**Appeal No. UA-2024-001243-AFCS**
**NCN. [2025] UKUT 033 (AAC)**

*Anonymity: There having been no objection from the parties, the appellant in this case is anonymised in accordance with the practice of the Upper Tribunal described in Adams v Secretary of State for Work and Pensions and Green (CSM) [2017] UKUT 9 (AAC), [2017] AACR 28. The practice does not prevent publication by a party or anyone else of the identities of the individuals involved in the case. Anyone who wishes to be informed of the identity of the parties may make an application to the Upper Tribunal, and the parties will be given notice and an opportunity to object if such an application is made.*

**IN THE UPPER TRIBUNAL**
**ADMINISTRATIVE APPEALS CHAMBER**

**Between:**

**MJU**

**Appellant**

**- v -**

**SECRETARY OF STATE FOR DEFENCE**

**Respondent**

**Before: Upper Tribunal Judge Stout**
**Decided on consideration of the papers**

**Representation:**
**Appellant:** In person
**Respondent:** Paul Carolan, Veterans UK

*On appeal from:*
Tribunal: First-Tier Tribunal (War Pensions and Armed Forces Compensation Chamber)
Tribunal Case No: AFCS/00461/2023
Tribunal Venue: Birmingham (in person)
Decision Date: 28 January 2025

## SUMMARY OF DECISION

**WAR PENSIONS AND ARMED FORCES COMPENSATION (56)**
**56.5 Armed Forces Compensation Scheme**

The First-tier Tribunal erred in law in failing to give adequate reasons for rejecting the appellant's case that he had been "ordered" to have the dental treatment that had been one of the causes of his myofascial/atypical facial pain. A conclusion that the appellant

had not been given an enforceable order to have the treatment would in any event not be sufficient to determine whether the appellant's consenting to the treatment was 'caused by service' or not for the purposes of Article 8 of the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 (SI 2011/517) ("the AFCS Order"). The assessment of whether or not something is 'caused by service' is more nuanced than simply whether the thing that causes the injury is a result of someone following an enforceable order or not. In this case, it required, first, adequate findings of fact to be made about what happened between the appellant and his officer in advance of that appointment. Secondly, taking full account of the guidance in *JM v Secretary of State for Defence (AFCS)* [2015] UKUT 332 (AAC), [2016] AACR 3, the Tribunal needed to consider whether or not the appellant's consenting to undergo the treatment in the light of whatever happened between him and his officer was "caused by service".

The Tribunal also erred in law in perversely concluding that there was "no evidence" that the stress that had contributed to the appellant's pain was work-related. There was ample evidence in principle as to that causal link. The Tribunal needed to consider that evidence and provide adequate reasons for the conclusions it reached on the issue in the light of the evidence. The Tribunal would need when making that assessment at the remitted hearing to apply the guidance in *JM* that the AFCS Order provides for a no-fault scheme and there is no "thin skull" exclusionary rule, so that stress may be "caused by service" even if there has been no breach of duty by the forces or the injury is not one that would be suffered by someone of ordinary fortitude.

***Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.***

## DECISION

**The decision of the Upper Tribunal is to allow the appeal.** The decision of the First-tier Tribunal involved an error of law. Under section 12(2)(a), (b)(i) and (3) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside and remit the case to be reconsidered by a fresh tribunal in the light of this decision.

## REASONS FOR DECISION

### Introduction

1. The appellant appeals against the decision of the First-tier Tribunal of 13 March 2024, in which the Tribunal upheld the Secretary of State's decision that the appellant is not entitled to compensation under the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 (SI 2011/517) ("the AFCS Order") because his condition of myofascial/atypical facial pain was not predominantly caused by service.

2. A Statement of Reasons (SoR) was issued on 24 April 2024. Permission to appeal was refused by the First-tier Tribunal on 8 August 2024, but granted by me on 26 September 2024.

