Pearson v Secretary of State for Defence [2024] EWCA Civ 150 – The AFCS considered by the Court of Appeal

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Introduction

1. In January, 3PB's Tom Webb appeared for the successful appellant in the Court of Appeal in the matter of **Pearson -v- Secretary of State for Defence [2024] EWCA Civ 150**. In this article, Tom discusses the case and the AFCS itself: required reading for those dealing with cases concerning current and former members of the Armed Forces.

The Armed Forces Compensation Scheme (AFCS): What is it?

2. Perhaps surprisingly, for hundreds of years there have been schemes of one form or another, designed to compensate those injured whilst serving in the armed forces. Such schemes gained increasing formality in the aftermath of the World Wars, coming to be known as 'War Pensions'.

3. In 2005, the 'Armed Forces Compensation Scheme' came into being[1]. This is a 'no-fault' scheme designed to compensate service men and women injured or made ill through service. The AFCS most recently underwent a significant update in 2011 and is reconsidered periodically.

4. Many PI practitioners will be aware of the better-known 'CICA' scheme which is drawn along broadly similar lines.

5. Those affected are entitled to an AFCS award if they can prove on the balance of probabilities that:

    a. They have a qualifying condition and

    b. It is wholly or predominantly attributable to service in the forces.

[1] By virtue of the Armed Forces (Pensions and Compensation) Act 2004

6. If those hurdles are successfully navigated, the claimant's injury falls to be assessed in line with various tariffs. It is similar to the process of assessing injuries against the Judicial College Guidelines. This determines the lump sum to be awarded.

7. In addition to the lump sum, injuries at the more severe end of the various tariffs, also qualify for a 'Guaranteed Income Payment'; a tax-free monthly-payment running from discharge for life. This can add significantly to the overall financial value of a claim, particularly for younger service members.

How does it work in practice?

8. A claim can be made whilst serving or following discharge. The time-limit provisions can be rather complicated, but in most cases the long-stop date will be seven years after injury or onset of illness.

9. Claims are made by way of application to Veterans UK, which administers the scheme on behalf of the Secretary of State for Defence. A decision is made on paper.

10. If dissatisfied with the decision (either in respect of the level of award, or in respect of whether an award is made at all) an appeal lies to the First-tier Tribunal (War Pensions and Armed Forces Compensation Chamber). The matter will be heard by a panel of three: a legally qualified member, a medical member and a service member (somebody with experience of serving in the forces). It is a re-hearing, rather than a review of the original decision. Subject to compliance with its procedural rules, the FtT is free to take its own decision.

11. An appeal from the FtT lies to the Upper Tribunal. The UT exercises the usual appellate jurisdiction, namely dealing with errors of law or serious procedural irregularity only. Frequently, although not exclusively, the UT decides matters on paper and without a hearing.

12. Further appeal lies to the Court of Appeal and ultimately the Supreme Court.

13. It is beyond the scope of this article to deal with the various procedural requirements at each stage, but there are comprehensive rules that apply and it will be important for practitioners to familiarise themselves with these when dealing with cases.

14. It is also important to note that the FtT is a 'no costs' forum; it has no jurisdiction to make a costs award to a successful appellant.

What happened in Pearson?

15. Dr Pearson had been a high-ranking ENT Surgeon Commander in the Navy. He joined the service in 1990 and progressed through the ranks. Alongside his Navy clinical work, Dr

Pearson worked in the NHS, sat on committees and performed research. The FtT found that he had had an "impressive" career and was "highly intelligent and very well qualified"

16. By around 2009, Dr Pearson's Navy work had impacted upon his mental health. A diagnosis of Depressive Adjustment Disorder followed. Over the coming years Dr Pearson scaled back his work commitments but ultimately was unable to return to his duties. In 2017, Dr Pearson was medically discharged.

17. By that time Dr Pearson had started working an average of one day per week as a medical member in the First-tier Tribunal (Social Entitlement Chamber). Following discharge from the Navy, this became Dr Pearson's sole source of work.

18. Dr Pearson applied for an award under the AFCS. It was accepted from the outset that his condition was attributable to service. The dispute concerned the level of award, with the applicable 'Mental Disorders' tariff (Table 3) proving difficult to interpret. Throughout the proceedings, the question was whether Dr Pearson's functional limitation was 'moderate' or 'severe'. The footnotes to the tariff provide the following definitions:

Item 1: Footnote (a) *"Functional limitation or restriction is **severe** where the claimant is unable to undertake work appropriate to experience, qualifications and skills at the time of onset of illness and over time able only to work in less demanding jobs"*.

Item 2: Footnote (b) *"Functional limitation or restriction is **moderate** where the claimant is unable to undertake work appropriate to experience, qualifications and skills at the time of the onset of the illness but is able to work regularly in a less demanding job."*

19. What is immediately evident is that the descriptors do not flow easily from one to the next. The 'moderate' descriptor appears to be concerned with regularity of work, whilst the severe descriptor makes no reference whatsoever to regularity. So, how to distinguish between them?

