



**SSD v CAW (WP)
[2023] UKUT 246 (AAC)**

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. UA-2023-000242-WP

On appeal from the First-tier Tribunal (War Pensions and Armed Forces
Compensation Chamber)

Between:

Secretary of State for Defence

Appellant

- v -

C.A.W.

Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 5 October 2023
Decided on consideration of the papers

Representation:

Appellant: Ms Jennifer Seaman of Counsel, instructed by the Government
Legal Department

Respondent: Mr Glyn Tucker, Royal British Legion

DECISION

The decision of the Upper Tribunal is to allow the Secretary of State's appeal. The decision of the First-tier Tribunal made on 26 October 2022 under case number SD/00065/2022 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside and re-make the decision that the First-tier Tribunal should have made as follows:

The Appellant's appeal is dismissed.

The Secretary of State's specified decision dated 28 January 2022 is confirmed.

The Appellant's claim for an Allowance for Lowered Standard of Occupation under Article 15 of the Service Pension Order is not allowed with effect from 23 December 2020 (nor is it allowed with effect from 1 November 2021). This is because the Appellant was not incapable of following an occupation with equivalent gross income to that of his regular service occupation.

REASONS FOR DECISION

The subject matter of this appeal to the Upper Tribunal

1. This appeal is about the rules governing entitlement to ALSO (Allowance for Lowered Standard of Occupation), which is a financial supplement payable in the war pensions scheme to certain claimants with reduced earning capacity.

An outline of the course of the appeal

2. The Veterans UK decision-maker, acting on behalf of the Secretary of State for Defence, decided that the claimant was not entitled to ALSO. This was on the basis that the claimant was not incapable of following an occupation with equivalent gross income to that of his regular service occupation. The claimant appealed to the First-tier Tribunal, which allowed his appeal in part. The Secretary of State, in the form of Veterans UK, now appeals to the Upper Tribunal against the decision of the First-tier Tribunal.

A summary of the Upper Tribunal's decision

3. I allow the Secretary of State's further appeal to the Upper Tribunal. This is because the decision of the First-tier Tribunal involves a legal error. For that reason, I set aside the Tribunal's decision. I re-make the decision that the Tribunal should have made. This is that the claimant's appeal against the Secretary of State's decision dated 28 January 2022 is refused. This is because the claimant is not entitled to ALSO with effect from the date of claim (23 December 2020) or from any later date (e.g. 1 November 2021) before the date of decision.
4. In this decision I refer to the Appellant as the Secretary of State to avoid any confusion. I refer to the Respondent as the claimant for the same reason. To protect the claimant's privacy, and to avoid the risk of 'jigsaw identification', I refer to the claimant's former employer in those terms rather than by their name.

The legal background to ALSO

5. The legislative basis for entitlement to ALSO is to be found in Article 15 of the Naval, Military and Air Forces etc. (Disablement and Death) Service Pensions Order 2006 (SI 2006/606, referred to below by its acronym as 'the SPO'). As amended, this provides as follows:

Allowance for lowered standard of occupation

- 15.—(1) Subject to paragraph (2), 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.

(2) No award of an allowance under this article shall be made where subparagraphs (a) or (b) or both apply—

(a) this subparagraph applies where a member submits a new claim (as defined in article 4(b))—

(i) on or after the date he attained the age of 65, or

(ii) where the degree of disablement is assessed at less than 40 per cent;

(b) this subparagraph applies where—

(i) a member submits a claim on or after 6th April 2009,

(ii) on the day which immediately precedes the date of claim the member or, where the member has died, the person by or in respect of whom a claim is made does not have an award of the allowance, and

(iii) the member is in receipt of—

(aa) incapacity benefit under Part II of the Social Security Contributions and Benefits Act 1992 or the corresponding provisions of the Social Security Contributions and Benefits Act (Northern Ireland) 1992,

(bb) employment and support allowance under Part 1 of the Welfare Reform Act 2007 or the corresponding provisions of the Welfare Reform Act (Northern Ireland) 2007, which includes a work-related activity component or a support component (within the meaning of the applicable Act)

(cc) any benefit or allowance under the law of any place outside the United Kingdom which in the opinion of the Secretary of State is analogous to incapacity benefit or employment and support allowance, or

(dd) an award of universal credit under Part 1 of the Welfare Reform Act 2012, the calculation of which includes an amount under regulation 27(1) of the Universal Credit Regulations 2013 in respect of the fact that the member has limited capability for work or limited capability for work and work-related activity, or would include such an amount but for regulation 27(4) or 29(4) of those Regulations or

(ee) an award of universal credit under Part 2 of the Welfare Reform (Northern Ireland) Order 2015, the calculation of which includes an amount under regulation 28(1) of the Universal Credit Regulations (Northern Ireland) 2016 in respect of the fact that the member has limited capability for work or limited capability for work and work-related activity, or would include such an amount but for regulation 28(4) or 30(4) of those Regulations.