3. In his appeal form, the appellant identified five numbered grounds of appeal. I granted permission on all grounds, but observed in doing so that the appellant's grounds 2 and 3 did not really raise separate arguable errors to that identified by ground 1, but were further arguments in support of ground 1, while ground 4 added nothing material to the appeal. The grounds of substance, and the only grounds that I have needed to deal with in order to resolve this appeal, are therefore grounds 1 and 5, which are in summary:-

   *Ground 1* – That the Tribunal gave inadequate reasons for concluding that the appellant's filling repair on 1 February 2021 was not 'caused by service'; and,

   *Ground 5* – That the Tribunal reached a perverse conclusion that there was *"no evidence"* that any stress which contributed to the facial pain was service-related.

4. In response to the order I made when granting permission to appeal, the appellant provided further information/submissions identifying the medical evidence he relied on before the First-tier Tribunal in relation to ground 5 (together with more recent medical evidence that was not before the First-tier Tribunal). The Secretary of State then filed submissions responding to, and resisting, the appeal, to which the appellant has replied. Both parties have consented to my determining the appeal on the papers and I am satisfied that it is in accordance with the overriding objective to do so and that further oral submissions would not assist.

## Legal framework

5. Article 8 of the AFCS Order provides:

> **Injury caused by service**
> 8.—(1) Subject to articles 11 and 12, benefit is payable to or in respect of a member or former member by reason of an injury which is caused (wholly or partly) by service where the cause of the injury occurred on or after 6th April 2005.
> (2) Where injury is partly caused by service, benefit is only payable if service is the predominant cause of the injury.

6. Article 2(1) provides that "'predominant' means more than 50%".

7. Article 60 makes provision in relation to burden of proof as follows:-

> **Burden of proof**
> 1.-(1) Subject to the provisions of this article, the burden of proving any issue is on the claimant.
> (2) Where paragraph (3) applies there is a presumption in favour of the claimant unless the Secretary of State proves to the contrary.
> (3) This paragraph applies where-

> (a) a contemporary official record relating to a material fact which is relevant to deciding a condition for payment of benefit under Part 2 is missing; and
> (b) there is other reliable evidence to determine the material fact.
> (4) For the purposes of paragraph (3)-
> (a) "a contemporary official record" means a record, including an electronic record, held by the Secretary of State for Defence or the Defence Council;
> (b) "a material fact" need not be a decisive fact for the purpose of determining a claim under Part 2;
> (c) a record is missing where it has been-
> (i) lost and cannot be found after a diligent search; or
> (ii) destroyed.

8. By Article 61, the standard of proof is the balance of probabilities.

## The First-tier Tribunal's decision

9. The appellant is still serving in the RAF and accordingly there was no dispute that his case had to be considered under Article 8 (set out above) only and not also under Article 9 (injury made worse by service) as Article 9 only applies to former members of the forces.

10. The appellant's case was that he developed myofascial/atypical facial pain as a result of dental treatment that he was obliged by his commanding officer to have against his wishes, and that the pain was also in part caused by work-related stress. His case was thus put on the basis that both the treatment and the exacerbation of the pain by stress were 'caused by service' so that, taken together, his injury was 'predominantly' caused by service.

11. The Tribunal directed itself by reference to the decision of the three-judge panel of the Upper Tribunal in *JM v Secretary of State for Defence (AFCS)* [2015] UKUT 332 (AAC), [2016] AACR 3 to apply a four-stage test of: (i) identify all potential causes; (ii) discount causes that are too remote or uncertain; (iii) categorise remaining causes as Service and non-Service; (iv) if not all remaining causes are Service-related, apply the predominance test. It reminded itself of the guidance in that case at [86] that breach of duty and fault are not relevant to the AFCS scheme, only the question of whether the injury is caused by service.

