Upper Tribunal for Scotland

2025UT86
Ref: UTS/AS/25/0020

DECISION OF

Lord Lake

ON AN APPEAL
IN THE CASE OF

RB
per Glasgow City Council Welfare Rights Appeals Team

Appellant

- and -

Social Security Scotland
per Scottish Government Legal Directorate

Respondent

FTS Case Reference: FTS/SSC/AE/24/01691

5 November 2025

Decision

1. On 27 July 2023 RB applied for adult disability payment. On 5 February 2024 Social Security Scotland made a decision in terms of which she was to receive the standard rate of both the daily living and the mobility component. She thereafter sought a re-determination and, when it was made on 4 April 2024, it removed her entitlement to the mobility component, but the daily living component remained in place. RB sought to appeal that decision. There were various procedural steps in the appeal. During the hearing, it became apparent that medical records which RB had submitted had not been added to the appeal bundle. Steps were taken to rectify this but there were difficulties in distributing the records to the members because of the format in which they had been submitted. The Tribunal offered RB the chance to adjourn the hearing in order that the medical records could be added to the bundle for the next tribunal or to proceed

with the hearing in the absence of the medical records. After a break in which she was able to discuss the matter with her advisor, RB confirmed that she wished to proceed in the absence of the medical records.

2. In its decision, the FTS decided that appeal for the reinstatement of the mobility element was unsuccessful and her scoring in respect of the daily living component should be reduced. The effect of that was to reduce her score to below 8 points and she was therefore no longer entitled to ADP. RB appeals the decision of FTS. Leave has been given only for an argument that there was a breach of proper procedures or lack of fairness.

3. RB submits that the change of position by SSS arose only after all the evidence had been led. It was at that stage she became aware of their intention to seek to argue that her score should be lowered such that she lost her entitlement. Prior to this, there had been an understanding that only the mobility element of her claim would be considered at the hearing. It was argued that she had not had a fair hearing and her Article 6 rights were breached. Although she had been given an opportunity by the Tribunal to ask further questions after the change of position by SSS, she was not offered an adjournment to allow her to consider her position and take advice. She was not able to consider making a motion to adjourn so that the medical records could be obtained after all. It was argued that the medical records which she had lodged but which were not before the Tribunal members would have had a bearing on the decision to remove points in respect of DLA9.

4. For SSS it was accepted that, at the outset, it was agreed that the focus of the hearing would be on the mobility component. It was noted that when the absence of medical records was raised at the start, both parties were willing to proceed with the hearing. It was noted also that the Tribunal had stated to RB at the outset that their decision could reduce her entitlement as well as increase it. Thereafter, three principal submissions were made for SSS. The first was that the Tribunal was the decision-maker in the appeal and had a duty to award the correct entitlement. It was not able to overlook evidence that had been led which had a bearing on the entitlement and to fail to take such evidence into account would be an error. The second was that a party is not bound by the position adopted in earlier stages of proceedings and so could change the position if appropriate. While the initial focus had been on the mobility component, the evidence led for RB related also to DLA9. This was material not previously known to SSS. Once they became aware of at the hearing, it would have been a wrong of them and a failure in their duty not to take it into account and change their position. The third was that at the hearing, the parties were given adequate time to set out their position to the Tribunal. It was not unfair to allow SSS to change its position in relation to DLA9. The applicant has been offered an adjournment to address the problems with the medical records but had said that she was willing to proceed. It was said that it was fair for the Tribunal to have allowed SSS to change its position.

5. SSS referred to the following case law:

(a) *R(IB) 2/04*. This was principally concerned with section 12(8)(a) of the Social Security Act 1998 which provides that the First-tier Tribunal "need not consider any issue that is not raised by the appeal". Reliance was places on the parts of the decision noting that the Tribunals are to ensure that claimants receive neither more nor less than their entitlement (paragraph 32). The decision notes that the Tribunal may make a decision less favourable to the applicant but that if there have not been submissions to that effect made by the Secretary of State, the Tribunal would have to consciously consider and apply the discretion in section 12(8)(a) to take into account issues not raised in the appeal. It was submitted that in this case, although section 12(8)(a) did not apply, the First-tier Tribunal for Scotland (Allocation of Functions to the Social Security Chamber) Regulations 2018, Regulation 4, produces the same effect of the Tribunal being able to consider matters not raised by the parties and that, in this case, the matter has been raised by SSS in its submissions after the evidence.

