

**PENSION SCHEMES ACT 1993, PART X**  
**DETERMINATION BY THE PENSIONS OMBUDSMAN**

<b>Applicant</b>	Mr W Milne
<b>Scheme</b>	Firefighters' Pension Scheme
<b>Respondent</b>	Government Actuary's Department ( <b>GAD</b> )

**Subject**

Mr Milne's complaint is that he has suffered a loss as GAD:

- failed to review the commutation factors from 1998 to 2006 applicable to the calculation of the lump sum which he was entitled to receive under the Scheme when he retired in November 2005 (aged 50);
- delayed in introducing new factors when discussions started in 2005;
- took into account irrelevant considerations when deciding whether to implement changes to the commutation tables.

**The Pensions Ombudsman's determination and short reasons**

The complaint should be upheld, as GAD failed to identify its continuing responsibility to calculate appropriate factors. GAD should notify the Scheme administrator of the appropriate factor and should compensate Mr Milne for the loss of use of money and any tax liability.

## DETAILED DETERMINATION

1. Mr Milne's complaint is one of a number of other complaints brought by members of the Scheme. His complaint has been chosen as the lead complaint. There are also many retired firefighters who could have brought similar complaints, but have not; in some cases because the Pensions Ombudsman Service, through their union, has discouraged them from doing so pending a decision on Mr Milne's complaint.
2. Firefighters are similarly affected by the issue, whether they retired from employment in England, Northern Ireland, Scotland or Wales. A connected issue arises in relation to the Police Pension Scheme.

### The Scheme

3. Current arrangements for the funding and administration of the Scheme differ in Scotland from the arrangements in England and Wales. In England and Wales (and Northern Ireland, under the separate Northern Ireland legislation, which creates a separate scheme) regional Fire and Rescue Authorities (**FRAs**) must each establish a Firefighters Pension Fund which consists of contributions made by members and employers, plus transfers and other payments. (In Northern Ireland there is a single FRA and a single fund.)
4. In England, Wales and Northern Ireland there is a requirement for the UK Government (England) and the devolved governments (Wales and Northern Ireland) to make up deficits – 80% in the year in which the deficit arises and the remainder the following year.
5. In Scotland, where Mr Milne was employed, in 2012 six FRAs were combined into a corporate entity – the Scottish Fire and Rescue Service. There is no requirement to maintain a fund. Liabilities are met by grants paid by the Scottish Government to the Scottish Fire and Rescue Service, which pays the benefits. (In using the general term "FRAs" in this Determination I include the Scottish Fire and Rescue Service. "The Scheme" should be taken to refer to the scheme established by the England, Wales and Scotland legislation alone or that and the scheme established by the Northern Ireland legislation, as the context requires.)

### Relevant Scheme provisions

6. Rule B7 of Schedule 2 of the Firefighters' Pension Scheme Order 1992 SI 129 provides:  
Commutation-general provision

B7.—(1) This rule applies to an ordinary, short service, ill-health or deferred pension under this Part; in relation to a deferred pension, it has

effect as if references to retirement and to the date of retirement were references respectively to the pension's coming into payment and to the date of its coming into payment.

(2) A person entitled or prospectively entitled to a pension to which this rule applies may commute for a lump sum a portion of the pension ("the commuted portion").

(3) The lump sum is the actuarial equivalent of the commuted portion at the date of retirement, calculated from tables prepared by the Government Actuary...

## Background

7. Mr Milne was an employee of the Strathclyde Fire and Rescue Service and retired on 18 November 2005 (aged 50). He was entitled to a pension of £29,610 and chose to commute the maximum amount of pension. He received a commuted tax free lump sum of £111,038 and a pension of £22,207. The calculation was done on the basis of commutation tables which had been in use since 1998.
8. Under Rule B7 (set out above) there is a general commutation provision enabling pensioners to take a lump sum on retirement which (Rule B7(3)) is the actuarial equivalent of the portion of the pension commuted calculated from tables prepared by the Government Actuary. The Government Actuary is a government officer in his own right and discharges his functions through his department - the GAD. GAD also has other functions and regards itself as an independent actuarial consultancy working within government and as a pension consultancy specialising in giving advice to public bodies in the UK. I use the term "GAD" to include both the Government Actuary for the time being and the department of the Government Actuary.
9. Mr Milne initially brought his complaint to my office in 2010 against GAD and the Department for Communities and Local Government (the **Department**). It was decided, early on, to limit the investigation to the actions of GAD and not the Department. The Department is the present manager of the Scheme. The department responsible has changed from time to time, but when referring to the manager of the Scheme I will use the term "the Department" throughout.
10. Mr Milne did not complain against the Strathclyde Fire and Rescue Service or the successor Scottish Fire and Rescue Service.