12. Regarding the dental treatment, the Tribunal concluded this was not caused by service as follows:-

> 42. The medical evidence demonstrates that the appellant consented to both procedures. We find no compulsion of service made the appellant undertake the dental treatment. The consent obtained for the two procedures was in line with civilian dental procedure.
> 43. The documentary evidence does not support a finding that the appellant was ordered to undertake the treatment.
> 44. We considered the appellant's perception that he had to have the treatment to remain dentally fit. The appellant's evidence was that he had lived with the chipped filling for 3-4 years and had remained fit for work. We find that although the appellant was required to attend an appointment, he

> was under no compulsion to have the treatment. Using the expertise available to it we found that if the appellant had not consented to the treatment and he remained fit for work then no action would have been taken. 45. We therefore found that a) the filling repair was not a service related cause.

13. Regarding the stress, the Tribunal concluded that although part of the injury was caused by stress, the appellant's stress was not caused by service:

> 46. We find that the medical evidence refers to stress being related to the condition. At page 127 in the letter which found that the pain was partly due to stress, the consultant stated that the appellant was not under undue stress at work but has had a very difficult year with facial pain and also some personal relations issues which are now better. He has been having CBT therapy at his base and this has been helpful. There is no evidence that any stress which contributed to the facial pain is service related.

14. The Tribunal thus concluded that as none of the causes of the injury were service-related, the appellant's claim must fail.

## Ground 1 - That the Tribunal gave inadequate reasons for concluding that the appellant's filling repair on 1 February 2021 was not 'caused by service'

15. In granting permission to appeal on Ground 1 I observed as follows:-

> 10. … It is arguable that the First-tier Tribunal has erred in law in its consideration of whether the appellant's filling repair on 1 February 2021 was caused by service.
>
> 11.The appellant's case as set out in his claim (p 16 of the First-tier Tribunal bundle) and in other earlier documents (e.g letter of 10 November 2022, pp 138-139 and record of complaint report of 19 February 2021, pp 139-140) was that he was not in pain prior to the filling repair and had (on advice from previous dentists) opted not to have it repaired previously. His case was that he was ordered by his Senior Dental Officer to have a replacement filling and the appointment was booked for that purpose.
>
> 12.The Tribunal records the appellant's oral evidence to that effect at [18] of the SoR. The Tribunal rejects the appellant's case in that respect at [43] because "The documentary evidence does not support a finding that the appellant was ordered to undertake the treatment". It is arguable that the First-tier Tribunal's reasons in this respect are inadequate as it has not explained why it would have expected documentary evidence of the alleged "order" to exist or why it has rejected the appellant's evidence that he was "ordered", despite the consistency of his position in this respect since very shortly after the treatment in question.
>
> 13.If the appellant's evidence that he was "ordered" was accepted, then it is arguable that would have materially affected the Tribunal's conclusion that the replacement filling and consequent injury were not "caused by" service.

> The guidance from the Upper Tribunal in McCabe [2016] AACR 3 at [98]-[102] would need to be considered in this regard.
>
> 14.I add that the Tribunal's reasons at [44] do not seem to me to assist on this issue as they deal with the separate question of "the appellant's perception that he had to have the treatment to remain dentally fit".

16. In response to this ground of appeal, the Secretary of State submitted as follows:

> With regards to the issue of whether [MJU] was unable to refuse dental treatment and therefore "ordered" to undergo the procedure in question. The Secretary of State would agree with the FTT that there is adequate evidence to demonstrate that [MJU] has refused medical treatment whilst in service in the past. Prior to his dental treatment, in 2015 [MJU] had refused physiotherapy being aware that treatment is not mandatory and is that of personal choice. The records also indicate that [MJU] consented to both dental procedures with the risks explained prior. The Secretary of State would agree with the FTT that the filling repair was not a service-related cause.

17. The Secretary of State's response is thus, in short, that the Secretary of State remains of the view that as a matter of fact the First-tier Tribunal's decision was correct.

18. That is no answer, however, to an appeal to the Upper Tribunal, whose jurisdiction under section 11 of the Tribunals, Courts and Enforcement Act 2007 is concerned with whether the First-tier Tribunal's decision involved an error of law.