(b) *CDLA/884/2008*. This was a decision by the Social Security Commissioner in an appeal against a decision of the Southampton Appeal Tribunal regarding entitlement to Disability Living Allowance ("DLA"). The decision turned on the fact that, at the outset of the hearing, the Tribunal had not waited for the claimant's evidence as to his care needs but had started questioning him in relation to the mobility element in a manner which was, in essence, cross examination. An intention to challenge this element of the claim had not been raised by the Secretary of State in the submission to the Tribunal.

(c) *BTC* v *Secretary of State for Work and Pensions* [2015] UKUT 0155. The decision followed *CDLA/884/2008* on the basis that the claimant, who had appealed the daily living component of her claim had not been invited to put her case on matters which were central to their decision to remove the mobility component. They had advised her that the mobility element had been at risk but did not ask her to put her case in relation to the elements which were crucial to the Tribunal's thinking on that point.

(d) *RC v Secretary of State (PIP*) [2017] UKUT 0139. An appeal was allowed on the basis that once it became clear to the Tribunal that the claimant/appellant was at risk of losing the whole of his award, it came under a renewed duty "to consider whether the hearing should be adjourned so that a full explanation could be given to the claimant of the risks which he faced if he continued with the appeal". SSS emphasised that the duty was only to 'consider' whether there should be an adjournment.

(e) *GA* v *Secretary of State for Work and Pensions* [2017] UKUT 416. This was a case which, like *R(IB) 2/04*, turned on the exercise of the discretion under section 12(8)(a) of the 1998 Act.

(f) *Kerr* v *Department for Social Development* [2004] UKHL 23. This vouched that process the evaluating entitlement was inquisitorial rather than adversarial and was one in which both parties had to play their part.

6. It was submitted that RB had not been ambushed by the Tribunal at the hearing in a manner which had been found objectionable in CDLA/884/2008. It was submitted that the Tribunal's conclusion was a reasonable and that the approach adopted by SSS in changing its

position was a reasonable one to adopt at the time. The hearing was the first time they had been presented with the evidence and, having heard it, they determined that their approach should change. Paragraph 5 of the Tribunal's decision concerning permission to appeal made it clear that the Tribunal had considered whether or not it was in the interests of justice to adjourn to allow the appellant to give further evidence. It was submitted they had weighed up the various factors involved. It was submitted also that after Social Security Scotland altered its position, RB was given an opportunity to provide further submissions to Social Security Scotland's concluding statement.

7. The issue that arises here is one of the fairness of procedure. It is correct to say that the Tribunal is tasked with identifying the correct entitlement, that it is open to a party to change their position and that it is open to a Tribunal on an appeal concerning ADP to reduce an award if they consider that the evidence does not merit it. I accept the submissions of SSS in these regards. Indeed, that was accepted on RB's behalf in the submissions in reply. That is not what is in doubt in this appeal. The question is what procedure is required in which situation to ensure that the hearing is fair where there has been a late change of position.

8. Fairness requires that parties have a chance to be heard, to put their case and to meet their opponent's case. To do this effectively requires that they are made aware of what their opponent's case will be with sufficient time to prepare a response. As it was put by Lord Mustill in *R* v *Secretary of State for the Home Department, Ex parte Doody* (1994 AC 531) after having noted that the prisoners in question should have an opportunity to make representations to the Home Secretary before the decision was taken,

> "Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer." (page 560G)

9. It was essentially the same issue that arose in *R(IB) 2/04* where it was said that the discretion to consider a matter was to be exercised judicially taking into account all the relevant circumstances. This means that it is necessary to ensure that the requirements of natural justice and requirements as to a fair hearing at common law and of the European Convention on Human Rights are met when there is a change of position or an entitlement is to be reduced.

10. The other authorities cited to me are of less assistance. This is not a case such as *CDLA/884/2008* where the Tribunal launched questioning without adequate prior notice. The decision in *BTC* notes that in *CDLA/884/2008* it had been said that the Tribunal should refrain "from making decisions less favourable to claimants than the decisions being challenged, except in the most obvious cases" but the decision was on the basis that the claimant could not have known that matters would be crucial to the Tribunal's decision. Here, once the submissions for SSS were made, RB would have been aware of these matters so that issue is not in point. Here, the question is what took place once RB had been made so aware. In *RC* the key element of the decision was whether the Tribunal should 'consider' adjournment where an award was at risk.

