



2025UT23

Ref: UTS/AS/25/0025

DECISION OF

Lady Poole

**ON AN APPEAL
IN THE CASE OF**

Social Security Scotland

Appellant

- and -

DG

Respondent

FTS Case Reference: FTS/SSC/AE/24/01477

22 April 2025

Representation

Appellant: Scottish Government Legal Directorate

Respondent: no appearance

DECISION

The appeal is ALLOWED. The decision of the First-tier Tribunal of Scotland dated 16 October 2024 is quashed. The case is remitted to the FTS for redetermination in accordance with the directions at the end of the reasons below.

REASONS FOR DECISION

Summary



1. This is an appeal about Adult Disability Payment (“ADP”). It concerns the need for an evidential basis for conditions of entitlement to be satisfied. More particularly, the appeal raises issues about (i) the relevance of an award of universal credit to entitlement to ADP (ii) the powers of the First-tier Tribunal of Scotland (“FTS”) to call for further evidence and (iii) whether the FTS should have given express reasons about one of the conditions for entitlement, the required period. The decision finds that the FTS wrongly relied on a decision notice awarding universal credit as a basis to award ADP. The FTS also erred by failing to consider exercising its procedural powers to obtain further evidence before determining the appeal, and observations are made about those powers.

Background and procedure for determination of this appeal.

2. The respondent (“DG”) applied for ADP on 30 May 2023. His application was refused by Social Security Scotland (“SSS”) on initial determination on 14 September 2023, and again on redetermination on 15 April 2024. DG appealed to the FTS, where he was not represented. The FTS made a determination on the papers and allowed the appeal, in a decision dated 16 October 2024.
3. SSS disagreed with the decision of the FTS, and asked the FTS to review it or grant permission to appeal to the Upper Tribunal for Scotland (“UTS”). The FTS refused to review its decision. The FTS also refused permission to appeal to the UTS in a decision of 6 February 2025. Its reason for refusal was that “it is not accepted that the tribunal erred at law”, but in so stating the FTS was not applying the correct legal test for permission. Under section 46 of the Tribunals (Scotland) Act 2014, the test for permission is whether there are arguable grounds of appeal on a point of law.
4. SSS applied to the UTS for permission to appeal. On 11 March 2025, the UTS granted permission. The decision granting permission mentioned representatives, and UTS staff provided DG with a list of contacts who might be able to provide support or advice. DG’s response to the UTS was to the effect he did not wish to participate in the appeal. SSS provided the UTS with written grounds of appeal, a further written submission in response to a request to parties by the UTS dated 20 March 2025, and supporting authorities.
5. The appeal before the UTS is being determined without an oral hearing because it is fair and just to do so. Neither DG nor SSS have requested an oral hearing. There is sufficient information before the UTS to determine the appeal on the points of law before it. Given that the outcome of the appeal is that there will be a rehearing on the merits of the application before the FTS, delay in the ultimate determination of DG’s application for ADP is reduced by proceeding in this way.

Relevance of an award of Universal Credit to ADP



6. The first ground of appeal is about the approach of the FTS to an award of universal credit previously made to DG. Universal credit is a payment to help with living costs. It is part of the UK system of benefits, administered by the Department for Work and Pensions, and appeals are decided within the UK courts and tribunals service (“HMCTS”). Universal credit is structured so that those entitled to it receive a standard allowance, which is then adjusted to reflect any entitlement to extra amounts or deductions. Entitlement to an extra amount of universal credit may arise if a disability or health condition affects capability for work and work related activity. ADP on the other hand is a devolved social security payment administered by SSS, and appeals are heard within the Scottish tribunal system. ADP is a social security payment to disabled working-age adults who live in Scotland, to help with extra costs of being disabled or having a long-term health condition. As a matter of practice, panel members in initial appeals about social security may sit in Scotland in both HMCTS and Scottish first tier tribunals, and be familiar with both universal credit and ADP. Nevertheless, universal credit and ADP are different social security payments, governed by different legislative provisions.
7. The papers before the FTS included a decision notice of an HMCTS tribunal dated 15 June 2023 awarding universal credit to DG. The FTS noted that the HMCTS tribunal had decided DG had limited capability for work-related activity. In doing so, the HMCTS tribunal found that DG was unable to get to a specified place with which he is unfamiliar without being unaccompanied by another person; and engagement in social contact with someone unfamiliar to the appellant is not possible for the majority of the time due to the difficulty relating to others or significant distress experienced by the claimant. The FTS stated that those universal credit descriptors had ADP equivalents in ADP daily living activity descriptor 9 (c) and mobility activity descriptor 1(d). The FTS found it likely the HMCTS tribunal had sufficient evidence before it to make its findings (although, given that the FTS had seen neither a statement of reasons for the HMCTS decision, nor the papers or evidence before the HMCTS tribunal, the basis on which the FTS could properly make that finding is unclear). The FTS decided it could use the award of universal credit to find points were scored for the ADP descriptors, and made an award of ADP.
8. The approach by the FTS was in error of law. Entitlement to ADP depends on satisfying conditions which are set out primarily in the Social Security (Scotland) Act 2018 (the “**2018 Act**”) and the Disability Assistance for Working Age People (Scotland) Regulations 2022 (the “**ADP Regulations**”). There is no legislative provision in that governing legislation stating that qualification for universal credit is a passport to qualifying for ADP. Nor is there any legislative provision providing that qualification for certain descriptors for universal credit means certain descriptors in schedule 1 of the ADP Regulations are satisfied. Entitlement to universal credit is determined on the basis of a different legal framework, primarily the Welfare Reform Act 2012 and the Universal Credit Regulations 2013. The function of the FTS in an appeal about ADP is to apply the provisions in the 2018 Act and the ADP Regulations. The conditions of entitlement for ADP are not limited only