11. GAD challenged my jurisdiction to consider the complaint against it. Its principal ground was that, in relation to its actions prior to April 2005, it was not an administrator for the purposes of the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996. With effect from 5 April 2005 the definition of “administrator” changed as a result of an amendment to the Pension Schemes Act 1993, introduced by the Pensions Act 2004. GAD accepted that from April 2005 it was an administrator for the purposes of my jurisdiction.
12. In July 2011 I decided, as a preliminary issue, that GAD was an administrator for the purposes of my jurisdiction during the period prior to 5 April 2005 as it was “concerned with ...the administration of the scheme”. GAD applied for judicial review of my decision. Ouseley J<sup>1</sup>, at first instance, upheld my decision as did the Court of Appeal<sup>2</sup> following an appeal to that court by GAD. This meant that the investigation of the complaint could commence.
13. Although the judicial review proceedings related to my jurisdiction, the following finding of the Court of Appeal (at paragraph 31) is particularly relevant to Mr Milne’s complaint:

“The role of GAD in relation to the FPS cannot be described as incidental to the running of the scheme. It is central to its proper operation...GAD's function is essentially interventionist and is integral to the structure of the scheme. Its role is not reactive. It cannot wait to be asked to advise about updating actuarial tables. It is obliged to decide whether the tables need updating and to update them as necessary. The structure of the FPS is such that it can only function properly (in the sense of the fire and rescue authorities paying the correct lump sum benefits at retirement) if GAD reviews and updates the commutation tables as necessary. The authorities cannot change the tables themselves, nor can they apply different commutation rates (supplied by other actuaries) to calculate the lump sum payments: they are obliged to use the tables provided by GAD. That is why the position of GAD is fundamentally different from that of actuaries who are retained by the managers of pension schemes to advise and update commutation tables...such actuaries are not concerned with the administration of a scheme, although they perform functions that are necessary for the proper operation of the scheme. The fundamental difference is that a professional adviser employed to provide services at the request of the manager can choose whether or not to provide the services...”

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<sup>1</sup> Government Actuary's Department v Pensions Ombudsman [2012] EWHC 1796 (Admin)

<sup>2</sup> Government Actuary's Department v Pensions Ombudsman [2013] EWCA Civ 901

## The Police Federation Case

14. In 2009 Cox J decided<sup>3</sup>, in relation to the Police Pension Scheme, that GAD had a statutory duty to produce commutation tables for the purpose of ensuring commutation payments bore “actuarial equivalence” to the surrendered portion of the pension at the time of retirement, and to review those tables on a periodic basis as appropriate (the **Police Federation Case**). The judgment was the outcome of an application for judicial review of a decision of the Home Secretary, on 13 May 2008, to introduce new tables of lump sum commutation factors, for the purposes of Regulation B7(7) of the Police Pensions Regulations 1987, with effect from 1 October 2007 and not from 1 December 2006, when they were prepared. It was claimed that the delay in implementing the tables had had an adverse effect on officers retiring between 1 December 2006 and 1 October 2007.
15. The regulations considered in the Police Federation Case are essentially identical to those relating to the Scheme. Many of the findings (of law and fact) made by Cox J by analogy apply to the Scheme and to Mr Milne’s complaint and I am therefore bound by them. For this reason I set out below extracts from Cox J’s judgment with the most relevance for the purposes of my determination, as follows:

“104 No tables appear in the Regulations themselves, and it is common ground that the preparation of tables is a task to be undertaken by the Government Actuary, having regard to changing conditions relevant to the exercise of an actuarial judgment. The lump sum to be paid by each police authority, at any given time, must be the actuarial equivalent of the surrendered portion of an officer's pension. The overall costs of the lump sum in any case should reflect in the long term those costs which would have been incurred if part of the pension had not been commuted.