That is of some relevance but I do not consider that it is the whole of the obligation on the Tribunal. Here, it was not just that the award was at risk but that this came about as a result of a late (but legitimate) change of position by SSS. I consider that consideration by the Tribunal of adjournment themselves is not enough. When faced with a change of position after the evidence, fairness required that RB be asked whether she wished to seek an adjournment. Without it, there would be no opportunity to consider the change, to consider whether additional evidence was required and, critically, to consider whether it was necessary to have the missing medical records. The decision in *GA* does not add materially to *R(IB)*. The point from *Kerr* concerned which party had the burden of establishing a point and did not address a change of position in the course of a hearing.

11. In my view what has taken place was unfair to RB. After the change of position, she did not have adequate opportunity to consider the changed position and to present evidence and make submissions to respond. In paragraph 32 of the Decision, the Tribunal note that RB had been given the opportunity to give further evidence by way of clarification or explanation and the opportunity to adjourn the hearing in order for the medical records to be made available. They note that she declined this. This however conflates two different matters which arose in the hearing. She was given an opportunity to adjourn and declined it at the outset of the hearing. This is before she knew of the change of possession by SSS. At that stage she could not be aware what was coming and that the medical evidence might be critical. That she was given an opportunity when she was unaware of the situation cannot remedy the fact she was not given an opportunity once she was. Later, when she did become aware, she was given an opportunity to give further evidence but was not given the opportunity to seek an adjournment to take advice and consider the position or to obtain the medical evidence which by then may have become more relevant. This was unfair. I consider that the Tribunal are incorrect to state in paragraph 2 of the Decision on Permission to Appeal that, "[RB] had a full opportunity to present her case and to challenge the evidence in arguments presented by Social Security Scotland, including its closing submission."

12. In relation to adjournment, paragraph 5 of the Tribunal's decision on permission to appeal is in the following terms:

> After the hearing, the FTS considered whether it was in the interests of justice to adjourn for the medical records and to allow RB an opportunity to give further evidence. The FTS's overriding objective is to deal with cases fairly and justly. That includes dealing with appeals in ways which are proportionate and avoiding delay so far as compatible with proper consideration of the issues. The FTS also has to consider the interests of Social Security Scotland, the administrative cost and inconvenience and the impact on other appellants. Weighing up all those factors, the FTS was satisfied that there was sufficient evidence from which it could make a fair and just decision. It was not reasonable or proportionate to adjourn the hearing with the consequent delay and expense that would entail.

With respect to the Tribunal, this approach is flawed. It was not enough to consider it themselves without inviting submissions. More importantly, this was not simply a discretionary decision where it was appropriate to weigh the interests of justice as between the parties. This was a matter of the fairness of the hearing. The Tribunal had to make a decision as to whether or not it was fair. Fairness is part of the overriding objective contained in Regulation 2(1) of the First-tier Tribunal for Scotland Social Security Chamber (Procedure) Regulations 2018 and would be implied at common law and under the Human Rights Act 1998. Fairness required consideration whether or not RB had had an adequate opportunity to meet the new case. This is not merely giving her a chance to ask further questions. It would have required a chance to consider the issue with her advisor and also to obtain the medical records which she had attempted to lodge earlier and which it was said supported her position. The interests of Social Security Scotland and the cost and delay that would result, cannot outweigh the need for a hearing that is fair. In a situation in which the Tribunal had in mind upholding the new position of SSS and making a number of conclusions which were different from the previous assessment and would amount to rejection of her evidence, fairness demanded that she be able to at least obtaining the documents that she had attempted to lodge and which she claims would have supported her position.

13. I am aware that this goes further than the decision in *RC* which required only that adjournment be 'considered'. However, as I note above, I do not think it was sufficient for the Tribunal to consider it themselves. In addition, paragraph 5 does not indicate that they directed themselves to the issue of whether it was *fair* to RB to proceed without an adjournment as opposed to the issues of whether it was in the interests of justice between the parties, the cost and inconvenience of adjourning and whether it had enough material to make a decision.

14. The consequence of the above is that the decision of the Tribunal must be quashed and the matter remitted for a fresh decision by a differently constituted Tribunal.

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 Lake
Member of the Upper Tribunal for Scotland