to scoring points under descriptors. The FTS erred in finding that DG qualified for ADP, on the basis that a different HMCTS tribunal had found particular descriptors used to determine limited capability for work or work related activity in universal credit were satisfied.

9. A distinction needs to be made between the evidence on which an award of a benefit is based, and the law governing entitlement to a benefit. The statutory provisions governing universal credit and ADP are different, and it is wrong in law to find that satisfaction of descriptors for one means descriptors for the other are also satisfied. However, the evidence on which entitlement is determined may overlap between universal credit and ADP. Depending on the nature of the claim for universal credit, the effect on health conditions on aspects of functioning may be in issue in both a claim for ADP and universal credit. The same evidence may be relevant to both claims.
10. In this particular case, DG's application for ADP was made on 30 May 2023. Factual information about DG's medical conditions and effect on his functioning which was before the HMCTS tribunal at the time of its decision on 15 June 2023 might have had some relevance to whether DG also qualified for ADP. For example, if the HMCTS tribunal had before it DG's GP records and a healthcare assessment, and if DG made available these documents from his HMCTS appeal bundle to the FTS, they might be useful evidence in DG's ADP claim. But that is not the situation in which the FTS found itself. It did not have available to it the evidence that was before the HMCTS tribunal, nor did it have a full statement of reasons from the HMCTS tribunal, narrating the evidence and making findings in fact. What the FTS did was infer from a decision notice about universal credit that there was entitlement to ADP. It was an error of law for the FTS to proceed in the way it did.

The need for an evidential basis when making an award of ADP

11. The FTS was candid about why it chose to rely on the HMCTS decision notice. When refusing permission to appeal, it stated, "As is often the case, [SSS] had not obtained a great deal of medical evidence to include in the bundle", and referred to the "limited medical evidence". The fact finding by the FTS was limited, partly because of the relative lack of evidence before it. In essence, the evidence consisted only of DG's self report (in his application form, redetermination request, and appeal form), a selection of appointment and other letters he had chosen to provide, and the universal credit decision notice. The evidence available to the FTS disclosed among other things that DG is relatively young, 36 at the time of application, was managing to maintain a relationship with a partner and they had recently had a baby, he had worked in the past as a head chef, he was managing to get out to various different venues for medical appointments (as well as having some phone appointments), and he was interacting with a housing advisor. The evidence as it stood



did not adequately support an award for ADP. It appears that the FTS turned to the universal credit decision in a creative attempt to try to find a basis to make an award.

