



DECISION OF

Lord Young

**ON AN APPEAL
IN THE CASE OF**

Social Security Scotland
per Scottish Government Legal Directorate

Appellant

- and -

MW

Respondent

FTS Case Reference: FTS/SSC/AE/23/00744

Representation for appellant: Mr David Blair, advocate; Mr Graham Crombie and Ms Shy Zvouloun, Scottish Government Legal Directorate

No appearance for the respondent

4th December 2024

Decision

The Upper Tribunal for Scotland (UTS) in terms of section 47 of the Tribunals (Scotland) Act 2014 quashes the decision of the First-tier Tribunal (FTS) dated 10 June 2024 and remits the respondent's appeal to a re-hearing before a differently constituted First-tier Tribunal.



Introduction

1. The critical issue in this appeal is what amounts to a valid request for a re-determination in terms of section 41(1) of the Social Security (Scotland) Act 2018 (“the 2018 Act”). For reasons set out below, the FTS decided that the respondent did not make a valid request for a re-determination so her subsequent appeal to the FTS fell to be dismissed. Two initial observations might be made in respect of this decision. In the first place, although the respondent thought she was making a request for a re-determination and the appellant treated it as such, the FTS has decided that both parties were mistaken. In the second place, the respondent is receiving an adult disability payment (“ADP”) at a level which she considers is too low but which she cannot appeal against, while the appellant is obliged to make ADP payments at a level which it considers too high but which it cannot review until 2027.

Background Facts and Procedure up to the FTS Hearing

2. The respondent suffers from a number of medical conditions. She completed an application form for ADP on 29 August 2022 and provided further information to the appellant in the course of a telephone call on 11 May 2023. On 22 May 2023, the appellant issued a notice of determination awarding ADP calculated on the enhanced rate for the daily living component and the standard rate for the mobility component. Absent any change in circumstances, the next review date for the respondent’s entitlement was set for 29 August 2027. The respondent was not satisfied with this determination. In particular, she was unhappy with the failure to award any points for the activity of “planning and following a journey” which had the consequence that the mobility component was assessed at the standard rather than enhanced rate.

3. On 1 June 2023, the respondent completed a re-determination application form. This form stated:-



“If you disagree with our decision about your Adult Disability Payment application, you can ask us to look at our decision again. This is called a re-determination. It’s where a new team at Social Security Scotland who weren’t involved in making our original decision takes a fresh look at your application, along with any new information you want to give us.

They will decide if:

- You should get Adult Disability Payment
- You are being paid the right amount....

This decision will replace the most recent decision we made about your Adult Disability Payment.

You can ask us to look at our decision again by:

- filling in this form and posting it to us in the prepaid envelope provided
- Calling us on 0800 182 2222....”

4. The application form contained a section headed “Why you disagree with our decision”. The respondent ticked two boxes indicating that she considered that the amount of ADP should be increased and that she did not think all information had been considered by the appellant. Within a box that allowed an individual to provide further detail on why they disagreed with the determination, the respondent explained that she did not understand the basis for the appellant’s decision on the “planning and following a journey” aspect of the determination and she provided more information on the difficulties that she experienced in that regard.

5. A re-determination decision was issued by the appellant on 31 July 2023. It no doubt came as a shock to the respondent. Her entitlement to daily living component was reduced to the standard rate and it was determined that she had no entitlement to a mobility component. A comparison of the determination and re-determination decisions shows that the number of points for daily living activities reduced from 14 points to 10 points, while the points awarded



for mobility activities reduced from 10 points to 4 points. The respondent appealed to the FTS on 23 August 2023.

6. An appeal hearing fixed for 9 February 2024 was adjourned at the respondent's request to obtain copies of her medical records. The appeal came before a differently constituted FTS on 12 March 2024 when a further adjournment was granted to enable the respondent to obtain the medical records and to secure representation for the hearing. On that date, the FTS *ex proprio motu* made an order identifying a number of issues upon which it wished to be addressed regarding the nature of the re-determination jurisdiction. The FTS directed the appellant to lodge a written submission in advance of the adjourned hearing setting out its response to seven questions about the nature of the re-determination jurisdiction under the 2018 Act.

The FTS Decision and submissions before the UTS

7. The hearing proceeded before the FTS on 20 May 2024. The respondent represented herself. The FTS heard legal arguments in relation to the jurisdictional points previously raised. In addition, it heard evidence and argument on the merits of the appeal. The FTS dismissed the appeal on the basis that it lacked jurisdiction to hear the appeal.