105 Whilst it is correct that there is an express obligation only on police authorities to use the tables prepared in calculating the lump sum, 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 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. There is therefore an implied obligation upon the Government Actuary to prepare tables and, if necessary, to review and revise them, because they are needed to enable the police authorities to comply with their express obligation to use them, i.e. to make the provision

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<sup>3</sup> 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).

work (see *Padfield v Ministry of Agriculture Fisheries and Food* [1968] AC 997.)

106 There is therefore an implied obligation upon the Government Actuary to identify those factors which will, in his/her judgment, give the actuarial equivalent for each officer who elects to commute and serves the notice. As the evidence shows, 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 existing tables to enable police authorities to fulfil that obligation...

111 The witness statements filed by the Defendants have not addressed in detail the documentary evidence relating to these matters in the 1970s and 1980s. Yet that documentation indicates that, during that period, GAD was taking the initiative. The decision as to if and when new tables would be prepared was being made by the Government Actuary, who was then advising the Home Office as to what had been decided and forwarding new tables for dissemination to the police authorities for their use. The Defendants accept, at any rate in relation to the 1982 review, that GAD was itself instigating the review of the commutation tables at this time. This, in my view, indicates that both parties were aware at that time of the statutory obligation placed upon the Government Actuary under B7(7) and that, notwithstanding GAD's courteous reference to "recommending" tables in correspondence with the Home Office, the tables were for the Actuary alone to prepare, for use by all police authorities.

112 The tables prepared were then circulated by the Home Office within a short time, with a date for their commencement which varied between 1 and 3 months from the date of preparation...

113 The position seems to have changed however, with the advent of the new funding arrangements for GAD in 1989 and the requirement for "clients" to commission specific pieces of work. Stephen Humphrey states that GAD was not thereafter able to carry out any work without receiving instructions from a client to do so. He heads paragraphs 16 onwards in his statement as addressing "The review of actuarial tables by GAD on behalf of the Home Office".

114 ...this demonstrates a fundamental misunderstanding of the obligation placed upon the Government Actuary under Regulation B7(7) to prepare tables for use by all police authorities. It has led to a situation where, as the witness evidence shows, GAD considers that it must wait to be commissioned to prepare tables by the Home Secretary, as client and as administrator of the pension scheme; and that, whilst GAD may make recommendations as to when the tables should be reviewed, the decision as to if and when they should be reviewed and, once they have been

reviewed, as to when the new tables should be introduced, is one for the Home Secretary.

115 Whilst there may well be other consultancy work commissioned from GAD by the Home Office from time to time, the preparation of tables under Regulation B7(7) is, however, a specific statutory responsibility placed by Parliament upon the Government Actuary. I agree that it cannot therefore be changed by any internal alterations to GAD's relationship with the Home Office which post-date the 1987 PPR.

116 I agree with Mr. Millar that the witnesses' references, throughout their statements, to GAD's relationship with its clients, and to GAD's work and methodology, tend to elide the position of the Government Actuary's Department and the Government Actuary, a government officer in his own right. The statutory duties imposed upon the Government Actuary, as office-holder, are separate and distinct from the functions of the Department, as providers of actuarial services, referred to in the witness statements. The duty under Regulation B7(7) , in my view, falls clearly within the former category.

117 The exchange of correspondence relevant to the 2006 tables indicates, at times, some concern on the part of GAD, on the one hand recognising the Government Actuary's status as an independent actuary with statutory responsibilities, and, on the other, ceding responsibility for the preparation and promulgation of tables to the Home Secretary. This in my view explains the tension in some of the correspondence, GAD advising that the tables prepared in December 2006 should be activated urgently, so as to ensure actuarial equivalence under Regulation B7(7) ; and yet conceding, inconsistently, that it was for the Home Secretary to decide when to implement them.