12. That, however, was the wrong approach. The FTS is a judicial body. Entitlement to ADP depends on satisfaction of statutory conditions, mainly set out in the ADP Regulations. The FTS must consider evidence before it, and make findings about what facts have been established by evidence it has accepted, as well as drawing any reasonable inferences. It must apply the law to the facts it finds established. If on the available evidence the FTS is unable to find facts showing the statutory conditions for ADP are met on the balance of probabilities, there are at least two options available to it. The first (and most common) option is to refuse the appeal. Alternatively, if in the particular circumstances of the case it is not fair and just to proceed immediately in that way, the FTS can consider exercising its procedural powers to obtain more evidence. If the FTS decides that it should exercise those powers, it would proceed to make appropriate procedural orders and adjourn the case to a further hearing.
13. It is not in every case that the FTS must consider exercising its procedural powers to obtain further evidence. Rule 2(4) of the FTS Social Security Chamber Rules of Procedure 2018 (the “**FTS Rules**”) requires parties, insofar as is reasonably possible, to help the FTS to further the overriding objective of dealing with cases fairly and justly, and to co-operate with the FTS generally. In order to avoid delay, and for cases to be dealt with proportionately, the FTS is in general entitled to expect parties, who will have been informed of the date of a hearing, to make available for the hearing any documents or evidence reasonably available to them which support their position.
14. However, in some circumstances fairness may require the FTS to consider its powers to require further documents, information, evidence or submissions, or appoint an oral hearing (rules 4, 15 and 16 of the FTS Rules). There have now been a trio of cases discussing when that duty might arise. *NB v Social Security Scotland* 2023 UT 35 was a case where the FTS had refused an appeal by an unrepresented applicant on the papers, and there was a clear dispute which arose on the papers as to the nature and extent of the applicant’s medical conditions and the extent to which the applicant’s functioning was affected by those. The unusual combination of circumstances in that case meant that it was an error for the FTS not to consider further exercise of its procedural powers before deciding the appeal, for example to ask the applicant to sign a mandate for the FTS to obtain medical records or to attend an oral hearing. However, in *AK v Social Security Scotland* 2024 UT 05, there had been an oral hearing at which the applicant gave evidence, and the papers included information obtained by SSS from the applicant’s medical practice; and in those circumstances it was not an error of law to make a decision without calling for further evidence. In *SSS v DM* 2024 UT 61, there was no need for the FTS to consider exercising its procedural powers to open up a new line of inquiry not put in issue by parties. Overall, each case will turn on its own facts and circumstances. In many cases there will be



sufficient information before the FTS to enable it to determine a case justly and fairly without having to consider exercising its procedural powers to obtain more evidence.

15. In this particular case, the FTS erred in law in finding it had an adequate factual basis to make an award. SSS concedes that, rather than refusing the appeal, in the unusual circumstances of this case the FTS ought to have considered exercising its procedural powers to obtain further evidence. DG was unrepresented and had reported suffering from serious mental health problems, the case was being determined on the papers, the decision notice for universal credit alerted the FTS to the possibility that there might be evidence relevant to the satisfaction of ADP descriptors, and the FTS commented on the lack of evidence before it. Given that unusual combination of circumstances, it was an error of law for the FTS not to consider exercise of its procedural powers to obtain more evidence.

The required period condition

16. SSS also appealed on the basis that the FTS had erred in law by failing to consider whether the required period condition was met. Put shortly, the required period condition means that applicants only qualify for ADP if they suffer specified limitations on ability every day in a period of one year, starting in many cases from 13 weeks before the date the claim is made, and ending 39 weeks after it (regulations 3, 5 and 6 of the ADP Regulations and *Social Security v FK* 2024 UT 23 at paras 1 and 16).
17. In DG's case, the FTS made findings of fact about two relevant medical conditions from which he suffered or had suffered (paras 5 and 6). They were pulmonary embolism, and mental health issues. The FTS found as fact that the pulmonary embolism and associated surgery were historic and were not having any significant impact on DG's functional abilities. The FTS found that DG's current functional limitations stemmed from his mental health (paras 16-17). It also found at para 6 that "on an ongoing basis, the Appellant suffers from depression, and anxiety. He is prescribed 30mg of mirtazapine per day, and has weekly counselling at his GP's surgery".
18. The application for ADP was made on 30 May 2023. DG reported mental health problems at that time. The FTS considered DG's case on 16 October 2024, and it found that he suffered from depression and anxiety "on an ongoing basis". It can be inferred that the FTS considered that mental health problems had persisted between those dates. What appeared to be in issue was whether mental health issues resulted in sufficient functional limitation to score points, rather than if limitations had existed for at least a year. In those circumstances, the required period was not a substantial question in issue, and it was not necessary for the FTS expressly to address it in its statement of reasons. The ground of appeal based on inadequate reasons about the required period condition is not upheld.