(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.

(4) Subject to the provisions of paragraph (5), an allowance under this article shall not be payable to a member for any period in respect of which an allowance under article 12(1)(a) or article 17 is payable to him.

(5) Where a member is in receipt of an allowance under this article he may continue to receive such allowance if he becomes eligible subsequently for an allowance under article 12(1)(a).

(6) In this article "regular occupation" means—

(a) where the member's disablement is due to service between 2nd September 1939 and 1st August 1973, the occupation which was his regular occupation before his service; or

(b) where there was no such regular occupation, or where the member's disablement is due to service after 31st July 1973, 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 no such occurrence, the date of the termination of his service.

6. The claimant in the present case is "in receipt of retired pay or a pension in respect of disablement the degree of which is less than 100 per cent" and so satisfies the condition in Article 15(1)(a). The question that arises on this appeal is whether at the material time his "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" (Article 15(1)(b)).

The factual background to this appeal

7. The claimant was born in 1969 and so is now aged 54. He served as a (Gunner) Private from 1987 to 1994. He is entitled to a war pension with an aggregate assessment of 50%, based on a total of 9 accepted conditions (mostly of a musculoskeletal nature). He therefore satisfied both the age condition (being aged under 65: Article 15(2)(a)(i)) and the assessment of disablement condition (being assessed as at least 40 per cent but less than 100 per cent: Article 15(1)(a) and 15(2)(a)(ii)) for a claim to ALSO. In addition, as his service post-dated 31 July 1973, his "regular occupation" was as a (Gunner) Private (Field Guns), being "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 no such occurrence, the date of the termination of his service" (Article 15(6)(b)).
8. The claimant was first awarded ALSO following an application he made in 2002. He worked for his former employer from 2005 until 2020 as a Concierge and then (from 2009) as a Concierge Team Leader. His ALSO award was cancelled in 2013 on review, as his then current earnings from his civilian employment exceeded the earnings he would have received had he remained in his "regular

[service] occupation". However, in December 2020 the claimant took voluntary redundancy from his position as a Concierge Team Leader. He was then unemployed for nearly a year until he took up an appointment as a Concierge with a different employer in November 2021.

9. It is not in dispute that at all material times (i) the salary for a Concierge Team Leader was greater than the pay for a (Gunner) Private but (ii) the salary for a Concierge was less than the pay for a (Gunner) Private. The actual figures do not matter for present purposes.

The Secretary of State's decision on the new claim for ALSO

10. Thus, on 23 December 2020 the claimant made a fresh application for ALSO. On 28 January 2022 – and it is unclear from the appeal file quite why the decision-making process took more than a year – Veterans UK wrote to the claimant refusing his application in the following terms:

We have considered your claim and confirmed that you are not entitled to an Allowance for Lowered Standard of Occupation. We have only been able to take into account the effect of your accepted conditions have on your working ability.

We have confirmed you are earning more in your present job of Concierge Team Leader than you would if you were still in your service occupation of Private.

11. This reasoning was not strictly accurate in that the claimant's "present job" by that time was as a Concierge, not a Concierge Team Leader. The letter added that the claimant's civilian occupation (in the latter capacity) provided earnings of £690.88 a week whereas the pay for his regular service occupation was £535.86. He was also advised of his appeal rights.

The claimant's appeal to the First-tier Tribunal

12. On 3 February 2022 the claimant lodged an appeal against the ALSO disallowance decision, stating as follows:

I disagree with your decision because on 2nd of December 2020 I was made redundant by [my former employer]. 4th December 2020 I applied for lower standard of occupation. From 2nd December 2020 until 1 November 2021 I have been unemployed with no income, because I had a ongoing claim for lower standard of occupation I was unable to claim Universal Credit. The letter I receive from you dated 28th January 2022 it seems that you have not taken any of these details into account that I was no longer employed by [my former employer] as a Concierge Team Leader and that I was actually unemployed for 11 months. I have just started a new job on 1st November 2021 and I am still on probation period at the moment.

