

Ombudsman's Determination

Applicant	Mr T
Scheme	Police Pension Scheme (PPS)
Respondents	Government Actuary's Department (GAD)

Outcome

1. I do not uphold Mr T complaint and no further action is required by GAD.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr T has complained that his lump sum has not been recalculated in line with revised commutation factors provided by GAD.

Background information, including submissions from the parties

Background

4. Mr T was employed by Greater Manchester Police until his retirement on 10 August 2001.
5. The relevant regulations are the Police Pensions Regulations 1987 (SI1987/257) (as amended). At the date of Mr T's retirement, regulation B7(7) provided:

“Where the person retires or has retired and a notice of commutation given by him becomes or has become effective, the police authority shall reduce the pension to which the notice relates in accordance with the notice as from the time from which the notice is effective and shall pay him a lump sum of such amount as is the actuarial equivalent of the surrendered portion of the pension at the date of his retirement, calculated from tables prepared by the Government Actuary ...”
6. The provision of commutation factors for the PPS by GAD was the subject of a High Court case¹ in 2009. GAD's role in the provision of commutation factors for the

¹ *The Queen on the Application of the Police Federation of England and others v The Secretary for the Home Department, The Government Actuary's Department* [2009] EWHC 488 (Admin)

Firefighters' Pension Scheme (**FPS**) was also the subject of a complaint to the Pensions Ombudsman in 2010. GAD initially queried the Ombudsman's jurisdiction and this point was decided by the Courts in July 2013. The then Ombudsman issued a determination of the FPS case in May 2015². The PPS and FPS have practically identical provisions relating to the commutation of pension for lump sum.

7. In *Milne*, the then Ombudsman found the failure to undertake reviews of the commutation factors amounted to maladministration on the part of GAD. The Ombudsman said a review should have been undertaken in 2001/02 (para. 141). Following the *Milne* decision, GAD prepared tables for use in the calculation of redress, based on a best reconstruction of the commutation factors which would have applied if the factors had been reviewed and revised at 1 December 2001 and at 1 December 2004.

Mr T's submission

8. Mr T submits:-
 - In *Milne*, the Ombudsman found that the calculator used to determine pensions and lump sums was wrong and had been so since 1998.
 - The *Milne* case identified a date of 1 December 2001, but it clearly stated that he was affected.
 - The date for recalculation should be July 2001. Mr T cites a news update published on the Pensions Ombudsman's (**TPO**) website in August 2015.
 - The PPS administrator has not been instructed to deal with people in his situation.
 - Another member who retired in October 2001 has received around £35,000 as a lump sum and an increase to his monthly payments going forward.
 - His lifestyle has not been what he expected since his retirement.

Ombudsman's decision

9. There have been a number of applications to my office relating to the provision by GAD of commutation factors for the PPS and the FPS. My jurisdiction in these cases is not as straightforward as with the majority of applications I receive. It is important, therefore, to be clear about what it is that I can consider.
10. For Mr Milne's case, the Court of Appeal³ ruled that GAD was an "administrator" for the purposes of the Pensions Ombudsman's jurisdiction. It found that GAD has a proactive role which is central to the FPS' "proper operation" and, therefore, cannot

² *Milne* PO-1327

³ *The Government Actuary's Department v The Pensions Ombudsman* [2013] EWCA Civ 901

be considered to be incidental to the running of the FPS. The same must apply for the PPS.

11. The decision to review the commutation tables can be said to be an administrative act. However, Mr T's complaint is about the date at which to revise the factor tables. This is primarily an actuarial function. Reconstructing the sequence of events which should have taken place in 2001 required an actuarial analysis of what should have happened. In coming to this view, I am guided by the judgment in the *Police Federation* case.
12. As at the date of Mr T's retirement, regulation B7 provided him with the option to commute part of his pension for a lump sum. The lump sum was to be "the actuarial equivalent of the surrendered portion of the pension at the date of his retirement, calculated from tables prepared by the Government Actuary". In the *Police Federation* case, Cox J said:

"... the Regulation clearly contemplates that there is a duty to prepare tables, to enable that lump sum to be calculated correctly and paid. Since the actuarial equivalent is liable to change over time, a judgment must be exercised periodically as to whether to revise the existing tables, to ensure that the tables to be used in calculating the actuarial equivalence do in fact enable equivalence to be achieved in respect of any surrendered portion. **That judgment calls for an entirely actuarial expertise and is to be exercised only by the Government Actuary** ... [my emphasis]

... it is the changes in actuarial conditions (mortality assumptions and discount rates) which may lead the Government Actuary to review and revise the tables from time to time, in order to comply with this implied obligation. Whilst it is correct that Parliament has not specified the time which is to elapse between reviews, such express provision is in my view unnecessary. The express requirement in B7(7) that the tables must be such as enable a police authority to calculate a lump sum which is the actuarial equivalent of the surrendered portion is sufficient to enable the Government Actuary to determine whether, at any given time, changes are required to the existing tables ..."
13. The decision to revise the tables is a matter of professional actuarial judgment on the part of GAD. As such, the conduct of the 2001 review (as opposed to the decision to review) is not within my jurisdiction.
14. I should make it absolutely clear at this point that neither I nor my predecessor had any input in the decision made that the revised commutation factors should take effect from 1 December 2001. Mr T appears to be under the misapprehension that this date was determined by my predecessor in the *Milne* case. This is not so; the date was determined by GAD following its analysis of what should have happened in 2001.

15. I acknowledge that it might be possible to separate out purely administrative elements of the 2001 review. For example, it might be possible for me to consider whether there was any undue delay on GAD's part in completing the review. However, this, in itself, is problematical. For example, what data was required and where it should have come from were, primarily, actuarial decisions and would have had a major impact on the progress of the review.
16. In addition, as noted above, regulation B7 does not specify the frequency at which the tables are to be reviewed nor was there an agreed timetable for GAD to undertake a review. In the *Milne* case, it was accepted by both parties that no review of the FPS commutation factors had taken place between 1998 and 2006. My predecessor upheld Mr Milne's complaint and determined that a review should have taken place in 2001/02. However, when that review might have started and concluded are essentially matters of retrospective hypothesis and speculation. If there had been a review, the date at which the revised factors were produced would have been largely governed by actuarial analysis, which is outside the scope of this office.
17. Following the *Milne* determination, GAD produced revised commutation factors which were to take effect from 1 December 2001. As a result, members of the PPS who had retired after this date were eligible for further lump sum payments. Mr T's argument is, in essence, that the revised factors should have taken effect from an earlier date. He has suggested July 2001 and cited an update on TPO's website from August 2015. The reference to July 2001, in the update, relates to publication of the Continuous Mortality Investigation Report 20, which was one of the pieces of information GAD had considered in its review. TPO's update does not suggest that the effective date for the revised factors should have been July 2001; nor would it be appropriate for it to have done so.
18. As discussed above, the effective date of any commutation factors is an actuarial judgment. If the review had been completed by July 2001, Mr T would have been better off. On the other hand, there would still have been others who would not have benefitted. Whichever date was chosen, there would be a 'cliff edge' with members on either side. This is inevitable and would have been the case even if GAD had actually undertaken a review in 2001, as it was supposed to have done. Whenever actuarial factors are revised, there are those who fall the 'wrong' side of the effective date.
19. It has already been determined that the failure to undertake a review before 2006 amounted to maladministration on GAD's part. In 2015, my predecessor found that a review should have been undertaken in 2001/02. If he had felt able or thought it was appropriate to do so, it is likely that he would have been more specific at that time. Mr T would like me to find that the revised commutation factors should apply in cases where the individual retired before 1 December 2001. I do not find that there are grounds for me to make such a finding.
20. I note Mr T's reference to another member who retired in October 2001 and who is said to have received an additional lump sum. It would not be appropriate for me to

comment on another member's situation; particularly without more detail as to the circumstances of the payments. However, this does not alter the fact that the revised factors apply to those members of the PPS who retired on or after 1 December 2001. Unfortunately, this does not include Mr T.

21. Therefore, I do not uphold Mr T's complaint.

Anthony Arter

Pensions Ombudsman
24 January 2018