



DECISION OF

Lord Lake

**ON AN APPEAL
IN THE CASE OF**

Social Security Scotland,
per Anderson Strathern

Appellant

- and -

HK
per Dumfries & Galloway Citizens Advice Service

Respondent

FTS Case Reference: FTS/SSC/AE/23/01128

1 October 2024

Decision

Introduction

1. The appellant challenges a decision of the First Tier Tribunal made on 20 March 2024. The decision was that the respondent is entitled to an award of Adult Disability Payment (“ADP”) at (i) the standard rate for daily living component, (ii) the standard rate for the mobility component from 18 December 2022 to 27 October 2023 and (iii) the enhanced rate for the mobility component from 28 October 2023. The challenge is only as to the decision



that the enhanced rate. It is contended that the FTS did not have the power to make a decision in terms of which a different rate was payable from a specified date and that in making the award, the FTS misdirected itself as to Regulation 35(3) of the Disability Assistance for Working Age People (Scotland) Regulations 2022.

2. Both parties prepared written notes of arguments and, in the case of the appellants, a Response. These were adopted as the arguments in the Appeal.

Appellant's Submissions

3. The Appellants note that the Disability Assistance for Working Age People (Scotland) Regulations 2022 ("the ADP Regulations"), Regulation 35 identifies the date on which an application is treated as having been made and also when the entitlement to assistance begins. Regulation 35(3) states

(3) Where, on the basis of an application (other than where regulation 58(1) applies), a determination is made that an individual is entitled to Adult Disability Payment, the date on which entitlement begins is to be identified in accordance with paragraphs (4) to (6).

The Appellants contend that paragraph (4) applies and that the entitlement begins on the date on which the required data was submitted. They submit that a single date is identified in terms of Regulation 35 and that it contains nothing to provide for an entitlement to a rate or component of adult disability payment to begin on different days. The Appellant recognises that section 12(8)(b) of the Social Security Act 1998 does not apply but submits that it is implicit in the scheme of Chapter 3 of the Social Security (Scotland) Act 2018 which applies to claims for this benefit that the Tribunal considering an appeal will not take into account any circumstances not obtaining when the decision appealed against was made. Section 49 of the 2018 Act states



In an appeal under section 46 against a determination of an individual's entitlement to a particular type of assistance, the First-tier Tribunal may -

- (a) uphold the determination, or
- (b) make its own determination of the individual's entitlement to the type of assistance in question.

The Appellants contend that in making its own determination in terms of sub-paragraph (b), the FTS “steps into the shoes of the decision maker”, that it is bound by Regulation 35 as to when assistance begins and it can take into account only facts and circumstances that were relevant to the determination made by that decision maker.

4. In developing this, in the Response to the Respondent’s Note of Argument, the Appellant submits that there is a single concept of a determination of entitlement to assistance regardless of whether the decision maker is the Appellant, the FTS or the Upper Tribunal. They submit that in making a determination or a re-determination, a decision maker must consider entitlement in the period relevant to the application. As each decision maker is considering the same period, they must consider the same circumstances pertaining to it. They contend that, Regulation 48, which requires that changes after the relevant period are taken into account applies only to the Appellant. When decisions are taken by the FTS or the Upper Tribunal, they cannot act other than in ways authorised by statute and they are unable to exercise the power under Regulation 48.

Respondent Submissions

5. The Respondent also notes that the 2018 Act does not contain a provision equivalent to the Social Security Act 1998, section 12(8)(b), to the effect that changes in circumstances after the date of a decision appealed against cannot be taken into account. She contends that the time of the redetermination, the Appellant was aware of the material deterioration in her condition. This was acknowledged in the letter intimating the redetermination but it was



said that this was not taken into account in the decision because it occurred in July 2023. The Respondent contends that this approach was incorrect and that on becoming aware of the possibility of a change of circumstances, Regulation 48(a) of the ADP Regulations is in the following terms:

The Scottish Ministers must make a determination of an individual's entitlement to Adult Disability Payment, without receiving an application, where the individual has an ongoing entitlement to Adult Disability Payment and they become aware—

- (a) of a change of circumstances, whether or not notified by the individual in accordance with section 56 of the 2018 Act, or where the Scottish Ministers become aware that a determination of an individual's entitlement was made in ignorance of a material fact, which would possibly result in an alteration to the component or rate of Adult Disability Payment payable to the individual or which is likely to mean that the individual is no longer entitled to Adult Disability Payment,

The appellants contend that required the Appellant to conduct a determination without application and that the effect of section 49 of the 2018 Act is that the FTS is in the same position. They submit that the guidance produced by the Appellant on redeterminations supports this argument. In oral submissions it was contended that to decide otherwise would lead to unnecessary procedure and delay. A decision would require to be made on an appeal taking no account of circumstances known and then the process would have to start over again with a determination taking account of those circumstances. This would result in delay and additional expense.

