[2016] AACR 27

(Secretary of State for Defence v FA (AFCS)
[2015] NICom 17)

Dr K Mullan, Chief Commissioner **C1/12-13(AF)**
Mr O Stockman, Commissioner
Mr A Lloyd-Davies, Deputy Commissioner
26 May 2015

Armed Forces Compensation Scheme – temporary awards – proper approach by tribunals

On 1 May 2009 the respondent was medically discharged from the Royal Air Force in consequence of the principal invaliding condition of Plantar Fasciitis. In consequence, she was treated as having made a claim for benefit under the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 (the AFCS 2011). On 10 February 2011 the respondent was informed by the Secretary of State for Defence (the SSD) that it was accepted that her injury had been caused by service. However, as the injury was not on the tariff, and as it was not considered sufficiently serious to merit a temporary award under article 26 of the AFCS 2011, it had been decided not to make an award. The respondent appealed to the Pensions Appeal Tribunal (Northern Ireland) (the PAT (NI)). The PAT (NI), by a majority, allowed the appeal. It found that the respondent had suffered an injury for which no provision was made in the tariff and decided that a temporary award at level 10 was appropriate. The SSD appealed to the Pensions Appeal Commissioners with the leave of the legally qualified member. The SSD submitted that the decision of the PAT (NI) was in error on the basis that (i) it had devised a descriptor not provided for in the AFCS 2011 and thereby had misconstrued and/or misapplied article 16 of the AFCS 2011, and had acted *ultra vires* and (ii) it had purported to exercise a power under article 26 of the AFCS 2011 to make a temporary award which was exercisable only by the SSD and thereby acted *ultra vires*.

Held, allowing the appeal and giving the decision which the appeal tribunal should have given, that:

1. the applicable compensation scheme was that provided for in the AFCS 2011 (paragraphs 12 to 17);

2. the applicable "specified decisions appeal regulations" were the Pensions Appeal Tribunals Act 1943 (Armed Forces and Reserve Forces Compensation Scheme) (Rights of Appeal) Regulations 2011 (paragraphs 12 to 17);

3. the PAT (NI) erred in law in ignoring article 16(1)(a) of the AFCS 2011 (paragraph 29);

4. the PAT (NI) erred in law and acted without jurisdiction in undertaking to devise its own descriptor and in making a temporary award under article 26(2) of the AFCS 2011 (paragraphs 37 to 39);

5. *(obiter)*, the PAT (NI), in determining an appeal from a decision to refuse to make a temporary award (paragraphs 41 to 44), or an appeal where the decision is silent as to whether such an award should be made (paragraphs 45 to 46) may nevertheless consider whether the three conditions precedent in article 26(1) of the AFCS 2011 are satisfied. If so, it may allow an appeal from a decision refusing to make a temporary award and may remit the matter to the SSD for a reconsideration of the issue of whether a temporary award should be made.

DECISION OF A TRIBUNAL OF PENSIONS APPEAL COMMISSIONERS

1. The decision of the Pensions Appeal Tribunal for Northern Ireland (the PAT (NI)) dated 19 April 2012 is in error of law. The error will be explained in more detail below. Pursuant to the powers conferred on us by section 6A(4) of the Pensions Appeal Tribunals Act 1943 (the 1943 Act), we set aside the decision appealed against.

2. We are able to exercise the power conferred on us by section 6A(4)(a) of the 1943 Act to give the decision which the appeal tribunal should have given. Our revised decision is set out in paragraph 60 below.

Legislative references and the legislative provisions referred to in this decision

3. The legislation relevant to the issues arising in the decision is referred to as follows:

Pensions Appeal Tribunals Act 1943 (the 1943 Act)

Pensions Appeal Tribunals (Northern Ireland) Rules 1981 (SR 1981/231) (the PAT (NI) Rules)

Armed Forces and Reserve Forces (Compensation Scheme) Order 2005 (SI 2005/439) (the AFCS 2005)

Pensions Appeal Tribunals Act 1943 (Armed Forces and Reserve Forces Compensation Scheme) (Rights of Appeal) Regulations 2005 (SI 2005/1029) (the 2005 Regulations)

Pensions Appeal Tribunals Act 1943 (Armed Forces and Reserve Forces Compensation Scheme) (Rights of Appeal) Amendment Regulations 2006 (SI 2006/2892) (the 2006 Regulations)

Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 (SI 2011/517) (the AFCS 2011)

Pensions Appeal Tribunals Act 1943 (Armed Forces and Reserve Forces Compensation Scheme) (Rights of Appeal) Regulations 2011 (SI 2011/1240) (the 2011 Regulations)

4. The legislative provisions referred to in this decision are set out in detail in the Appendix to this decision.

This decision in summary

5. In summary, our decision is that:

(i) the applicable compensation scheme in the instant case is that provided for in the AFCS 2011 (paragraphs 12 to 17);

(ii) the applicable "specified decisions appeal regulations" in the instant case are the 2011 Regulations (paragraphs 12 to 17);

(iii) the PAT (NI) erred in law in ignoring article 16(1)(a) of the AFCS 2011 (paragraph 29);

(iv) the PAT (NI) erred in law in undertaking to devise its own descriptor and commencing the process of making a temporary award of its own volition (paragraphs 37 to 39).