19. The arguable error I identified when granting permission was that the Tribunal had failed to give adequate reasons for why it had rejected the appellant's case that he was not "ordered" to undertake the treatment.

20. It is well established that a failure to give adequate reasons is an error of law. A tribunal's reasons will not be inadequate merely because they fail to set out every step in their reasoning or even to deal with every point raised by the parties; but to be adequate reasons must deal with the substantial points in the case and be sufficient to enable the parties to understand why they have won or lost and any appellate tribunal to see there has been no error of law: see, eg. *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19, [2013] 2 AC 48 *per* Lord Hope at [25] and *R (Iran) v SSHD* [2005] EWCA Civ 982 at [13]-[16] *per* Brooke LJ.

21. In this case, the only specific reason that the Tribunal gave for rejecting the appellant's evidence that he was "ordered" to have the dental treatment was that "The documentary evidence does not support a finding that the appellant was ordered to undertake the treatment". However, given that there is no reason to suppose that there would be documentary evidence of such an order (the Secretary of State having identified none despite my raising this point in the grant of permission), this is in my judgment inadequate as a reason why the appellant's

evidence on the issue has been rejected. While I can understand why the Secretary of State and the Tribunal are sceptical that any officer would have "ordered" the appellant to undergo dental treatment, the appellant's evidence on this was clear and consistent and if it was to be rejected adequate reasons needed to be given.

22. The other factual matters on which the Secretary of State relies (i.e. that the appellant had both consented and refused medical treatment on other occasions) also do not help one way or another. It does not follow from what happened on other occasions that the appellant was not "ordered" on this occasion.

23. The Tribunal in its reasons at [42] places weight on the appellant having consented to the treatment on this occasion, but it does not follow from that that he was not "ordered" to have the treatment (and thus, implicitly, required to give his consent to it).

24. Although the Secretary of State has not referred to [44] of the Tribunal's reasons in response to this ground of appeal, it seems to me on revisiting this case that this paragraph (which deals with what to me at the permission stage seemed an unhelpful digression as to the appellant's "perception") does provide some further insight into the Tribunal's reasoning. The Tribunal states that it has used its expertise to find "that if the appellant had not consented to the treatment and he remained fit for work then no action would have been taken". As I read this now, it seems to me that this sentence is the Tribunal explaining that it has found the appellant was not "ordered" because, even if he was given an order in so many words, it would not have been treated by the RAF as a failure to follow orders. If that is what is meant by this paragraph, however, then there would in my judgment be a further error here as follows.

25. The issue for the Tribunal was whether the treatment that caused the injury was predominantly caused by service. The guidance in *JM* at [98]-[103] about when something is caused by service and when it is not does not turn simply on the question of whether the thing that has caused the injury was the result of someone following orders or not; that is merely one possible indicator of whether something is caused by service or not: see the Secretary of State's own policy guidance cited at [103] of *JM*. Nor, it follows, does it turn on the question of an order that has been made would have been enforced by the RAF as such. The exercise required of the Tribunal is much more nuanced than that. Not every communication from an officer as part of service life will be an order, but following or responding to that communication may still be "compliance with the general … obligations of service" or "reasonably incidental to these obligations", to use the language of Tucker J in the *Horsfall* case cited at [98(i)] of *JM*. The complexities of the analysis required in order to decide whether something is 'caused by service' or not become even more difficult where what is in issue, or potentially in issue, is bullying, or bullying-type, conduct, as the three-judge panel in *JM* explore at [103]-[115]. That guidance may be relevant here, depending on what the facts are as to the appellant's interaction with his officer regarding having this treatment. In making that observation, I emphasise that I am not suggesting that the appellant is alleging that he was 'bullied' into having the treatment, merely

that the guidance given in *JM* about when bullying behaviour may be regarded as being part of service and when it is not will also be relevant to deciding whether, if the officer did in fact order the appellant to undergo the treatment, the appellant's following of that order is to be regarded as part of his service life or not.

