



DECISION OF

Lord Young

**ON AN APPEAL
IN THE CASE OF**

JJ

Appellant

- and -

Social Security Scotland,
per Anderson Strathern,

Respondent

FTS Case reference: FTS/SSC/AE/23/00647

11 October 2024

Decision

I refuse the appeal and uphold the decision of the First-tier Tribunal for Scotland (FTS) dated 30 January 2024.

Introduction

1. The appellant applied for Adult Disability Payment (ADP) on 21 November 2022 on the basis that he had developed a heart condition which affected his daily and mobility activities. The principal symptoms which he described in the ADP application form were tiredness and breathlessness. By notice of determination dated 20 April 2023, the respondent declined to make an award of ADP having concluded that the appellant was entitled to 0 points for daily activities and 4 points for mobility activities.



2. The appellant applied for a redetermination on 24 May 2023 at which time he referred to certain other symptoms including back pain and some difficulties in relation to toileting. The re-determination dated 24 July 2023 awarded 4 points for daily activities (being two points for preparing food and two points for washing & bathing) and 4 points for mobility. These points were still insufficient for an award of ADP to be made. The appellant appealed to the FTS. The respondent's appeal response invited the FTS to make its own determination of the appellant's entitlement to ADP while also contending that the appellant was not entitled to an award. The respondent's appeal response contended that the appellant was entitled to 6 points for daily activities and 4 points for mobility activities.

3. The hearing before the FTS took place by teleconference on 26 January 2024. FTS decision was issued on 30 January 2024. In that decision, the FTS decided that the appellant was not entitled to ADP on the basis that the points awarded at re-determination were appropriate. In particular, the FTS did not agree with the respondent's submission that points were appropriate in relation to daily activities 5b (toileting) and 6b (dressing and undressing).

Grounds of appeal

4. The appellant sought permission to appeal the decision of the FTS and advanced three grounds of appeal. The FTS refused two of those grounds of appeal but granted permission in relation to the third ground of appeal.

5. The ground of appeal on which permission was granted was in the following terms:-
"The tribunal...(c) intimated that the appellant would be awarded two more points and that this would result in an award of ADP".

6. This related to what it is alleged was said by a member of the FTS towards the end of the hearing. The appellant's contention being that "near the end of the teleconference Ms W had asked me of my toileting issues and confirmed the use of pulling myself up from the toilet bowl via the radiator attached to the adjacent wall and she would review the points awarded to allocate 2 more resulting in a 'standard award' for ADP." Ms W was the disability qualified member of the FTS.

7. In granting permission on this ground, the FTS said:-

"as regards (c) above there is a plain error in the decision notice dated 26 January 2024 that echoes the appellant's submission. (If in the course of the tribunal, it was said that points sufficient to merit an award of ADP would be awarded, this should not have been said, and if said, should not have been allowed to stand – this writer cannot comment on whether this was said, at this remove). This would however, if said, justify this decision being overturned on appeal.



Question for the Upper Tribunal – Whether, in the event that an appellant is told, in the course of an appeal that the appellant will be successful in the appellant’s appeal, and in the event the appellants is not successful, the decision should stand?

The answer may be thought obvious – it should not stand. If, in fact (and this writer does not know if it is a fact) the appellant was told he was entitled to ADP, then, it may be, this appeal will be allowed.”

8. The appeal to the Upper Tribunal took place on the papers. I was provided with a response to the Appeal by the respondent and a brief response to that document from the appellant.

Discussion

9. Somewhat unusually, the FTS has granted permission on a point of law where there is a preliminary factual matter which needs to be resolved. Rather than offer its opinion on that factual matter which concerns what was or was not said by a member of the FTS during the hearing on the 26 January 2014, the FTS has taken a position of agnosticism. In granting permission, the FTS does state that if it did advise the appellant that he would be awarded sufficient points for an award to be made, it should not have been said and it should not have been allowed to stand.

10. In its response to the present appeal, the respondent explains that the recording of the hearing has been listened to and that what occurred was that the respondent made a submission that the appellant ought to be awarded a further 2 points in relation to toileting which would, along with the other points which the respondent considered should be awarded, have resulted in an award of ADP. However, the FTS members did not indicate during the hearing that the appellant was entitled to these further 2 points. The appellant has misinterpreted what was being submitted by the respondent as being a statement made by the FTS. Although the appellant does not, in terms, accept this. His own response to this appeal does not engage with the respondent’s explanation on re-listening to the recording. Nor does his response explain why what might have been said by a FTS member should result in the appeal being allowed.

11. The respondent’s explanation of the recording makes sense. It is clear from the decision of the FTS that the FTS did not accept aspects of the respondent’s submission in relation to certain points which the respondent considered could be awarded. The FTS was entitled on the basis of the evidence presented to come to a different decision on the appellant’s entitlement to points for particular activities. The respondent’s explanation also fits with the reaction of the FTS that such a statement ought not to have been made. I am accordingly not persuaded that the FTS gave any indication to the appellant at the hearing that he would be awarded sufficient points for an award of ADP. That is a sufficient basis to refuse the appeal.

12. I have not considered it appropriate or necessary to listen to the recording of the hearing itself. In the first place, being unfamiliar with the individuals involved with the hearing, I have



some doubt whether listening to an audio recording would assist me in determining who said what. In the second place, even if a member of the FTS made an unguarded comment which indicated that points would be awarded for a particular activity, that falls far short of a basis for allowing this appeal. The decision of the FTS is taken by the three members of the Tribunal. Each member takes part in the deliberations and has a vote on the ultimate decision. A comment by a single member during the hearing cannot, and should not, be taken by a party as amounting to an indication that a particular decision will follow. Where the FTS does not issue its decision immediately at the conclusion of the hearing, it is always open to the tribunal to issue a decision different from how the members' minds might have been thinking at the conclusion of the hearing. That is an inherent part of the decision making process where subsequent reflection and discussion between the members may alter members' views and votes.

13. The FTS, when granting permission to appeal, states that it would be wrong to have indicated to an appellant during the hearing that he would succeed. That is perhaps framed in too absolute terms. It is open to the FTS to issue an oral determination at the end of the hearing (see rule 28.1). Further, there may be occasions during a hearing that in order to make best use of the time available, the FTS might advise a party that the FTS accepts its position on a particular point and does not need to be addressed further on that. This is often a valuable part of case management by the FTS and should not be discouraged. It should, of course, only relate to matters which the members of the FTS agree needs no further submission on. If, having given a party such an assurance, the FTS were to issue a decision containing a different decision on that issue, the party may well have a good appeal challenge on the basis that it has been denied a fair hearing. It is not suggested that we are in that territory in the present appeal. A further way in which a FTS may appear to give an indication that a particular argument may be successful, is in the way that a legal proposition or chapter of evidence may be tested during the hearing. It is not uncommon during hearings that a decision maker may seek to test an argument by adopting a hypothesis which appears to be supportive of one party to that hearing. This can be a useful tool for the decision maker trying to focus the issue for the parties in argument. There is a risk that the hypothesis may be misinterpreted by a party as indicating acceptance that their argument will prevail. However, they would be wrong to do so. A misunderstanding by the party as to what the FTS were doing in testing an argument can not amount to a lack of a fair hearing.

Conclusion

I find that the FTS did not provide any indication to the appellant that he would be awarded additional points for daily activities and, as such, the factual premise on which permission to appeal was granted has not been established. The appeal is refused.

Upper Tribunal for Scotland



*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.*

Lord Young
Member of the Upper Tribunal for Scotland