6. In addition, we have given guidance on the appropriate approach for an appeal tribunal to take when in appeals against decision where the decision is to refuse to make a temporary award (paragraphs 41 to 44), or where the decision is silent as to whether such an award should be made (paragraphs 45 to 46). We conclude that the appropriate approach does not interfere with

the objective of the Secretary of State (SOS) to reserve the decision on the appropriate tariff level to himself and, where thought appropriate, to amend the tariff (paragraphs 50 to 52).

Background to the appeal

7. What the SOS decided, how the respondent reacted to the decision-making process and the decision of the PAT (NI) is set out in greater detail below.

8. By way of more general background, on 19 June 2012, the SOS sought leave to appeal to the Pensions Appeal Commissioners from a decision of the PAT (NI) dated 19 April 2012. Leave was granted by the legally qualified member (LQM) of the appeal tribunal on 10 July 2012 without specifying reasons.

9. On 30 May 2013 the Chief Pensions Appeal Commissioner, in accordance with section 6D(5) of the Pensions Appeal Tribunals Act 1943, as amended, directed that the appeal involved a question of law of special difficulty and that it should, accordingly, be dealt with by a Tribunal consisting of three Pensions Appeal Commissioners. The Chief Pensions Appeal Commissioner also directed that there should be an oral hearing of the appeal.

10. The substantive oral hearing of the appeal took place on 10 October 2013. The SOS was represented by Ms Laura McMahon of counsel instructed by the Crown Solicitor's Office on behalf of the SOS. The respondent was present and was represented by Mrs Sara Waugh and Mr Chris Francis of the Royal Air Forces Association. Gratitude is extended to all representatives for their detailed and constructive observations, comments and suggestions.

11. At the oral hearing, an issue arose as to the date on which the appellant had first appealed to the PAT (NI). This was significant in the present appeal for the reason that the form of the regulations specifying those decisions which could be appealed to the PAT (NI) changed on 9 May 2011.

The making of the appeal to the PAT (NI) and the applicable compensation scheme

12. Subsequent to the oral hearing of the appeal, we formed a provisional view of the factual background to the making of the appeal to the PAT (NI). This provisional view was intimated to the parties together with our further view that if this provisional view was correct then there is "… no doubt that the applicable scheme is that provided for in the (AFCS 2011) (article 86(3) (b) refers) and the applicable 'specified decisions appeal regulations' are the 2011 Regulations".

13. The replies to the indication of these provisional views from the parties to the proceedings indicated general agreement with them. At the oral hearing of the appeal both representatives agreed that the applicable scheme was that provided for in the AFCS 2011 and that the applicable "specified decisions appeal regulations" are the 2011 Regulations.

14. We are reinforced in our view of the factual background to the making of the appeal to the PAT (NI) and for the reasons which we set out therein are satisfied that the actual appeal was made on 24 May 2011 when, for the purposes of section 8(3) of the Pensions Appeal Tribunals Act 1943, as amended, (the 1943 Act) and Rule 4 of the Pensions Appeal Tribunals (Northern Ireland) Rules 1981, (the 1981 Rules) the appeal was commenced by the service of the notice of appeal on the appropriate form.

15. We are also reinforced that the applicable compensation scheme is that provided for in the 2011 Order. Article 86 of the 2011 Order provides that:

> "**Decisions made before 9th May 2011**
>
> **86.** (1) Where paragraph (2) applies, and subject to article 88, the Secretary of State is to determine a reconsideration or review in accordance with this Order.
>
> (2) This paragraph applies where on or after 9th May 2011 the Secretary of State reconsiders or reviews a decision made before 9th May 2011 in the circumstances specified in paragraph (3).
>
> (3) The circumstances referred to in paragraph (2) are –
>
> > (a) a person makes an application on or after 9th May 2011 for reconsideration under article 53(1);
> >
> > (b) an appeal is made to an appropriate tribunal on or after 9th May 2011 and article 53(5) applies;
> >
> > (c) the Secretary of State reviews a decision under article 58 or 59 (including a review under article 59 following an application by the claimant made on or after 9th May 2011);
> >
> > (d) the Secretary of State reviews a decision under article 47 of the AFCS 2005 in respect of a member of the forces who was discharged on medical grounds before 9th May 2011 for the same injury for which an award of injury benefit was made before the member was discharged.
>
> (4) Where an application for review under article 55, 56 or 57 is made on or after 9th May 2011 in respect of a decision made before 9th May 2011 the Secretary of State is to review that decision in accordance with this Order."