26. In short, the Tribunal's conclusion that the appellant was not given an enforceable order to undertake the treatment would not by itself answer the issue that the Tribunal had to determine. The issue of whether the treatment the appellant received was "caused by service" required the Tribunal, first, to make careful findings of fact about what happened between the appellant and his officer in advance of that appointment, providing adequate reasons for any part of the appellant's account it rejected (in particular his evidence that he was "ordered"). Then the Tribunal had to consider, taking full account of the guidance in *JM*, whether or not the appellant's consent to undergo the treatment in the light of whatever happened between him and his officer was "caused by service".

**Ground 5 - That the Tribunal reached a perverse conclusion that there was *"no evidence"* that any stress which contributed to the facial pain was service-related**

27. In granting permission on this ground, I directed that in order for the appellant to establish on this appeal that the Tribunal reached a perverse conclusion that there was "no evidence that any stress which contributed to the facial pain is service related", he would have to identify precisely which medical evidence he was relying on in this respect.

28. In response to this direction, the appellant provided a list of 14 bundle references. Some of those deal with the evidence that the Tribunal accepted did exist as to the link between stress and the myofascial pain. However, some of the references do in my judgment clearly constitute evidence that the stress was in turn related to work or, at least, evidence that needed to be addressed by the Tribunal in its reasons if it was to provide adequate reasons for why it concluded that there was "no evidence" of work-related stress. Those references in the appellant's medical notes are as follows:-

    a. 3/3/22 – "Future stressors: return to work …"

    b. 18/2/22, 10:00 – Diagnoses of Depressive episode and Anxiety disorder; 16:05 - "Recurrent depression. Occ downgrade for the last 10 yrs. Recent struggles over lack of perceived support for training at JSSU – refusing to return there but is adamant that he wants to return to work. Would be willing to go to another position at Digby but none seemingly available. RAF Addington would be an acceptable alternative for him. If the Welfare route to another position is unsuitable/unavailable then, assuming the SP is willing to accept the risks inherent in this, we would be willing to support Geographical Assignment"

c. 16/2/22, 13:34 – "MDT DISCUSSION: remains off work/keen to return/no clear way forward with occupational recommendations causing greater stress … "

d. 19/1/22, 09:11 – "Anxiety continues but has improved from initial period of sick leave… Home life is good … Worked JSSU at Digby prior to TNE and this was a very difficult posting. Has support from Welfare and looking into a non blame-worthy posting, hopefully within Lincolnshire…"

e. 12/1/22, 15:51 – "… DCMH assess as unfit to return to previous role/location"

f. 16/12/21, 12:31 – "Drivers for low mood include homelife issues, working pattern and teeth issues"

g. 3/12/21, 09:15 – "still not ready to go back to work yet given work was the main trigger for the recent increase in anxiety"

h. 25/11/21, 08:35 – "main source of unhappiness is work …"

i. 11/11/21, 14:34 – "Due back in work next week and cannot realistically see himself doing this at present. Had 'breakdown' in work and feels current anxiety and panic symptoms mean could not function in work".

j. 9/11/21, 10:07 – "discussed that as work is part of the trigger for increase in anxiety would be beneficial to start talking …"

k. 16/4/21, 09:29 – "dental issues (treatment awaited) and stressors at work …"

29. In responding to the appeal, the Secretary of State has dealt with each of these entries and sought to explain why the Tribunal was right to conclude that these did not provide evidence of a causal link between work and stress.

30. Again, I am afraid the Secretary of State's response is no answer to an appeal on a point of law. The Tribunal's conclusion that there was "no evidence" of a link between work and stress was perverse, even applying the high threshold required before such a conclusion is reached: see *R (Iran) v SSHD* ibid at [11]. There was in fact ample evidence of a link; it was not open to a Tribunal, properly directing itself on the evidence, to find that there was no such evidence. Of course, the Tribunal may nonetheless be able to conclude that the causal link is not made out for some or all of the reasons identified by the Secretary of State. However, in an appeal on a point of law, it does not assist for the Secretary of State to provide the evidence and reasons missing from the Tribunal's analysis. The Tribunal's role was to consider that evidence and explain what it made of it; it has not done that.