Observations

19. That is sufficient to determine the appeal. However, the problem encountered by the FTS of limited evidence is not confined to this case, and so the following observations are offered.
20. A decision was taken, when the Scottish social security system was designed, not to require applicants as a matter of course to undergo healthcare assessments. The practical outcome for the FTS is that a source of independent evidence available to HMCTS tribunals, which often gives a basis for fact finding resulting in an award or refusal of a benefit, is not ordinarily available to the FTS. Nevertheless, if an award of ADP is made, the public purse must bear what may over time amount to substantial sums of money. As a result, the legislature has set out conditions of entitlement which govern when this public expenditure is justified. The FTS can only find an applicant entitled to ADP where it has a proper factual basis to find the conditions of entitlement are met.
21. In many cases, parties will have provided enough information for facts to be found and an appeal fairly determined. But if a case arises in which the FTS decides it should exercise case management powers under rules 4(d), 15 and 16 of the FTS Rules to obtain more evidence, there are at least three sources from which further evidence might be obtained.
22. The first source is the applicant for ADP. If the application for ADP is successful, the applicant will receive regular payments from public funds. In those circumstances, it is reasonable and in accordance with rule 2(4) of the FTS Rules for applicants to be expected to play their part in providing information for the FTS, where that is reasonably possible. If the FTS considered it appropriate, DG could, for example, have been requested to:
 - (a) obtain copies of his GP records for 2 previous years or so (including both primary and secondary care records within the GP records) and provide them to the FTS, or sign a mandate authorizing the FTS to obtain those records on his behalf. The applicant has a right to access his medical records under the Access to Health Records Act 1990;
 - (b) provide the healthcare assessment or any other medical information from the appeal bundle for the HMCTS UC appeal, if he still retained it;
 - (c) attend an oral hearing of his ADP appeal to give evidence, if the FTS did not consider it was able to decide the matter without a hearing (FTS Rules, rule 23). While DG preferred not to have an oral hearing, the papers disclosed that he was able to interact with medical and housing professionals, and he stated in correspondence with the UTS "If there's no other option apart from a video thing then I guess I will just have to do it". No medical professional had provided the FTS information suggesting the applicant was unable to participate in an oral hearing.



It was open to DG to refuse to provide his medical information or access to it, or to decline to attend any oral hearing ordered. But he might have preferred to be given the opportunity to participate in these ways, if he understood that without further evidence the FTS did not have a proper evidential basis upon which it could be satisfied the conditions of entitlement to ADP were met.

23. The second source was SSS. From its Charter, part of SSS's function is to work with applicants to gather supporting information that is needed, which includes gathering it for applicants if they ask them to do so. There are a number of ways in which SSS gathers information in connection with ADP claims, for example supporting an applicant by explaining how they can obtain their GP records and submit them, or themselves obtaining information from the applicant's GP, or by consulting with the applicant, or by taking advice from healthcare professionals. In this case SSS might also have liaised with the Department of Work and Pensions to try to recover the HMCTS universal credit bundle which may have obtained a healthcare assessment (*FN v SSWP* (ESA) [2015] UKUT 670 (AAC) and *GD v SSWP* (PIP) [2017] UKUT 415 (AAC)). It was open to the FTS to order SSS to provide evidence or submissions obtained in these ways.
24. The third potential source of further evidence was third parties. The FTS may order any person to produce documents in that person's possession or control, under rule 16 of the FTS Rules. This can include, for example, employers, or government departments such as the DWP or HMRC.
25. It is for the FTS to decide how most efficiently to organise its procedures. In doing so, no doubt it will bear in mind the overriding objective in rule 2 of the FTS Rules, and the need to deal with cases in proportionate ways and avoid delay where possible. If, as the FTS in this case suggested, lack of evidence on which a case before the FTS can properly be decided is a persistent problem, the FTS might consider a triage/case management stage in advance of a full hearing to consider if procedural powers to obtain further evidence should be exercised. Or the decision about whether to exercise procedural powers could be left to a fully convened three member panel hearing the substance of an appeal - or a combination of both. But what the FTS cannot do is make a decision to award ADP which is unsupported by facts properly found on the basis of evidence.

Outcome

26. The FTS erred in law, in its approach to DG's award of universal credit, and by failing to consider exercise of its procedural powers to obtain further evidence. The decision of the FTS must be quashed. The case will be returned to the FTS for redetermination in accordance with the directions below.



DIRECTIONS

1. The appeal should be redetermined by a freshly constituted FTS.
2. The FTS should initially convene for a procedural hearing to decide whether to exercise any of its procedural powers in relation to gathering further evidence and ordering an oral hearing, having regard to paragraphs 20-25 above.
3. When redetermining the appeal, the FTS should bear in mind the guidance in paragraphs 6-18 above. It should undertake a complete reconsideration of the issues raised in the appeal before it, including the required period condition, and the entitlement of the applicant to ADP pursuant to his application of 30 May 2023.

Lady Poole

*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.*