order may be reviewed by the Secretary of State at any time if the Secretary of State is satisfied that—
> (a) the award was made in consequence of ignorance of, or a mistake as to, a material fact, or of a mistake as to the law;
> (b) there has been any relevant change of circumstances since the award was made;
> (c) the award was based on a decision or assessment to which paragraph (1) of this article applies, and that decision or assessment has been revised".

Article 44(5) provides:

> "(5) An award under this Order may be revised by the Secretary of State to the detriment of a member of the armed forces only where the Secretary of State is satisfied that—
> (a) the award was made in consequence of ignorance of, or a mistake as to, a material fact, or of a mistake as to the law; or
> (b) there has been any relevant change of circumstances since the award was made; or
> (c) the decision or assessment upon which the award was based has been revised under paragraph (4)".

The circumstances in which a decision can be revised to the detriment of the claimant are therefore restricted: a mere difference in opinion will not be a ground for revision (*FS v SSD* [2017] UKUT 194). In this case the SSD relies on the

ground of mistake as to material fact under Article 44(5)(a) (the use of a Level 9 rate of pay rather than a Level 7 rate of pay).

12. Various provisions of the SPO have a bearing on the question of whether rates of remuneration at the time of the original award or at the time of review should be used on a review.

12.1 First of all, there are three grounds of intervention under Articles 44(2) and 44(5), as set out above. There is mistake of fact, relied on in this case. But there is also a change of circumstances since the award was made, or a revision of assessment such as the level of disability. In cases relying on the second ground, and often the third ground, the basis of intervention is something which has happened after the original award, which has changed the picture. It would not make sense to go back to rates at the time when the initial award was made if the review is based on a later change of circumstances or change in level of disability. This suggests that the general position is that a recalculation will ordinarily be based on rates and circumstances at a time later than the original award, which may be the date of the review.

12.2 This interpretation is given support by provisions in Schedule 3 paragraph 1, given effect by Article 46. Schedule 3 is headed up "Commencing dates of Awards". Paragraph 1 contains the following provisions:

> "(6) Subject to subparagraph (7) ….. where an award is adjusted upon review instigated by the SSD, the adjustment shall take effect from the date of the review.
> (7) Where an award is reviewed as a result of a decision (the "original decision") which arose from an official error, the reviewed decision shall take effect from the date of the original decision and for this purpose "official error" means an error made by SSD or any officer of his carrying out functions in connection with war pensions, defence, or foreign and commonwealth affairs, to which no other person materially contributed, including reliance on erroneous medical advice but excluding any error of law which is only shown to have been an error by virtue of a subsequent decision of a court".

Paragraph 1(7) effectively "carves out" official error decisions from a general position that adjustments of awards take effect from the date of review. Where the original decision involved official error, there is an exception to the rule that adjustment takes effect from the date of the review. If the mistake of fact is based on official error, under the SPO the change is retrospective, and takes effect from the date of the original decision.

12.3 Article 44(7) of the SPO also suggests that the general position on review is that a revised award is not calculated on the basis of circumstances at the time of the original decision. It provides:

> "…where a decision accepting a claim for pension is revised, the SSD may, if in any case he sees fit, continue any award based on that decision at a rate not exceeding that which may from time to time be appropriate to the assessment of the degree of disablement existing immediately before the date of the revision".

Article 44(7) is interpreted in Andrew Bano's *War Pensions and Armed Forces Compensation Law and Practice* as giving the SSD "a discretion to continue any award based on the decision at the rate in payment immediately prior to the date of the revision even if a decision accepting a claim for pension is revised to a claimant's detriment" (page 43). The need for such a discretion, allowing the SSD effectively to go back in time, is predicated on reviewed awards being based on new considerations, not those pertaining at the time of the original decision. Article 44(7) is referred to in Article 2(5) of the SPO which provides:

> "Subject to Article 44(7), any condition or requirement laid down in this Order for an award, or the continuance of an award, or relating to the rate or amount of an award, shall, except where the context otherwise requires, be construed as a continuing condition or requirement, and accordingly the award, rate or amount shall cease to have effect if and when the condition or requirement ceases to be fulfilled".

This has the effect that rates or amounts are construed as continuing conditions or requirements. Once again this suggests that rates are not approached as if fixed for all time when the original award is made, and so if they have changed new rates would be applied on review.