16. The decision which the respondent wished to appeal was made before 9 May 2011. We have determined that the respondent's appeal was received on 24 May 2011. At that stage there had not been any application for a reconsideration of the decision under appeal. On receipt of the appeal the Secretary of State was obliged to reconsider the decision under appeal (article 53(5)). The actual reconsideration took place on 15 February 2012.

17. We are also satisfied that the applicable "specified decisions appeal regulations" are the 2011 Regulations. The 2011 Regulations came into force on 9 May 2011. The appeal was received on 24 May 2011.

What was the decision-making process giving rise to the appeal?

18. On 1 May 2009 the respondent was medically discharged from the RAF in consequence of the principal invaliding condition of Plantar Fasciitis. This was treated by the SOS as a claim to benefit under the 2011 Order by virtue of article 45(1)(a).

19. On 10 February 2011 the SOS wrote to the respondent. Copies of the decision and the correspondence notifying the respondent of the decision are set out at documents 123 and 124 of the appeal bundle which was before the PAT (NI). We begin with the details of the correspondence dated 10 February 2011. The respondent is informed that although a previous PAT (NI) had accepted that service was the cause of the claimed condition of Plantar Fasciitis, it had been decided that:

> "… after consideration of all of the available evidence you are still unfortunately, not entitled to an award of compensation under the scheme. The enclosed AFCS025 gives details of the reasons for our decision.
>
> You have a further right of reconsideration and subsequent appeal following our decision to place your condition below tariff level …"

20. As was noted above, attached to the correspondence dated 10 February 2011 was a template document, "AFCS025". That document is headed "Reasons for Decision" and included the following:

> "Although your injury is accepted as having been caused by your service, benefits are normally only paid for injuries and conditions which are on the tariff. The Secretary of State has the discretion to make a temporary award for up to one year for an injury which is not on the tariff if he considers that the injury is sufficiently serious to warrant an award of benefit and the injury is listed in the International Statistical Classification of Diseases and Related Health Problems or in the Diagnostic and Statistical Manual of Mental Disorders. In your case the Secretary of State has decided not to exercise his discretion because the injury is not significantly serious to warrant an award of benefit."

21. The Reasons for Decision added:

> "To clarify, your condition has been accepted as an overuse injury ... Your GP feels a referral to an orthopaedic surgeon is appropriate however she is unsure if they will consider surgery to be an option. I should explain that the tariff descriptor for an overuse injury is:
>
> - Overuse injury of foot or heel, which has required or is expected to require operative treatment.
>
> As your GP has confirmed that at present there are no plans for any surgery the condition falls below tariff level. Should this situation change you may wish to ask us to review your case again."

What did the PAT (NI) decide?

22. The appeal tribunal hearing took place on 19 April 2012. The appeal tribunal, by a majority, allowed the appeal. In summary the appeal tribunal decided that:

> "The Tribunal's decision is that the Appeal is allowed as the decision of the Secretary of State was not rightly made.
>
> The appropriate Descriptor, for the reasons given in the Statement of Reasons is 'Plantar Fasciitis' causing permanent significant functional limitation or restriction."

23. In the statement of reasons for its decision, the following reasons for the majority of the appeal tribunal are recorded:

> "The Tribunal considered the requirements of section 26(1) of the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 and determined that the Appellant had sustained an injury of a description for which no provision is made in the tariff in force on the date on which the claim for benefit was made (subsection(a)); the injury is sufficiently serious to warrant an award of injury benefit (subsection (b)); and the injury is listed in the International Statistical Classification of Diseases and related Health Problems namely M72.2 (subsection (c)). The Tribunal in accordance with section 26(2) considered that a temporary award at level 10 is appropriate for the injury suffered by the Appellant and accepted by the Secretary of State as being caused by service."

24. The references to "sections" and subsections' should be to "articles" and "paragraphs".

The submissions of the parties

25. In summary, the SOS submits that the decision of the appeal tribunal was in error on the basis that:

(i) The PAT (NI) "… erred by devising their own descriptor… This Descriptor is not provided for in the (AFCS Order 2011). By purporting to make an award under a Descriptor for which the AFCS 2011 makes no provision, the (appeal tribunal) disregarded, ignored, misconstrued and/or misapplied article 16 of the AFCS 2011 and acted outside their legislative remit and in so doing acted *ultra vires*";

(ii) The PAT (NI) erred in law by purporting to exercise a power under article 26 to make a temporary award. The power to make a temporary award is a power held by, and exercisable only by, the SOS. In purporting to make a temporary award to the Claimant for which the AFCS 2011 makes no provision as regards the appeal tribunal, the Tribunal acted outside of its legislative remit and in so doing acted *ultra vires*.