8. The FTS accepted much of the appellant's analysis of the re-determination jurisdiction. In particular, it accepted that a re-determination involved a fresh decision on the individual's entitlement. The re-determination would supersede the earlier determination. Therefore, an individual would put at risk those parts of the original determination that they were content with if they sought a re-determination. However, the FTS concluded that, properly understood, the respondent had not made a valid request for a re-determination. The reasoning of the FTS can be summarised as follows:-

- (a) s.41(3) & (4) of the 2018 Act did not provide the only two requirements for a valid request for a re-determination [see paras [13]-[17)];



- (b) the intention of the individual making the request for a re-determination was also a critical element for a request to be valid, (see paras [24] & [47]);
- (c) if the intention of the individual submitting the request was that the original determination should only be re-determined in part, that would not be a valid request under section 41(1), (see para [22]);
- (d) the printed forms produced by the appellant were not, in themselves, sufficient to evidence an intention on the part of the individual completing those forms that they were seeking a re-determination of their whole entitlement, (paras [25]-[39]);
- (e) once regard was had to the respondent's written reasons in her re-determination application and to her application to appeal to the FTS, it was apparent that her intention was to seek a partial re-determination which was not a valid request under s.41 (paras [40]-[47]);
- (f) in the absence of a valid re-determination request, there was no valid re-determination decision. Absent a re-determination decision, the FTS had no jurisdiction to hear the respondent's appeal so the appeal fell to be dismissed [para [48]) and the original determination dated 22 May 2023 remained the operative one; and
- (g) although not critical to its decision, the FTS also set out a number of other concerns relating to the re-determination process (see para [49])

9. The FTS granted permission to appeal on a limited number of points that were set out in paragraphs 16-20 of the appellant's application for permission to appeal.

10. The appeal before the UTS took place in the absence of the respondent. She had originally hoped to attend the appeal hearing but unfortunately that was not possible. She did produce a written document that helpfully summarised her thoughts about the issues under discussion and I have had regard to that. That document also highlighted the very real difficulty for individuals in her position of securing suitable representation before both the FTS and UTS.



11. Mr Blair, counsel for the appellant, observed that the FTS had accepted the appellant's arguments on the majority of the questions posed concerning the re-determination jurisdiction. Where, according to the appellant, the FTS erred in law was in considering what was required for a re-determination request. Mr Blair developed his submissions based on four broad propositions namely:-

- (a) the FTS identified that a request for a re-determination required consideration of an individual's intention which, the appellant contended, cannot be found in the legislation;
- (b) the FTS's approach to construction enabled the respondent to benefit from her own unilateral error of law. The general rule is that individuals are not to be excused the legal consequences of their own juristic act where they have not anticipated the legal consequences of that juristic act, (*Bowmaker Ltd v Tabor 1941 2 KB 1*, per Goddard L.J. at p. 5);
- (c) the effect of the FTS decision is to impose a significantly more burdensome approach upon the appellant which is not advantageous to the system as a whole; and
- (d) in purporting to ameliorate a situation that the FTS perceived to be unfair to the respondent, the FTS decision created unfairness in other ways.

Discussion

12. Section 41(1) of the 2018 Act provides an individual with the right to request a re-determination of their entitlement to a particular type of assistance. Section 41(2) states that a request "is valid only" if the conditions set out in sub-sections (3) and (4) are satisfied. The first requirement is that the request is made "in such form as the Scottish Ministers require". The second requirement is that the request is made within such time period as is prescribed in regulations or, if made out with that time period, there is a good reason for any late request and the late request is still made within one year of being informed of the original determination. It can be seen that in relation to the form of the request, sub-section (3) does not require the form to be prescribed by regulations. The only requirement in relation to an acceptable form of request is



that the Scottish Ministers must publicise any requirements for the time being, (sub-section (5)). Thus, the express wording of the legislation contains only two requirements for a valid request namely (a) being in a form publicised by the Scottish Ministers, and (b) being made within a prescribed time period. Section 41 is silent as to the intention or objective of the individual making the request, or the appellant being satisfied that the individual appreciates the nature of the re-determination process.

13. The FTS referred to the intention of the person making the request as being the “key consideration” (see para [24]) or the “guiding concept” (see para [47]). The FTS concluded that the word “request” in s.41 fell to be construed as requiring that the individual’s intention was for the whole of their claim to be re-determined. At paragraph [24] of the decision, the FTS appear to draw a contrast between an “application” and a “request” with the concept of intention being central to a “request”. This is not developed further but it is difficult to see why a “request” more readily imports the concept of intention than an “application”. Both are conscious actions by the individual asking the appellant to assess their legal right.