13. In the response to the appeal, the Secretary of State's appeal writer explained the decision under appeal as follows:

The Secretary of State notes that on his appeal form dated 3/2/22, the Appellant states that he was made redundant in December 2020. On the claim form received on 23/12/20 the Appellant stated that he was still employed. However, it is noted that the Appellant did not leave his former job as a result of his accepted disabilities, but because he was made

redundant. The Secretary of State considers that the Appellant remains capable of following an occupation with equivalent gross income to that of his Regular Service Occupation, and the decision not to make an award of ALSO remains appropriate.

The First-tier Tribunal's decision

14. The First-tier Tribunal (from now on, simply 'the Tribunal') held a remote CVP hearing of the appeal on 26 October 2022. It issued its decision notice (but with extensive summary reasons) a few days later on 31 October 2022. This was followed by the Tribunal's full written reasons (signed on 3 December 2022, issued on 12 December 2022).
15. I start by making one observation about the content and the formatting of the Tribunal's decision notice and its full written reasons. Under the heading "DECISION", both documents record that the decision of the Tribunal was to "ALLOW IN PART" the claimant's appeal against the Secretary of State's decision of 28 January 2022. However, neither document actually explains in the text under the heading "DECISION" the extent to which the appeal had indeed been allowed *in part*. It is only towards the end of the 6th (unnumbered) paragraph on the decision notice that we are told that the Tribunal "find that from 1/11/2021 he was entitled to ALSO. [The claimant] was not capable of following an occupation with equivalent gross income to that of his regular service occupation from 1/11/2021." Likewise in the full written reasons the Tribunal stated it was satisfied that the claimant's employment as a Concierge from November 2021 "was at a lower rate of pay than his service equivalent ... and therefore find that from 1/11/21 he was entitled to ALSO" (paragraph 8).
16. Leaving aside the substantive issues that arise on this appeal, the Tribunal's decision notice and full written reasons are therefore less than clear in two respects. First, the documents do not actually spell out in terms that the Tribunal found that the claimant was *not* entitled to ALSO from 23 December 2020 to 31 October 2021, although that proposition can be inferred or deduced from the Tribunal's reasons. Second, neither document allows the reader to understand at a glance the extent to which the appeal had subsequently been allowed (namely with effect from 1 November 2021). The reader may be e.g. a busy Veterans UK officer charged with implementing the Tribunal's decision or an equally busy reviewing or appellate judge who is considering an application for permission to appeal. Either way the reader needs to be able to grasp readily the core features of the decision. However, in the present case a key part of the Tribunal's decision was buried in the text of the Tribunal's reasons.
17. Turning to the substantive issues, the Tribunal's full written reasons to a large extent incorporated its summary reasons (subject to one matter referred to below) and ran to 11 paragraphs in total. Paragraphs 1-3 inclusive set out undisputed factual matters. The reasons then recorded the claimant's acceptance that as at April 2020 his salary as a Concierge Team Leader with his former employer (£36,050) was greater than his service equivalent salary (£27,961). It also noted that his former employer had made him redundant with effect from 2 December 2020 (paragraph 4). The Tribunal recorded the component elements of the claimant's redundancy package (paragraph 5). Paragraph 6 is central to the Tribunal's decision, as it set out the background to the redundancy:

6. [The claimant] told us that he was targeted for redundancy because as a team leader, with his seniority, he was on a better salary than other concierges and they wanted to offload him. He had just lost his mother, and felt cornered to either take a salary cut as a senior concierge or take voluntary redundancy which he agreed to do in the end. We agree with Vets UK that he was not made redundant because he was incapable of following his occupation, as his company would have retained him with a salary cut of some £10,000 at a lower grade – they were looking to control their wage bill.

18. Pausing there, and referring back to the lack of clarity mentioned above, the only possible inference from paragraph 6 is that the Tribunal found that the claimant was not entitled to ALSO as at the point he was made redundant (an inference supported by the Tribunal's observation in paragraph 10 of its full reasons, referred to below). At paragraph 7 the Tribunal noted that after being made redundant, the claimant sought another Team Leader or Head Concierge role but had to settle for a Concierge post with effect from 1 November 2021. As mentioned above, at paragraph 8 the Tribunal found as a fact that this role was remunerated (as is not in dispute) at a lower rate of pay than his regular service occupation. On that basis alone the Tribunal ruled the claimant was entitled to ALSO with effect from 1 November 2021. Paragraph 9 gave directions for implementation of the Tribunal's decision, while paragraph 10 commented on the claimant's feeling "that he had lost out on ALSO for the period from 2/12/2020 to 1/11/2021." In paragraph 11 the Tribunal made some explanatory observations on the inter-relationship between ALSO and Universal Credit.
19. There is just one paragraph of note in the summary reasons which did not find its way into the Tribunal's full reasons. This was the Tribunal's observation about the claimant's decision to take a Concierge post in November 2021:
- We accept that with the impact of the pandemic, and that senior posts are less numerous, accepting the post of concierge at a lower income was an appropriate and pragmatic decision for [the claimant] and note that he had unsuccessfully attempted for nearly a year to obtain employment at a greater gross income. The employment is appropriate taking into account his education, training and experience given the current economic climate and the period of time he attempted to find employment at his previous grade and remuneration.
20. On 2 February 2023 Tribunal Judge Siddique (who had not sat on the Tribunal which heard the claimant's appeal) refused the Secretary of State's application (drafted in-house by Veterans UK) for permission to appeal to the Upper Tribunal.