26. The respondent has been represented throughout by the RAF Association. In the initial response it was submitted that the appeal was not opposed. At the oral hearing, Mr Francis made cogent and persuasive submissions on the issues arising in the appeal.

27. It is also important to note that the respondent provided us with a personal statement in which she set out with admirable clarity and conviction the issues which were of importance to her.

28. The respondent also provided us with details of an award which had been made to her under the Armed Forces Pension Scheme under which she had been awarded a lump sum and annual service pension following her medical discharge. The appellant, quite naturally, queried

why she had been awarded a pension following her medical discharge but did not qualify for an award of benefit under the 2011 Order.

Analysis

29. Why was the decision of the PAT (NI) in error of law? Our view is that the fundamental error of the tribunal was to ignore article 16(1)(a) of the AFCS 2011 which specifies that "benefit for injury is payable only in respect of an injury for which there is a descriptor".

30. Article 16(1) applies subject to articles 25 and 26. Article 25 has no application in the present case. Article 26 contains the power of the Secretary of State to make temporary awards. The crux of the argument in this appeal centred on whether this power resided solely in the SOS, or whether a tribunal also had jurisdiction to exercise the power in appeal proceedings.

31. The answer to this question depended on the relevant regulations governing rights of appeal. As the PAT (NI) is a creature of statute, the extent of its jurisdiction is governed by such regulations. For the reasons which we have set out above, the relevant regulations are the 2011 Regulations.

32. These were made as a result of the introduction of the new Armed Forces Compensation Scheme in 2011 through the making of the AFCS 2011. In connection with the policy objective behind the 2011 Regulations, the Explanatory Memorandum is less than instructive. At paragraph 4.3 there is a very general statement that:

> "This instrument is required in order to specify the types of decisions made under the 2011 Order which are capable of appeal."

33. At paragraphs 7.2 to 7.3, there is some further detail:

> "7.2 Most decisions made under the 2005 Order are capable of appeal to an appropriate tribunal which has the jurisdiction to make a determination on the basis of the facts, the law and over all merits of the case. It is considered that most decisions made under the 2011 Order should be similarly capable of appeal. Indeed it is considered the only types of decisions which should be incapable of appeal to an appropriate tribunal will be those where the decision will be usurped over time by a decision which is capable of appeal or the decision is of a type where challenge by way of judicial review is sufficient and appropriate.
>
> 7.3 As a result, the specified decisions which are listed in regulation 3(1) of this instrument are drafted in very wide terms and the types of decisions listed broadly corresponds to the types of decisions made under the 2005 Order that are capable of appeal. For the avoidance of doubt, regulation 3(2) also sets out more restrictively the types of decisions which are not specified. With the exception of decisions relating to the payment of medical expenses and fast payments (which are both new benefits that will be created under the 2011 Order) the decisions listed in regulation 3(2) broadly correspond to the types of decisions made under the 2005 Order which were incapable of appeal to an appropriate tribunal."

34. Initially, therefore, a direct link back to the policy objectives of the 2005 Regulations is made. The stated intention is to "broadly" replicate the types of decisions made under the AFCS 2005 which were incapable of appeal. Despite a detailed analysis of the policy background to the

2011 Regulations, ascertaining the specific purpose or policy objective behind the variation in the wording remains elusive. As was noted above, in general terms, the legislators sought to replicate the types of decisions made under the AFCS 2005 which were incapable of appeal. It is clear, however, that for whatever reasons, the wording of the 2011 Regulations is wholly different.

35. We are of the view that the decision under appeal in the instant case may be classified as including a decision not to make a temporary award. Does a decision not to make a temporary award also fall into the classification of a decision which makes or arises from the making of a temporary award? It is axiomatic that it cannot be a decision which makes a temporary award. Does it, therefore, arise from the making of a temporary award? In our view, the answer to that question also has to be "no". A decision which arises from the making of a temporary award is necessarily linked to the making of a temporary award. A decision which refuses to make a temporary award cannot be said either to make a temporary award or arise from the making of a temporary award. Accordingly a decision which either incorporates a decision which refuses to make a temporary award or, in its own right, makes such a refusal, does not fall foul of the exemption contained in regulation 3(2)(c) of 2011 Regulations.