118 This approach serves only to frustrate the object of this Regulation, which is to provide a certain, statutory procedure for achieving actuarial equivalence, consistent with the aim of the Regulations generally to provide clearly identifiable pension benefits in return for officers' service and payment of contributions.

119 The construction contended for by the Defendants leads, in my view, to confusion and uncertainty. Once it is recognised that the aim of Regulation B7(7) is achieved by imposing a duty on the Government Actuary to prepare tables, there is no basis for limiting that duty to one only to be carried out if and when commissioned by the Home Secretary. The Regulation does not in its terms confer any power upon the Home Secretary to commission reviews of commutation factors or to decide when the tables prepared by the Actuary are to come into effect.

120 The Defendants submit that there is a distinction to be drawn between preparing the tables, which necessitates the exercise of an actuarial judgment, and issuing those tables, the decision as to which is to be made by the Home Secretary. There is however no such distinction to be found in the Regulations, where the Home Secretary has no role to play in deciding upon individual pension entitlement or upon methods of calculation, save in those limited situations where such a role is expressly assigned to her.

121 In any event I see no meaningful distinction between “preparing” and “issuing” new tables for the purposes of Regulation B7(7), the plain words of which confer upon the Government Actuary, the only person named in the Regulation, an obligation to prepare tables for use, so that the commuted sum may be correctly calculated. In my judgment, absent any express provision to the contrary, once the Government Actuary had prepared the tables for use in December 2006, the statutory obligation under Regulation B7(7) had been discharged and the tables took effect from that date.

122 The Defendants' submission that, so long as the tables in use remained within the limits of what is “actuarially acceptable”, the decision to back-date to 1 October 2007 was lawful and rational, fails to have regard to the obligation imposed under B7(7). That provision is not concerned with a “range” of actuarial equivalence. Whilst there may well be a period of time during which use of existing commutation factors may be said to be defensible, the obligation under B7(7) is not to describe the acceptable range, but to prepare tables for use. The obligation on a police authority is not to pay an actuarial equivalent, or to pay a lump sum that might reasonably be said to represent the actuarial equivalent. Rather, it presumes a statutory, actuarial equivalent sum, namely the one identified by the Government Actuary's tables.

123 Calculating lump sums to be paid by reference to a range of actuarially acceptable factors would in any event lead to uncertainty and confusion, as factors moved further from the centre of that range over time. Certainty as to actuarial equivalence is obtained once tables have been prepared, based on the best available evidence as at that date, thereby ensuring that any lump sum thereafter to be calculated by a police authority accurately represents the value of the annual pension specified in the relevant notice. In this case that certainty was obtained was on 1 December 2006. From that date onwards the tables have represented the best assessment by the Government Actuary of those factors which would enable police authorities to comply with their obligations under the Regulation, until such time as he/she considered that changes in actuarial conditions necessitated a review...”

## **Material Facts**

16. Historically tables of actuarial factors were reviewed by GAD in connection with the Police Pension Scheme and the Scheme around the same time, as most of the benefit provisions are the same and similar considerations and assumptions largely applied with allowances for certain essential differences. Reviews in relation to the Scheme were carried out 1982, 1986, 1994 and 1998. In setting out the material events below I include some communications that specifically concern the Police Pension Scheme rather than the Scheme because GAD's general thinking on the calculation and revision of factors would have been the same for both schemes.