The proceedings before the Upper Tribunal

21. The Secretary of State subsequently filed an expanded and fully reasoned notice of appeal (settled by counsel) directly with the Upper Tribunal. Judge Hemingway granted the Secretary of State permission to appeal. Ms Jennifer Seaman of Counsel (on behalf of the Secretary of State) and Mr Glyn Tucker of the Royal British Legion (on behalf of the claimant) have each provided helpful written submissions on the appeal. Both parties have indicated a wish to have an oral hearing, but then immediately qualified that rather lukewarm preference by stating that this was only if the Upper Tribunal wished to hear further legal arguments. However, I am satisfied that the issues have been well ventilated in

the parties' written submissions. I am not persuaded that an oral hearing of the appeal is necessary or proportionate. I am therefore proceeding to determine the appeal on the papers.

The Secretary of State's grounds of appeal

22. The Secretary of State advances three grounds of appeal.
23. The first is that the Tribunal failed properly to apply Article 15(1) to the facts as they were found, in that it should have taken into account that the occupation of Concierge Team Leader was still suitable for the claimant for the purposes of Article 15(1)(b).
24. The second ground of appeal is that the Tribunal failed properly to apply Article 15(1) to the facts as they were found, in that it should not have taken into account the claimant's new job as a Concierge and its (lower) salary.
25. The third ground of appeal is that no person or tribunal acting judicially and properly instructed as to the law could have come to the decision the Tribunal reached.
26. This last ground of appeal adds nothing to the first two grounds so I propose to say no more about it.

Analysis

27. This appeal concerns the proper interpretation and application of Article 15(1)(b) of the SPO. The question is therefore whether the claimant's "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".
28. The test under Article 15(1)(b) needs to be taken in stages. First, and indisputably, the claimant's "disablement is such as to render him incapable, and likely to remain permanently incapable, of following his regular occupation" as a (Gunner) Private.
29. The question then is secondly whether, in the alternative, he is "incapable of following any other occupation with equivalent gross income which is suitable in his case taking into account his education, training and experience". However, this is not a stand-alone requirement which can be applied in isolation. The qualifying test is governed by the opening phrase in Article 15(1)(b), namely that the individual's "disablement is such as to render him incapable ... (etc)." This requirement falls to be considered at two points in time, given the way the Tribunal approached the case. The first was at the date of claim in December 2020, when the claimant was being made redundant from his position as Concierge Team Leader. The second was in November 2021, when he took up his appointment as a Concierge with his new employer.
30. In the former instance the Tribunal found as a fact that the claimant was not made redundant from his previous position as Concierge Team Leader because of his accepted conditions (i.e. his disablement). Rather, he was made redundant as part of a cost-cutting exercise by his former employer. The claimant therefore ceased to be employed as a Concierge Team Leader for reasons not related to his disablement and the accepted conditions. The Tribunal was therefore correct

to find (albeit it did so only by inference) that the claimant was not entitled to ALSO as from the date of claim in December 2020. At that point in time his “disablement was not such as to render him ... 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 could still do that job as a Concierge Team Leader – it was just that his former employer had decided to take steps to rein in its wage bill and so to dispense with his service.