36. That is not the end of the matter, however. That such a decision does not fall into the category of decisions which are not specified decisions does not lead to the parallel conclusion that it falls into the regulation 3(1) decisions which are specified decisions. To fall into the general category of regulations 3(1) specified decisions which are capable of appeal, the decision must fall into one of the sub-categories in sub-paragraphs (a) to (c). It seems to us, however, that no difficulty should arise. In the correspondence dated 10 February 2011, the respondent was informed that she was not entitled to an award of compensation or benefit under the AFCS 2011, that the basis for the non-entitlement is that her injury does not meet any of the descriptors in the tariff of the AFCS 2011 and that she has the right of appeal against the decision of the SOS. We conclude, therefore, that the decision notified to the respondent is, for the purposes of regulation 3(1)(a) of the 2011 Regulations a decision, in its entirety, "which determines whether a benefit is payable" and is, therefore, for the purposes of regulation 3 and section 5A(2) of the 1943 Act a "specified decision" with rights of appeal.

37. We turn to the Tribunal's conclusions that it "in accordance with section 26(2) [*sic*] considered that a temporary award at level 10 is appropriate for the injury suffered by the Respondent and accepted by the Secretary of State as being caused by service". Assuming for the moment that the Tribunal was entitled to exercise the powers of the SOS under article 26(2) on an appeal under section 5A(2) of the 1943 Act, we consider that the tribunal further fell into error.

38. We note that the SOS's decision had been to the effect that, because her injury had not resulted in operative treatment, the respondent did not fall within the descriptor which is to be found in Item 35 of Table 9 in Schedule 3 to the AFCS 2011, namely "Overuse injury of foot or heel, which has required or is expected to require operative treatment". Such an injury might have attracted an award at level 14 on the tariff. It appears to us that an overuse injury – and Plantar Fasciitis can be described as such – which does not require operative treatment might be expected to attract a lower award than one at level 14 on the tariff. It is not evident why the tribunal felt it appropriate to fix an award at level 10. Looking elsewhere in the same Table, a level 10 award is made for "Ligament injury which has resulted in full thickness rupture affecting both knees, ankles, shoulders, elbows or wrists, causing permanent significant functional limitation or restriction" (at item 3). This would appear to be a substantially more

serious injury in terms of its effects and duration. Therefore it seems to us that an award at level 10 for the lesser injury of Plantar Fasciitis would border on irrationality.

39. The finding of the tribunal illustrates the difficulty which can arise when a tribunal assumes jurisdiction over the setting of the tariff level which is appropriate to a particular injury. This is a task which can involve detailed comparative assessments of the types of injuries which appear in the Tables and is not a task for which a tribunal is well-suited. As we have observed, a refusal to make a temporary award is a decision "which determines whether a benefit is payable" and is therefore generates a right of appeal. However, as we have also observed, by regulation 3(2)(c) of the 2011 Regulations a decision which "makes … a temporary award under article 26(2) of the 2011 Order" is not a specified decision and therefore does not generate a right of appeal. We consider that, if the claimant had no right of appeal to the tribunal on a decision by the SOS under article 26(2), the tribunal can have had no jurisdiction to make a decision under article 26(2). In our view, the tribunal erred in law by purporting to fix a tariff for the respondent's injury under article 26(2). That is not to say, however, that it had no jurisdiction to entertain the appeal at all and, in particular, to address article 26(1).

40. Our conclusion is that the PAT (NI) was in error by purporting to make an award of benefit for an injury in respect of which there was not a descriptor, contrary to article 16(1)(a) of the AFCS 2011, and by purporting to set a tariff for the respondent's injury under article 26(2) of the AFCS 2011 without jurisdiction. This is sufficient to dispose of the appeal. We are of the view, however, that it is incumbent on us to give guidance to a first-tier appeal tribunal on the proper approach to an appeal against a decision which either incorporates a decision which refuses to make a temporary award or, in its own right, makes such a refusal.

41. Section 5A(1)(b) of the 1943 Act provides that:

> "**5A. – Appeals in other cases.**
>
> (1) Where, in the case of a claim to which this section applies, the Minister makes a specified decision –
>
> …
>
> and
>
> …
>
> (b) thereupon an appeal against the decision shall lie to the appropriate tribunal on the issue whether the decision was rightly made on that ground."

42. Accordingly the general duty is determine whether the specified decision under appeal was correctly made. Next it is important to note that the invariable basis upon which the SOS will make a decision to refuse to make a temporary award will be that the three conditions precedent in article 26(1) of the 2011 Order are not satisfied. That the second condition precedent – that the injury has to be sufficiently serious to warrant an award of benefit – was the basis upon which the SOS, in the instant case, refused to make a temporary award. It is axiomatic that if the SOS considers that none of the conditions precedent in article 26(1) are satisfied then there will be no requirement for the SOS to determine the appropriate level of tariff for the purposes of article 26(2). Once again, in the instant case, no article 26(2) determination was made.

43. Accordingly, the issue before the appeal tribunal will be whether the SOS was correct to decide that the three conditions precedent were not satisfied. In our view, that should not provide any difficulty for an expert, experienced, fact-finding, first-tier appeal tribunal. If the appeal tribunal concludes that any one or more of the conditions precedent are not satisfied, then the appeal will be disallowed and, subject to any onward right of appeal, that will be the end of the matter. The appropriate level of tariff need not be considered.