13. Finally, it is relevant to notice that, although there was no argument on this specific matter, *R(AF) 4/07* concerned a review of an award of ALSO initially made in 1991 carried out in 2005. The reason for the review was a change of circumstances, in that the claimant was now earning more in his civilian occupation than he would have been in his service regular occupation. The case directs a like for like comparison of the claimant's earnings capacity from his service regular occupation and from his occupation with his civilian occupation as at September 2005, which was the time of the review and not the original award.

Ground 1 – Did the tribunal materially err in law because it stated in Section 3 of its decision that the original award was made under Article 44 of the SPO?

14. In the tribunal's statement of reasons, paragraph 3, headed up "Background Facts", the tribunal stated that the claimant was awarded ALSO at the maximum rate on 4 July 2007 "under Article 44 of the SPO".

15. This was a technical error by the tribunal, because it was the review in 2017/18 which was carried out under Article 44, but awards of ALSO are made under

Article 15 of the SPO. However, I do not find this to be a material error in law, and would not have set aside the tribunal's decision on this ground alone. This technical error made no difference to the outcome, because the tribunal was clearly aware of Article 15 and applied its terms in making its decision. The discussion in paragraph 7 shows this. The tribunal correctly refers to the basis on which ALSO is calculated under Article 15, and the statutory definition of regular occupation found in Article 15(6).

Ground 2 – was the SSD entitled to use rates in force at the time of the review rather than the time of the original decision when re-calculating the award?

16. There is no dispute in this case that the SSD made a mistake as to a material fact when initially calculating the claimant's ALSO award in 2007. The claimant, given his rank as Sapper at the time of his injury and when his service was terminated (Article 15(6)), should have been assessed on Level 7 salary. By error of officials acting on behalf of the SSD, he was assessed on the basis of a Level 9 salary. In my opinion this resulted in the award being made in consequence of a mistake as to a material fact, entitling the SSD both to review the award of ALSO under Article 44(2)(a), and to revise the award to the claimant's detriment under Article 44(4)(a).

17. However, in my opinion the SSD's mistake of fact in 2007 also amounted to an official error. It was an error carried out by the SSD's officials when carrying out functions in connection with war pensions. It is not suggested that any other person materially contributed to this error. This is therefore a case which falls within paragraph 1(7) of Schedule 3 of the SPO, set out above. This provision creates an exception to the general position about the dates to be used for applicable pay rates on reviews. Paragraph 1(7) provides that the reviewed decision "shall take effect from the date of the original decision". The intention of paragraph 1(7) is to provide an opportunity to correct the original error. The implication of the provision is that a recalculation will be carried out having corrected that information, rather than using erroneous information. In my view, because the change is to take effect from the date of the original decision, the recalculation on review should be made using the correct rates at the time of the original decision. It should not be carried out using current rates in 2017.

18. The tribunal's attention does not appear to have been drawn to paragraph 1(7) of Schedule 3 of the SPO, and it failed to apply it to the claimant's case. The outcome of the case is likely to have been different, had the tribunal applied this provision. I therefore find that the tribunal materially erred in law. I do not need to deal with additional interesting arguments of the claimant about there being unjustified discrimination between people still in service and veterans, if pay rates were not protected as a result of using revised 2017/18 pay rates. In this particular case, where the SSD relies on a mistake of fact as to pay rates, in the

recalculation the SSD should have used 2007 pay rates because of paragraph 1(7) of Schedule 3.

Ground 3 – Did the tribunal err by failing to deal with an alleged error in the rates used in 2007 for the claimant's civilian pay?

19. At paragraph 4 of its decision, the tribunal notes that on the day of the appeal, further salary documentation from March, April and May 2007 was produced by the claimant. That information was not added to the tribunal papers which came to the Upper Tribunal, but the claimant provided a further copy. On the basis of this information, the claimant submitted to both the tribunal and the Upper Tribunal that the rates for his civilian pay in 2007 used by the SSD were incorrect. He submitted to the Upper Tribunal that, because his actual rates of civilian pay were lower than the SSD had calculated in 2007, there was still a differential between them and service pay at Level 7 of about £60 a week. This meant he should still have qualified for the maximum rate of ALSO.