20. Both the FtT and the UT recognised the difficulty, but ultimately decided that regularity of work must be the key distinguishing feature. At §26 the UT judgment:

"The use of the work [intended to be 'word'] *'regularly' in footnote (b) must be taken to have been deliberate and intentional. Footnote (a) must, therefore, be read as not including jobs that might fall within footnote (b) as being ones that a claimant is able to do 'regularly'. To read otherwise is to ignore Parliament's deliberate use of the word 'regularly' in footnote (b) and to omit it in footnote (a)."*

21. And further at §29:

"Once the FTT had determined that the Appellant's work as a fee paid medical member in the First-tier Tribunal was 'regular' (as to which see further below), it was not only entitled, but was compelled to conclude that Item 2 applied".

22. At the heart of Dr Pearson's appeal to the CoA, lay the contention that this was an error of law; that it was wrong to conclude that a finding of regularity automatically precluded eligibility for an award within the severe descriptor. Regularity was (at most) but one factor to be weighed into the balance; the other being whether the nature and / or hours of the work were over time becoming increasingly less demanding. Which is the more important factor in any given case was and is a matter of judgment for the tribunal: but both must be considered.

23. The Court of Appeal (Holroyde LJ, Macur LJ, W.Davis LJ) agreed. The judgment confirms that what is required is a broader consideration of capacity for work, rather than solely regularity. At §46:

"Given how closely the terms of footnotes (a) and (b) coincide, there is clearly an overlap between them, and they are not mutually exclusive. For that reason, it is in my view inappropriate to adopt a rigid approach to the footnotes, and to view them as definitive of all cases which can come within Item 1 and all cases which can come within Item 2. Such an approach would inevitably lead to arbitrary and irrational results. It would, for example, assess a claimant, whose mental disorder had reduced him or her from a high-achieving role to a capacity for only a low level of menial work, as suffering no more than moderate functional limitation or restriction, merely because the menial work could fairly be described as "regular"."

24. And at §47:

"Where a claimant's circumstances can be said to come within the terms of more than one footnote, the decision-maker or Tribunal must make an evaluation of fact and degree to determine which category is the more appropriate. In such a situation, the footnotes should in my view be read as indicative of circumstances which would place a claimant in a particular category, rather than as definitive statements of circumstances which inevitably place a claimant into a particular category. Depending on the facts of a particular case, the decision-maker or Tribunal may have to decide which of two relevant considerations – the course or trajectory of a claimant's ability to work since the onset of his or her mental disorder, and his or her ability to work regularly in a less demanding job – is the more significant in performing the task required by Article 16(1)(b)."

25. Whilst acknowledging that the writer has a certain interest in supporting the CoA's decision, it would seem that the reasoning here is logical. During the hearing, there were plenty of hypothetical scenarios considered. On either the FtT / UT or the appellant's

interpretation, there are likely to be difficult cases and odd results. Most challenging of all though, is the question of quite what amounts to working 'regularly' anyway. Is it three times per week? Once per week? Once per month? Once every six weeks? It is at least arguable that *any* formal working arrangement is likely to have some degree of regularity. Noting that there is a separate descriptor covering inability to work at all, it is difficult to see how that 'severe' descriptor could ever apply if regularity is the sole distinguishing feature between the categories. Thus a broader consideration enables decision makers the room to make an award without being limited to the almost unanswerable question of how (ir)regular work must be in order to give rise to an award under the 'severe' descriptor.

26. It will be interesting to see what, if anything, comes next as a result of the **Pearson** decision. Article 59 of the AFCS gives the Secretary of State the power to review and change any decision made in ignorance of, or mistake as to, the law. Might previous decisions under the 'Mental Disorder' tariff therefore fall to be reconsidered? This has potentially significant financial implications for hundreds, if not thousands, or service men and women with awards concerning mental health. Does the Minister have the resource, or indeed the inclination, to commit to such a review process?

27. Further still, in the event of a *refusal* to increase an award on review, there is an interesting question as to whether FtT would (or will) have jurisdiction to hear an appeal against that decision. In similar circumstances in social security law, this has proven to be a particularly thorny issue: see **GJ v Secretary of State for Work and Pensions (PIP): [2022] UKUT 340 (AAC)**.

28. Accordingly, whilst there is some clarity as to the tariff, the longer-term impact remains to be seen. It may be that a re-draft of the tariff would be the next logical step.

Why do I need to know about this?

Those representing service men and women need to be aware of the AFCS. There is no requirement for negligence and so it can provide a route to at least *some* compensation, even in cases where a claim in tort may prove unsuccessful.

It is also worth noting that any payment in damages is to be taken into account when making an award under the scheme (Art.40) and doubtless vice versa so as to prevent double-recovery. When considering a claim in negligence, it will be necessary to take instructions as to whether there has been (or will be) any AFCS award.

Tom Webb, instructed by Parker Bullen LLP, represented Dr Pearson in the Court of Appeal. Tom is a member of 3PB's personal injury, clinical negligence and costs teams. He has

represented service members in a variety of War Pensions / AFCS claims, both at the FtT and on appeal.

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