14. I consider that the FTS have added an unnecessary gloss onto the statutory language by interpreting the word “request” in the manner suggested. It would be fair to ask, what purpose the legislature was seeking to advance by embedding this concept of intention as explained by the FTS before a request would be regarded as valid?

15. One possible purpose for focusing on the individual’s intention when considering if a valid request has been made would be to remove the risk of an individual unintentionally triggering the re-determination procedure. So, for example, an individual seeking more information or a further explanation might be mistakenly assumed to be asking for a re-determination. For that reason, it might be argued that by focusing on the individual’s intention, that risk is removed. But it is harder to see why the legislature would seek to deal with that mischief by focusing attention on the individual’s intention which is an inherently difficult



concept to establish with any degree of certainty. The risk of mistakenly triggering a re-determination is negligible given the terms of section 41(3) that require the request to be in a publicised form acceptable to the appellant. It was explained to me at the hearing that the appellant currently accepts requests made by completion of the pre-printed re-determination form; completion of the online re-determination form; or via a telephone service that involves the appellant's employee going through the pre-printed form with the caller and completing it on their behalf. There is no need to find that a "request" requires consideration of the individual's intention simply to deal with the risk of a mistaken triggering of the re-determination procedure.

16. The FTS considered that the intention of the individual was critical to a request in order to deal with the situation where an individual has misunderstood the scope of the re-determination jurisdiction. It is conceivable that the legislature intended to provide a degree of protection to individuals from their own misunderstanding of the law although, it has to be said, that would be unusual. No authority was cited by the FTS in which a word or phrase was construed in a specific manner because the legislature's intention was discerned to require protection of individuals who might misunderstand the legal consequences of another part of the same statute. My own limited research has revealed no such authorities. It would be usual to expect parties to operate within the scope of the jurisdiction conferred by the legislation regardless of what their own understanding is or intentions are.

17. The FTS did not suggest that its approach to the construction of the word "request" would have any significant administrative advantages. Indeed, the FTS accepted that further administrative steps would fall to be taken because of its decision. At para 49(d), the FTS noted that even if the clearest warning were set out in the appellant's forms, there would be occasions where the appellant will need to check with an individual whether they wish to proceed with a re-determination. It can also be said that, on the basis of the FTS decision, all requests for a re-determination in which an individual puts forward some reasons for challenging the original determination will result in an additional administrative step whereby the appellant checks with



the individual what their intention is in relation to their claim as a whole. Indeed, it would appear that even where a re-determination application does not specify particular reasons for the request, the appellant will need to clarify what an individual's intention is if that individual has any level of monetary award from the original determination. Such additional administrative steps in a large proportion of claims is likely to add to the cost of the administration of ADP claims. It seems reasonable to anticipate that the conversations required and the proper recording of those conversations will be time intensive and will delay, to some extent, the processing of these claims. The additional administrative burden that results from the FTS's decision is a strong indication that the legislature did not intend that the validity of a request depended on the ascertained intention of the individual submitting that request.

18. At paragraph [16] above, I considered whether the legislature could be said to have intended to provide a degree of protection for individuals who had misunderstood the nature of the re-determination jurisdiction. A further reason why the legislature is unlikely to have viewed a "request" as importing consideration of the individual's intention, is that the re-determination and appeal provisions in the 2018 Act assume a valid request. Any increase in the number of invalid requests will result in a greater number of individuals being deprived of their legal rights to challenge the appellant's decisions. As can be seen in the present case, the re-determination process is central to the FTS's own jurisdiction. Section 46(1) gives an individual the right to appeal to the FTS against a re-determination decision or where the appellant has failed to complete a re-determination within the requisite period. It is implicit for a right of appeal under s.46 that a valid request under section 41(1) was made by the individual. There is a further right to appeal under s.61 where the appellant did not action a re-determination request as it was not made in the correct form (s.61(1)(b)) or was rejected as coming too late without good reason (s.61(1)(c)). If an individual's intention were a critical requirement for the validity of the request, a misunderstanding as to the scope of the re-determination procedure would mean that the individual loses both their right to a re-determination and the right to appeal to the FTS. That is very unlikely to have been the legislature's aim. It would have the result that some of the most



vulnerable in society, including those suffering from mental health problems or the effects of social deprivation, lose their rights to challenge the original administrative decision if their intention does not happen to align with what is legally possible. It also follows from the fact that s.61 contains a specific right of appeal where the request for a re-determination was invalid due to its defective form or being out of time, but not for being invalid for any other reasons, is an indicator that the legislature only envisaged these two express requirements as affecting the validity of the request.

