

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Upper Tribunal case no's: CE/2265/2266/2017

Before: E Mitchell, Judge of the Upper Tribunal

Date of Hearing: 30 April 2019

Venue: Leeds Magistrates' Court

Representation: The Appellant Mr W attended in person
Miss Wilson (of counsel) for the Respondent Secretary of State for
Work & Pensions (instructed by the Government Legal Department)

Decision: The decisions of the First-tier Tribunal (30 May 2017, Scarborough, file reference SC 010/17/00285 & SC 010/17/00286) did not involve any material errors on points of law. Under section 11 of the Tribunals, Courts and Enforcement Act 2007, these appeals are **DISMISSED**.

REASONS FOR DECISION

1. On 3 October 2016, Veterans UK, acting for the Secretary of State for Defence, informed Mr W that, in response to his application for immediate payment of his deferred service pension, he had been awarded a service pension of £4,203.41 per annum from 5 January 2015 as well as a terminal gratuity of £12,610.23.

2. A letter to Mr W dated 5 October 2016, from 'Equiniti Paymaster', stated "this letter is to tell you about the payment of your Armed Forces Pension". After giving details of payment dates, the letter informed Mr W that he could find out more about how his pension entitlement was calculated by writing to a particular office of Veterans UK.

3. On 20 October 2016, Mr W was paid arrears of his service pension (£7,248.53 gross; £5249.47 net).

4. On 8 February 2017, the Secretary of State informed Mr W that she had decided that he was entitled a reduced rate of income-related Employment & Support Allowance (ESA) for the period 23 January 2015 to 27 October 2016 "because you received a late payment of occupational pension". The Secretary of State also decided that, in consequence of the entitlement decision, Mr W was liable to repay some £5,000 in overpaid ESA.

5. The First-tier Tribunal dismissed Mr W's appeals against the Secretary of State's decisions.

Grounds of appeal

6. The Upper Tribunal's determination granting Mr W permission to appeal to the Upper Tribunal against the First-tier Tribunal's decision read:

“Why I have granted permission to appeal

2. Mr W's application describes graphically the effect of the Secretary of State's decision on his life and finances. I strongly suspect Mr W understands that I cannot grant permission to appeal simply for the reasons set out in his written application. Mr W's application does not disclose any arguable errors of law.

3. Having gone through the appeal papers myself, I conclude that there are two arguable errors on points of law in the First-tier Tribunal's decisions and I grant permission to appeal to the Upper Tribunal on those grounds.

4. The first ground of appeal is that, arguably, the First-tier Tribunal made an error of law by failing to consider whether Mr W's pension was a war disablement pension. If it was, a £10 weekly disregard should have been applied (i.e. £10 not taken into account in calculating Mr W income for Employment & Support Allowance purposes). The war disablement pension disregard is found in Schedule 8.17 to the ESA Regulations 2008.

5. The second ground of appeal is that the First-tier Tribunal arguably gave inadequate reasons for its decision. The Tribunal upheld a Secretary of State decision that relied on section 74 of the Social Security Administration Act 1992. During the relevant period it seems that Mr W was entitled to both income-based and contributory ESA. Section 74 applies to income-based ESA. Section 6 of the Welfare Reform Act 2007 applies where a claimant is entitled to both a contributory allowance and an income-related allowance. I cannot find within the papers any explanation of the division of Mr W's ESA between an income-based allowance, to which section 74 of the 1992 Act applies, and a contributory allowance, to which section 74 does not apply. Arguably, this should have been explained.”

Ground 1 – whether Mr W was in receipt of a war disablement pension

7. At the hearing of this appeal, the status of the pension referable to Mr W's military service was clarified. Mr W agreed with the Secretary of State's counsel that his pension was not

awarded because he had suffered a service injury. It was a ‘standard’ armed forces pension but, it seems, was put into payment early due to his ill-health (in technical terms, as described in the DWP’s written submissions, “early payment of preserved pension in case of ill health”). In the light of Mr W’s concession, I am satisfied that his pension was not a “war disablement pension” as defined by regulation 2(1) of the Employment and Support Allowance Regulations 2008 (the definition is “any retired pay or pension or allowance payable in respect of disablement under an instrument specified in section 639(2) of the Income Tax (Earnings and Pensions) Act 2003”). Ground 1 does not therefore succeed.

Ground 2 – Contributory and income-related allowance

8. At the hearing of this appeal, the Secretary of State’s counsel fairly conceded that the Department for Work & Pensions’ explanation of Mr W’s National Insurance record and its relationship with his ESA entitlement had not always been consistent. However, counsel went on to submit that, following Departmental investigations, it was clear that Mr W had not paid (as opposed to being credited with) National Insurance contributions since tax year 2006/07. That meant he could not have been entitled to contributory-based ESA during the relevant period (January 2015 to October 2016). On that basis, the DWP were entitled to act under section 74 of the 1992 Act. At the hearing before myself, Mr W said he could not be entirely certain but thought the DWP were probably correct that he had not actually paid National Insurance contributions since 2006/07.

9. The DWP’s stance was supported by H.M.R.C. data supplied on this appeal. The data showed that, in each tax year from 2006/07 to 2016/17 Mr W was credited with National Insurance Contributions (possibly as a result of him having been entitled to Incapacity Benefit) but had not himself paid National Insurance Contributions. Given the absence of any real objection from Mr W, and that it is unlikely that H.M.R.C. supplied inaccurate data, I am satisfied that the H.M.R.C. records supplied on this appeal are accurate.

10. Schedule 1 to the Welfare Reform Act 2007 provides for the National Insurance-related conditions for contributions-related ESA. The first condition, in Schedule 1(1), includes “the claimant has actually paid Class 1 or Class 2 contributions in respect of one of the last two complete tax years”. Since Mr W’s ESA award began in 2013, I am satisfied that he was not entitled to a contributions-based award of ESA. The First-tier Tribunal could not have materially erred in law by failing to enquire into whether the DWP were correct to proceed under section 74 of the 1992 Act.

10. Neither ground of appeal succeeds. This appeal is therefore dismissed

(Signed on the Original)

E Mitchell
Judge of the Upper Tribunal
28 July 2019