Decision

6. A key issue is whether the combined effect of section 49 of the 2018 Act and ADP Regulation 48 means that the latter applies to the FTS in determining the entitlement of an individual in the course of an appeal or only to the Appellant when making a

Upper Tribunal for Scotland



determination. In this regard, both parties refer to the FTS stepping into the shoes of the Respondent when considering an appeal. To consider this, it is necessary to examine the obligations of the Appellants and the FTS in relation to taking decisions.

7. In terms of Chapter 3 of the 2018 Act the Scottish Ministers are required to make determination on receipt of an application or when one is required under Regulations made under the Act (section 37). Regulation 49 of the ADP Regulations falls into the latter category in that it requires that a determination is made in the absence of an application *inter alia* then they become aware of a change of circumstances. Once a determination is made, if dissatisfied the individual may request the Scottish Ministers to re-determine entitlement. If that is done, the Act places obligations on the Scottish Ministers to make the re-determination (section 43). If the individual is not satisfied with the redetermination or a redetermination is not made within the stipulated time frame, the individual may appeal to the FTS (section 46) which will then be required to make a decision. Section 49 makes express provision for what powers are available to the FTS may do on hearing an appeal in respect of ADP. Viewed in that context, it is apparent that the power in section 49(b) is intended to make it clear that if the FTS considers the appeal to be well founded, it can determine the entitlement itself rather than merely quashing the existing decision and remitting it back to the Scottish Ministers. While this entails that the FTS should assess the correct entitlement, I do not consider that it is correct to characterise this as meaning that the FTS must stand in the shoes of the Scottish Ministers in the sense of making the FTS subject to all the obligations that are incumbent on the Scottish Ministers. Section 49 is not couched in terms of imposing obligations on the FTS. Instead, it confirms the scope of its powers and, in particular, that if it does not wish to uphold the decision of the Scottish Ministers, it can make a decision itself.
8. This conclusion arises from the words of the Act and Regulation but is consistent with the roles of the various bodies. It is understand able that Regulation 48 imposes an obligation



to make a determination in the absence of an application on the Scottish Ministers. This obligation sits alongside the obligation to make determinations and redeterminations in response to applications. It is hard to see why such an obligation would be placed on the FTS, an appellate body. It is not equipped or staffed to fulfil the duty to carry out an assessment of entitlement when it becomes aware of a relevant change of circumstances. It would also lead to a situation in which it would be making a first decision to which there would be no right to a redetermination and from which the right of appeal – to the Upper Tribunal – would be limited.

9. While the above conclusion means that FTS is not obliged by Regulation 48 to make a redetermination, the issue remains of that was the correct determination of entitlement in the appeal that was made. The appeal followed the redetermination and the issue is that entitlement should have been found due. In its decision, the FTS concluded that the appellant's condition has deteriorated by 28 July 2023, the time she applied for re-determination (Reasons, paragraph 8). This meant that the entitlement was to increased benefit.

10. The Tribunal rejected the appellant's submission that it was not possible to take into account circumstances after the original date of decision. As both parties noted, there is no express provision to the effect that circumstances after the original decision cannot be taken into account. It can be said that the use of the term "re-determination" suggests that it is necessary to look back to the time of that original decision and, as the appeal is against the redetermination, it too must look back to the original decision. That is consistent with the Appellants' guidance in relation to redeterminations. It is, however, at odds with the terms of section 48. The purpose of that provision is clearly to ensure that the assessment of entitlement remains up to date. It is not dependent on the applicant taking any steps and is instead an obligation on the appellants. This means that at the time of the redetermination, the appellants were under a duty to re-determine the application *and a*



duty to make a determination under Regulation 48(a) taking into account the new circumstances. In that situation, it would be highly artificial and at odds with the apparent intention behind Regulation 48 that a decision should be taken on a basis which no longer reflects the up to date entitlement.

11. In view of the above, I conclude that the determination made by the FTS was one which it did have the power to make and the appeal is refused.

Member of the Upper Tribunal for Scotland

Conclusion

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