19. For the reasons discussed above, I cannot discern any clear reason why the legislature intended that a request under section 41(1) required consideration of the individual's actual intention in order for the request to be regarded as valid. The FTS sought some assistance for its conclusion from a consideration of the Social Security Charter. At paras [32]-[35] of its decision, the FTS considered the appellant's application and request forms against the backdrop of the Charter commitment to communicate clearly with individuals. The FTS concluded that the Charter commitment to communicate clearly with individuals had not been satisfied as these forms did not warn an individual of the risk of losing those parts of the original determination with which they were content. The FTS then proceeded at para [36] to state that the Charter is relevant to the competing constructions of s.41 and what is meant by a request in s.41(1). But it is difficult to see how the adequacy or otherwise of the communications in forms produced to give effect to the terms of the 2018 Act, can affect the proper construction of the word "request" in primary legislation. The legal question is what the legislature intended would amount to a valid request under section 41. The answer to that question cannot depend on what subsequent forms were produced by the appellant.

20. The FTS has fallen into error in its decision. The FTS has read into the legislation an additional requirement that does not appear within the statutory scheme. There is no requirement for a request to be valid that the individual's actual intention is to seek a re-determination of their whole claim. The only form of re-determination available under the 2018



Act is one of the whole claim and if an individual triggers the jurisdiction by making a timeous request in an appropriate form then the appellant must make that re-determination which will supersede the original decision.

21. It is clear that the FTS considered that the respondent was unfairly treated by the re-determination process in this case. The re-determination in her case significantly reduced her entitlement to ADP. I accept the findings of the FTS that she was unaware that that was a potential consequence of the re-determination and I accept that she had believed the re-determination would be limited in scope. However, it must be remembered that the re-determination was not the final decision in respect of the respondent's entitlement. She had a right, which she sought to exercise, to have her entitlement to ADP determined by the FTS. Fairness dictates that an individual will receive the appropriate level of ADP allowed by law for that individual's needs. That has yet to be finally determined in the respondent's case. If, as the respondent believes, her disabilities are such that she is entitled to the enhanced rate of ADP for both daily living and mobility activities then it is unfair that she currently receives a lesser amount and cannot pursue her appeal to the FTS. If, as the appellant believes, the respondent's legal entitlement is to a lesser amount than she is being paid under the original decision then it is unfair to the public purse that she receives in excess of her entitlement. Fairness, in terms of ensuring the right level of assistance is paid to the respondent, has not been achieved by the FTS's decision in this case but it should be achievable if her appeal proceeds before a newly constituted FTS.

22. It is unfortunate that the FTS did not proceed as it indicated at paragraph [7] of its decision. At paragraph [7], the FTS noted that it heard evidence on the merits of the appeal "in order that we could made a final decision on the appeal following the hearing, whatever the outcome of the legal argument". However, the decision dated 10 June 2024 did not contain the FTS's decision on the merits on an *esto* basis. If that had been done, it would have been possible for the UTS to allow this appeal and to give effect to the FTS's decision on the facts. However, as



it is, the respondent has not yet had her entitlement to ADP properly determined by the FTS and so it will be necessary to remit this matter back to a differently constituted FTS to make that final determination on the evidence.

23. There are two final observations that I wish to make. In the first place, this decision should not be taken by the appellant as a vindication of the wording in the re-determination form. While I do not consider that the form is misleading, I have little doubt that the form could be significantly improved in order to explain to an individual that a re-determination decision can reduce or remove points and/or payments awarded in the original decision. Secondly, I disagree with the FTS's observation at para 49(a) that the re-determination jurisdiction is discriminatory. The fact that individuals run different risks for different potential rewards depending on the original decisions made in their respective cases, does not mean that the legislation operates in a discriminatory way between such individuals. Each individual enjoys exactly the same rights to claim ADP and exactly the same rights to challenge the appellant's decisions on their entitlement. There is no discrimination just because one individual has nothing or little to lose by seeking a re-determination when compared with another individual.

Conclusion

24. The appeal is allowed and the decision of the FTS to dismiss the respondent's appeal is quashed. The respondent's appeal is to be re-heard before a differently constituted FTS.

*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.*

Upper Tribunal for Scotland



Lord Young
Member of the Upper Tribunal for Scotland