20. The tribunal did not deal directly with this argument in its decision, merely noting at paragraph 5 that in 2007 the SSD had used a current earnings figure of £422.11 per week. The tribunal did not consider whether that figure was wrong in the light of the information provided by the claimant. This is perhaps unsurprising. The tribunal had found elsewhere that current rates at the time of the review could be used by the SSD in recalculating the award. If that had been correct, the argument by the claimant about his 2007 civilian earnings would have been irrelevant.

21. However, given that I have found the effect of paragraph 1(7) of Schedule 3 is that the SSD should have corrected its error by using the pay rates for Level 7 in 2007, the tribunal erred in law by not dealing with the claimant's argument about civilian pay. Under Article 44, the SSD was entitled to review and recalculate the award using the correct pay rates for the regular service occupation in 2007. But it is intrinsic to awards of ALSO under Article 15 that there is a comparison between the rates for the regular service occupation and the civilian occupation. It has been found in the context of ALSO that, as a matter of fairness and equity, there is a requirement to compare like with like; *R v Deputy Industrial Injuries Commissioner, ex parte Humphreys* [1966] 2 QB 1, followed in *R(AF) 4/07* in the context of ALSO at paragraph 27. As a matter of fairness and equity, in my opinion, if revisiting the award the SSD should also have taken into account whether there were mistakes in fact in the correct rates for the civilian occupation in 2007. It follows that it was an error of law for the tribunal to fail to consider the claimant's argument and decide whether there had been an error in the SSD's calculation of civilian pay in 2007.

Disposal

22. This appeal before the Upper Tribunal is brought under Section 6A of the Pensions Appeal Tribunals Act 1943. By virtue of Section 6A(4A), the powers of the Upper Tribunal in this appeal are as set out in Section 12 of the Tribunals, Courts and Enforcement Act 2007. Because of the errors in law I allow the appeal and set aside the tribunal's decision. Thereafter I have decided to remit the case for reconsideration by a differently constituted tribunal. I make the directions at the end of this decision in connection with the rehearing of this case.

23. The claimant asked me, if allowing the appeal, to remake the decision and find him entitled to ALSO at the maximum rate. I have sympathy for the claimant, who has been challenging the decision of the SSD and the tribunal for some time, and would like closure. However, the jurisdiction of the Upper Tribunal is by statute limited to errors in point of law. Remaking the decision would involve a degree of fact finding on my part which is inappropriate, particularly without the benefit of submissions from the SSD on the correct figure to take for the 2007 civilian earnings. The actual gross civilian pay received by the claimant in 2007 prior to the award is in essence a question of fact. It is not for me to choose whether to take the figures from the claimant's payslips produced to the tribunal and Upper Tribunal relating to April and May 2007, or the payslips previously used by the SSD at pages 24 to 26 of the bundle relating to June and July 2007. Indeed, there may now with the passage of time be more accurate ways to determine the claimant's gross income at the time of the original decision in 2007, for example if he has P60s or if there are HMRC records relating to the relevant periods. I have therefore decided to remit the case rather than remake the decision.

Directions

1. Within one month of the date of issue of this decision, the claimant is to produce to the Pensions Appeal Tribunal for Scotland all pay information he retains relating to the period of six months prior to 4 July 2007, together with any P60s he retains relating to that period. That information should be copied to the SSD by the tribunal.
2. Within one month of receipt of any information provided under the previous direction, the SSD is to lodge with the Pensions Appeal Tribunal for Scotland a recalculation of the claimant's entitlement to ALSO. That recalculation should be based on the correct figures applicable at the time of the initial decision of 4 July 2007. The SSD should apply the law as set out in paragraphs 10, 12.2, 17 and 21 above when carrying out the recalculation.
3. If the claimant is not content with that recalculation, the case should be reconsidered at an oral hearing. The members of the tribunal who are chosen to reconsider the case are not to be the same as those who made the decision which has been set aside. The new tribunal will not be bound in any

way by the decision of the previous tribunal. It will not be limited to the evidence and submissions before the previous tribunal. It will consider all aspects of the case entirely afresh and it may reach the same or a different conclusion to the previous tribunal.

These Directions may be supplemented by later directions by a judge in the Pensions Appeal Tribunal for Scotland.

A I Poole QC
(Signed on original)
Judge of the Upper Tribunal
Date: 3 December 2019