31. What then of the latter point in time, namely in November 2021 when the claimant took up the job as Concierge with the new employer? Had anything changed? Clearly the claimant had spent nearly a year being unemployed and searching for a Concierge Team Leader role but unfortunately without any success. Clearly after such a period of time the claimant had taken the pragmatic and understandable decision to accept a post as a Concierge. Clearly his new salary in that role was less than the pay he would have received both as a Concierge Team Leader and as in his regular (service) occupation. However, equally clearly, nothing had changed in terms of the application of Article 15(1)(b) of the SPO. His disablement was not such as to render him incapable of following the occupation of Concierge Team Leader. He could still do that more senior job and would no doubt have snapped up such an appointment had a suitable vacancy arisen. It was the wider state of the labour market that rendered him incapable of following his preferred occupation, and not his disablement. Accordingly, the occupation of Concierge Team Leader remained “suitable in his case taking into account his education, training and experience”.
32. Thus, the focus of the language of Article 15(1)(b) is very much on the individual war pensioner and not on wider externalities. This is evident in at least two respects. First, as noted, under the SPO it is the disablement, the accepted conditions, which must render the claimant incapable of following a relevant occupation, and not the state of the labour market. Secondly, the test for such a relevant (civilian) occupation is whether it is “suitable in his case taking into account his education, training and experience”. Those latter three attributes are uniquely personal characteristics and cannot be extended to cover the state of the wider labour market. The test is therefore one which focusses on the individual’s reduced earning capacity as a result of service (see e.g. *Secretary of State for Defence v DK* [2009] UKUT 51 reported as *R(AF) 4/09* at paragraph 24).
33. It follows that the Tribunal misdirected itself by posing the test in terms of whether the claimant had made a sensible and pragmatic decision to take up the Concierge appointment in November 2021 in the light of the prevailing labour market conditions. In its summary reasons, the Tribunal reasoned as follows: “The employment is appropriate [*sic: what the Tribunal meant to say was ‘suitable’*] taking into account his education, training and experience given the current economic climate and the period of time he attempted to find employment at his previous grade and remuneration.” The Tribunal should have ended that passage with “education, training and experience”. There was no warrant under the SPO for introducing the qualifying phrase starting with “given”. Those givens were obviously important in the real world, but they do not form part of the assessment process under Article 15(1) of the SPO.
34. It follows that the Tribunal erred in law in the two respects identified by the Secretary of State. First, it should have taken into account that the occupation of Concierge Team Leader was suitable for the purposes of Article 15(1)(b) of the

SPO for the whole period in question. Second, the Tribunal was wrong to take into account the claimant's new job as Concierge and its salary with effect from November 2021.

35. Finally, the Secretary of State has made reference at various stages in these proceedings to the Ministry of Defence's policy and operational guidance to decision-makers on dealing with claims for ALSO. I have not relied on, or referred to, such guidance in this decision for the simple reason that it is just that, guidance. This appeal must be determined by reference to the law and not to the Secretary of State's internal guidance, however helpful that is intended to be.
36. In conclusion, I am satisfied that the First-tier Tribunal erred in law for the reasons set out above. I therefore allow the Secretary of State's appeal to the Upper Tribunal and set aside the Tribunal's decision. This is not a case in which it is necessary to remit the appeal for re-hearing before a fresh Tribunal, as the material facts are not in dispute and the appeal does not require the specialist input of the medical member or service member who would sit on a first instance new panel. The re-made decision is that the claimant's appeal to the First-tier Tribunal against the Secretary of State's decision of 28 January 2022 is refused. This is because the claimant was not incapable of following an occupation with equivalent gross income to that of his regular service occupation. Accordingly, the claimant is not entitled to ALSO with effect from the date of claim on 23 December 2020 (or from 1 November 2021).
37. Although I do not need to rely on the point for my decision, I note that the construction of Article 15(1) of the SPO advanced above is consistent with the approach taken in relation to the equivalent allowance under the civilian industrial injuries scheme. That scheme used to have a special hardship allowance for individuals with reduced earning capacity (later replaced by reduced earnings allowance, itself since abolished for new claims). The case law of the Industrial Injuries Commissioners showed that special hardship allowance was not payable where a claimant's failure to obtain employment was due to causes other than their loss of faculty, e.g. to "slackness of trade" (reported decision *R(I) 29/53* at paragraph 7).

Conclusion

38. I therefore conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision of the Tribunal (Tribunals, Courts and Enforcement Act (TCEA) 2007, section 12(2)(a)). I re-make the decision under appeal (TCEA 2007, section 12(2)(b)(ii)). I substitute the following decision for the decision of the Tribunal, namely that the claimant's appeal against the Secretary of State's decision of 28 January 2022 is refused. This is because the claimant is not entitled to ALSO with effect from the date of claim on 23 December 2020 (or from 1 November 2021). This, in turn, is because the claimant was not incapable of following an occupation with equivalent gross income to that of his regular service occupation. My decision is also as set out above.

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised for issue on 5 October 2023