31. It follows that this ground of appeal succeeds. However, given some of the arguments raised by the Secretary of State regarding the evidence of work-

related stress, and the appellant's response to those arguments, I need to say a little more about the task that will face the Tribunal when this case is remitted.

32. In the Secretary of State's submissions, it is argued (among other things) that the medical records "do not give any information as to the cause or nature of the stress", that "service proactively removed [the appellant] from any potential workplace stressors by preventatively signing him off" and that a reference "lack of 'perceived' support isn't a specific indication of any service exacerbation, and would potentially suggest [the appellant] has a different view point relating to required support".

33. The difficulty with these submissions is that they suggest that fault and breach of duty are relevant to the question of whether the injury was caused by service. However, as Judge Rowland neatly summarised the law in the light of *JM* in *SN v SSD (AFCS)* [2018] UKUT 263 (AAC), "this is a no-fault scheme … a mental disorder caused by stresses at work in the Armed Forces may be caused by service even if no-one behaved improperly towards the claimant".

34. The Secretary of State's submissions also suggest that weaknesses, or the appellant's subjective perception of matters at work, may be the cause of the stress rather than work. That is an issue that the Tribunal will need to consider on remission. In doing so, the Tribunal will need again to take account of the guidance in *JM* that having a "thin skull", and thus being more susceptible to work-place stressors, does not remove the causal connection between the work and the stress. In *JM* the Upper Tribunal held as follows:-

> 132 In this context we do not see any sign that the intention behind the AFCS is to deprive those with constitutional weaknesses from the protection usually regarded as appropriate in other compensation schemes, that is to say the "thin skull" approach.
>
> 133. We acknowledge that, in exercising the judgment between process causes that have been categorised into service and non-service causes of the injury, a literal approach to the language of the test in the 2005 and 2011 Orders could, in an equivalent case to Marshall, found the view expressed by Denning J with the result that the claimant would not get an award because the predominant cause of the injury was the constitutional weakness and the cough was a lesser cause.
>
> 134. But in our view the width of the language permits a more sophisticated approach to deciding whether, as the Secretary of State put it, conceptually the service cause contributes more than one half of the causative stimulus for the injury claimed, and thus whether service is the predominant cause in a case where (after the categorisation process) the only competing causes are service and constitutional or other pre-existing weaknesses. In such a case the decision-maker generally should firstly consider whether without the "service cause", the injury would:
> (a) have occurred at all, or
> (b) have been less than half as serious.

> 135. If the answer to the first question is that the injury would not have occurred at all in the absence of the service cause, we consider that this can and generally should found a conclusion that the service cause is the predominant cause of the relevant injury.

35. This Tribunal will need to apply this guidance when considering the appellant's case at the remitted hearing.

## Conclusion

36. I have found that the decision of the First-tier Tribunal involved errors of law and I set the decision aside and remit it for rehearing before a fresh panel. I emphasise that it does not follow that because this appeal has been successful that the appellant will ultimately succeed in his claim to benefit. The Tribunal needs to consider all the evidence afresh, make the necessary findings of fact and apply the law correctly taking account of the guidance in this decision. In addition to the matters that have been considered by me in this appeal, the Tribunal will of course also need to consider, if it concludes that at least some of the appellant's injury was caused by service, whether it was predominantly so caused. As this Tribunal did not need to address this question, I have not addressed it on this appeal, but the new Tribunal will need to do so if it reaches that stage in the analysis. The other matters of fact and evidence raised by both parties in this appeal will be matters that they will need to place before the First-tier Tribunal at the remitted hearing (including the appellant's new medical evidence obtained since the First-tier Tribunal hearing). It will be for the First-tier Tribunal to evaluate that evidence and the parties' arguments in the light of the guidance in this judgment.

**Holly Stout**
**Judge of the Upper Tribunal**

Authorised by the Judge for issue on 29 January 2025