44. If, on the other hand, the appeal tribunal considers that all of the conditions precedent are satisfied then it seems to us that it is appropriate for the appeal tribunal to allow the appeal and remit the matter to the SOS for reconsideration of the issue of a temporary award in accordance with the appeal tribunal's decision. We return below to the question of the role of the SOS in determining the appropriate tariff level.

45. What is the appeal tribunal's jurisdiction where it is considering a decision which is silent on the issue of temporary awards? To begin with, it is important to note the provisions of section 5B(a) of the 1943 Act:

> "**5B. Matters relevant on appeal.**
>
> In deciding any appeal under any provision of this Act, the appropriate tribunal –
>
> > (a) need not consider any issue that is not raised by the appellant or the Minister in relation to the appeal;"

46. Accordingly, there is no requirement for the appeal tribunal to consider the issue of a temporary award if it is not an issue raised by the appeal by the appellant or the SOS. Thereafter, if it is raised by the appeal and the appeal tribunal determines that it is appropriate to consider it, then it seems to us that the appropriate approach is as set out above – determination as to whether the article 26(1) conditions precedent to the making of a temporary award are satisfied and, if so, remittal to the SOS.

47. At the oral hearing of the appeal, the SOS was requested to provide a response to the following question:

> "Does the SPVA receive decisions from appeal tribunals throughout the United Kingdom that include a direction or strong recommendation that the SOS exercise his discretion to make an article 26 temporary award, and, if so, what does the SPVA do with any such decisions/recommendations?"

48. The following response was received from the SOS:

> "The SPVA do receive such decisions from the appeals tribunals throughout the UK. On occasion it appears that the tribunal are making a temporary award themselves. On other occasions their directions contain a strong recommendation for the Secretary of State to consider making a temporary award.
>
> In both such circumstances the Secretary of State undertakes an agreed process with the SPVA. Initially, the tribunal decision is referred to the senior medical advisor to determine whether a temporary award is appropriate. Where she agrees with the tribunal that a temporary award should have been made, a temporary award will be so made. If

> the senior medical advisor determines that a temporary award is not appropriate, then consideration is given as to whether the original decision remains appropriate or if this should be revised and a more fitting descriptor/award made under the legislation.
>
> Regardless of whether a temporary award is or is not deemed appropriate by the senior medical advisor, in all instances the SPVA will write to the relevant tribunal to explain why a temporary award is or is not thought to be suitable. In all letters, it is explained that the power to make temporary awards rests with the Secretary of State. To the knowledge of the Secretary of State, no other tribunals has [*sic*] gone as far as purporting to make a temporary award and creating a descriptor as in this case."

49. Rights of appeal against decisions on temporary awards were dealt with through the amendments to the 2005 Regulations by the 2006 Regulations. The Explanatory Memorandum to the 2006 amending regulations is instructive as to the role of the Secretary of State in connection with setting the appropriate tariff level for a temporary award and in amending the tariff when a temporary award is made permanent. It states, at paragraphs 7.1 to 7.2:

> "7.1 The 2005 Order contains a tariff listing the types of injury in respect of which compensation may be awarded and assigning to each injury a tariff level, which determines the amount of compensation that an individual receives. Where a claim is made for an injury which is not on the tariff, article 20(1) of the 2005 Order provides that a temporary award may be made at the tariff level that the Secretary of State thinks appropriate. If, within a year of making the temporary award, the Secretary of State amends the tariff to include the injury, then a permanent award will be made (article 20(4) of the 2005 Order). If he does not amend the tariff then no permanent award will be made.
>
> 7.2 This Instrument amends the 2005 Regulations to provide that a decision determining whether or not a permanent award is made is a "specified decision" (i.e. a decision attracting a right of appeal to the PAT). This Instrument also amends the 2005 Regulations to provide that a decision determining whether a temporary award is made is not a specified decision. The objects of this amendment are:
>
> - to avoid proliferation of appeals on the same issue;
> - to ensure that the policy decision as to whether an injury appears on the tariff, or as to the tariff level which applies to any particular injury, is reserved to the Secretary of State; and
> - to avoid the possibility of a temporary award being altered on appeal and set at a higher level than the tariff level set for that injury when the tariff is amended and the permanent award is made."

50. In respect of the decision as to whether an article 20 temporary award should be made the emphasis is the central role of the Secretary of State – "Where a claim is made for an injury which is not on the tariff, article 20(1) of the 2005 Order provides that a temporary award may be made *at the tariff level that the Secretary of State thinks appropriate*". The emphasis is our own. The objective is to reserve the decision on the appropriate tariff level to the Secretary of State. The further objective set out at the third bullet point of paragraph 7.2 is also enlightening. It is clear that what is not desired is for appeal tribunals to alter a temporary award set at the level deemed appropriate by the Secretary of State and, more particularly, altering the tariff level by increasing it.

51. The SOS has, accordingly, established a practice of examining claims for an injury which does not appear on the tariff, provided for temporary awards for a fixed period at a level the SOS considers appropriate, with a view to amending the tariff by adding the new injury to that tariff by way of adding a new or amending an existing descriptor. A good example of how the practice operates is provided for in the Armed Forces and Reserve Forces (Compensation Scheme) (Amendment) Order 2014. Articles 4 to 9 amend Tables 1 to 4, 6, 8 and 9 of Schedule 3 (the tariff) to the AFCS 2011 by inserting new descriptors or amending existing descriptors in the tariff. Paragraph 7.4 of the Explanatory Memorandum indicates that:

> "In line with Art. 26 of the Principal Order, MOD is amending and adding descriptors in the Tariff (Schedule 3 of the Principal Order) to make permanent Temporary Awards that have been paid to claimants whose injury or illness is accepted as predominantly caused by service but whose condition does not fit an existing descriptor."

52. Our proposal is that the appropriate approach for the appeal tribunal, in appeals against decision where the decision is to refuse to make a temporary award, or where the decision is silent as to whether such an award should be made, but is raised as an issue by the appeal is as set out above – determination as to whether the article 26(1) conditions precedent to the making of a temporary award are satisfied and, if so, remittal to the SOS. That should not interfere with the objective of the SOS to reserve the decision on the appropriate tariff level to himself and, where thought appropriate, to amend the tariff.

Another matter arising

53. We have noted that the decision of the PAT (NI) was a majority decision of a three-member tribunal. The statement of reasons sets out what we presume to be the reasons for the majority decision and makes no reference to the reasons for the dissenting panel member's decision. We would remind Tribunals of the guidance given by the Pensions Appeal Commissioner in *KB v Secretary of State (AF)* [2010] NICom 103, C1/09-10(AF) on the importance of recording the reasons of both the majority and dissenting minority decisions where a decision is by majority.

Disposal

54. The decision of the PAT (NI) dated 19 April 2012 is in error of law. Pursuant to the powers conferred on us by section 6A(4) of the Pensions Appeal Tribunals Act 1943, we set aside the decision appealed against.

55. We are able to exercise the power conferred on us by section 6A(4)(a) of the Pensions Appeal Tribunals Act 1943 to give the decision which the appeal tribunal should have given.

56. We find that the respondent suffers from the condition "plantar fasciitis", and that this can also fairly be described as an overuse injury. However, as the injury has not and is not expected to require operative treatment, it does not meet the descriptor which most closely describes the injury – descriptor 35 in Table 9 of the 2011 Order. Therefore we are precluded from making an award in respect of the injury suffered by the respondent under article 16(1)(a).

57. Nonetheless, we find that the condition of article 26(1)(a) is satisfied, namely that the respondent has an injury of a description for which no provision is made in the tariff in force on

the date. This is a necessary implication of our finding that the injury is one to which article 16(1)(a) applies.

58. We find that the injury led directly to the respondent's discharge from service. Although each case will depend on its own individual circumstances, where, as in the instant case, an injury is such as to bring an end to the ability of an individual to serve, against the background of the scheme as a whole, it appears to us that it can reasonably be considered "sufficiently serious" to warrant an award of injury benefit. Accordingly, article 26(1)(b) is satisfied.

59. The condition "Plantar Fasciitis" is listed in the International Statistical Classification of Diseases and Related Health Problems and referred to as "M72.2 (subsection (c))".

60. Our decision is that the respondent's appeal against the decision of 10 February 2011 (as upheld on reconsideration on 15 February 2012) is allowed on the basis that that decision was not rightly made. The case is remitted to the SOS for consideration of the appropriate tariff level, if any.

Appendix

The provisions in the 2011 Order relevant to the substantive issues

Article 2 of the AFCS 2011 is an Interpretation article which includes the following definitions:

> "benefit" means a benefit payable under this Order;
>
> "injury benefit" means a lump sum, a supplementary award and guaranteed income payment;
>
> "temporary award" means an award referred to in article 26.

Articles 16(1) and (2) provide:

> "16.–(1) Subject to articles 25 and 26 –
>
> (a) benefit for injury is payable only in respect of an injury for which there is a descriptor;
>
> (b) where an injury may be described by more than one descriptor, the descriptor is that which best describes the injury and its effects for which benefit has been claimed; and
>
> (c) more than one injury may be described by one descriptor.
>
> (2) In Tables 1 to 9 of the tariff the descriptors give rise to entitlement at the corresponding tariff level."

Article 26 provides:

> "**Temporary Awar**ds

26.–(1)This article applies *where the Secretary of State considers that* –

(a) a person has sustained an injury of a description for which no provision is made in the tariff in force on the date –

(i) on which the claim for benefit was made; or

(ii) of an application for a review under article 55, 56, 57 or 59;

(b) that the injury is sufficiently serious to warrant an award of injury benefit; and

(c) that injury is listed in the International Statistical Classification of Diseases and Related Health Problems (20) or in the Diagnostic and Statistical Manual of Mental Disorders (21).

(2) The Secretary of State is to make a temporary award in respect of that person relating to the level of the tariff which the Secretary considers appropriate for that injury.

(3) The amount of the lump sum payable under a temporary award is the amount which would have been payable had a descriptor been included in the tariff at the tariff level which the Secretary of State considers appropriate for the injury.

(4) Where guaranteed income payment is payable under a temporary award, the amount payable is that which would have been payable had the descriptor been included in the tariff at the tariff level which the Secretary of State considers appropriate for the injury.

(5) The making of a temporary award does not give rise to a right to –

(a) a reconsideration of the decision under article 53; or

(b) a review of the decision under article 55, 56 or 57.

(6) Except where paragraph (7) applies, if the Secretary of State –

(a) does, within the period of 1 year starting with the date on which the temporary award is given or sent to the claimant, amend this Order by including a descriptor which describes the injury and is at the same tariff level for which the temporary award is made –

(i) a decision is to be issued making a permanent award in favour of the claimant, which takes effect on the day on which the amending Order comes into force; and

(ii) guaranteed income payment is to continue to be paid in accordance with this Order; or

(b) does not within the period of 1 year so amend this Order –

(i) a decision is to be issued refusing to make a permanent award in favour of the claimant; and

(ii) guaranteed income payment ceased to be payable under the temporary award at the end of the period but no amount of benefit paid in accordance with that award is recoverable.

(7) This paragraph applies where, after the date of a claim or application for review (referred to in paragraph (1)(a)(ii) but before the determination of that claim or application, the Secretary of State has amended this Order, by including a descriptor in the tariff which describes the injury at the tariff level which the Secretary of State considers appropriate for that injury.

(8) Where paragraph (7) applies the Secretary of State is to make a temporary award and immediately issue a decision making the temporary award permanent."

Article 43(1):

"43.–(1) Except where article 45 applies, a person is not entitled to any benefit unless, in addition to any other conditions relating to that benefit being satisfied, a claim is made for it in the manner, and within the time, specified in the following provisions of this Part."

Article 45(1)(a) provides:

"45.–(1) Subject to paragraph (3), it is not a condition of entitlement to benefit that a claim be made for it where a member—

(a) is discharged on medical grounds;"

Paragraph (3) is not relevant in this appeal.

Articles 51(1) and (2) provide:

"51.–(1) The Secretary of State is to determine any claim for benefit and any question arising out of the claim.

(2) The Secretary of State is to give reasons for the decision."

Specified decisions and appeal rights

Section 5A(1) and (2) of the 1943 Act, as amended, provide that:

"5A.–Appeals in other cases.

(1) Where, in the case of a claim to which this section applies, the Minister makes a specified decision –

(a) he shall notify the claimant of the decision, specifying the ground on which it is made, and

(b) thereupon an appeal against the decision shall lie to the appropriate tribunal on the issue whether the decision was rightly made on that ground.

…

(2) For the purposes of subsection (1), a 'specified decision' is a decision (other than a decision which is capable of being the subject of an appeal under any other provision of this Act) which is of a kind specified by the Minister in regulations."

Regulation 3 of the 2011 Regulations provides that:

"**Specified decisions capable of appeal**

3.–(1) Subject to paragraph (2), the following decisions are specified for the purposes of section 5A(2) of the Pensions Appeal Tribunals Act 1943, that is a decision which –

(a) determines whether a benefit is payable;

(b) determines the amount payable under an award of benefit; and

(c) is issued under article 26(6) (refusal to make a temporary award permanent etc.) or 26(8) (addition of new descriptor) of the 2011 Order, relating to the making of a permanent award.

(2) The following decisions are not specified decisions, that is a decision which –

(a) makes or arises from the making of an interim award under article 52(1) of the 2011 Order;

(b) suspends the payment of an award of benefit;

(c) makes or arises from the making of a temporary award under article 26(2) of the 2011 Order;

(d) determines whether a fast payment is made under article 27(1) of the 2011 Order;

(e) relates to the payment, in whole or in part, of medical expenses under article 28(1) of the 2011 Order."

Regulation 4 of the 2011 Regulations revoked the 2005 Regulations. It is worthwhile setting out certain parts of those Regulations, as amended by the 2006 Regulations.

Regulation 3(2)(c) provides that:

"A decision which –

…

(c) determines whether a temporary award should be made,

is not a specified decision."