17. As Cox J found, in 1989 and during the 1990s the relationship between GAD and other government departments changed in that they became clients of GAD, commissioning GAD to undertake research and reviews for payment of a fee. Since then GAD's funding has been derived from fees that it charges to clients for specific pieces of work it is commissioned to do by its clients. It has also operated on the basis that the responsibility to order the review of the commutation tables and to publish the tables produced lay with the relevant government department.
18. This arrangement is confirmed in a Service Level Agreement made between the Scheme division of the Department and GAD for the period 1 April 2006 to 31 March 2007 which sets out the services to be provided by GAD to its client at the Department. GAD was to be responsible for supplying independent professional actuarial advice, either orally or in writing, of the highest quality and at a reasonable cost. Specifically, GAD was to provide those actuarial services requested by its client at the Department in connection with the Scheme and only those services commissioned could be invoiced under the agreement. Services included: advice and comments on the design of the new scheme; estimates projections and other cost calculations for the old and new scheme; advice and comments and costing on other aspects of the Scheme. In providing its services under the agreement GAD was to comply with "the provisions of legislation, mandatory professional guidance issued by the Faculty and Institute of Actuaries and guidance issued by OPRA [the then pension scheme regulator]" which were to take precedence. There were provisions for the settlement of disputes between the parties and for notice of termination prior to 31 March 2007. GAD submits that it operated under similar terms with the Department prior to the agreement (and this is supported by Cox J's findings that the relationship concerning the Police Pension Scheme had been on a similar basis since the late 1980s/early 1990s). It seems the relationship was continued on the same basis until the Police Federation Case.
19. A review of the commutation factors was discussed between GAD and the Department in late 1993 – in particular the possibility of using unisex factors – in relation to both the Scheme and the Police Pension Scheme. (At that time the department responsible for both was the Home Office.) In a letter to the Department dated 10 August 1994 (by which time the idea of unisex factors had been abandoned) GAD referred to the present tables, produced in 1982, and said that, adopting similar factors, it was reasonable to conclude that new tables did not need to be produced. The letter explained the methods used and the overall framework within which the calculations had been made and said that if the

Department was happy with this information then the Scheme could continue to use the existing tables. However, if the Department preferred a full review then some up to date information on pensioner mortality was required.

20. The Department wrote to GAD on 3 April 1998 asking it to consider whether, in the light of the revised tables prepared for the Police Pension Scheme, the commutation factors for the Scheme should be reviewed as this had not been done since 1994. GAD responded on 15 June 1998 saying that it had finished its review of the commutation factors. GAD explained that when the current commutation factors were last reviewed in 1994 improved mortality rates were used which increased the factors but the interest rates used to discount future payments were increased which acted to reduce the factors. As the resulting commutation factors were, overall, similar to the factors then in use, it was decided that no amendments would be made in 1994.
21. GAD went on to explain that for the current review, it did not have information to undertake a full analysis of mortality experience amongst former firefighters and that the last data was collected in the mid-1980s and used for the 1990 review of new entrant contributions. Adopting the same rates of mortality as for the Police Pension Scheme, which were based on experience in the 1980s adjusted in line with mortality improvements elsewhere, it found that the commutation rates were increased. However changes in the interest rate of return largely offset the effect of mortality improvements. The factors were actuarially cost neutral compared to the pension payable if members chose not to commute. But as most firefighters commuted the maximum amount if the revised commutation factors were introduced there would be some increase in expenditure. It recommended that the factors be reviewed in three years when more information would be available and there would be a clearer picture.
22. A note prepared by GAD at the same time explained that commutation factors fell to be reviewed from time to time and that the lump sum option was an attractive one as it was, for example, tax free. In relation to the assumption as to the appropriate interest rate to apply to discount future pension payments, the note said that exact matching of the income foregone was not possible so allowance needed to be made for reinvestment rates which would apply in future. GAD was also conscious of the desire to avoid having frequent changes in the factors as market conditions change. This avoided perceived inequalities (as different cash payments were made at different retirement dates) and eased the

administration of the Scheme. The note concluded that “Such a system does imply regular review of the factors.”

23. This was the last review of commutation factors undertaken in relation to the Scheme until 2006.
24. In September 1999 GAD reviewed the “allocation tables” in relation to the Scheme. These dealt with the option to give up part of a pension in return for a pension payable to a dependant and involved consideration of certain factors including assumptions as to the expected rates of mortality for former firefighters and the appropriate rates to discount future pension payments. Its impression was that allocation was a rarely used option.
25. On 1 November 2002 GAD wrote to the Department, which was at that stage reviewing the cost of the Scheme and had enquired about the value of benefits provided by the Scheme. GAD replied that there were two central financial assumptions which had been set for many years. They included assumed long term rates of return, the average career progress of a new recruit and life expectancy of firefighters in retirement. Public sector schemes were using assumptions for future pensioners that incorporated substantial allowances for expected greater longevity. As there was no system for collecting data about firefighter pensioners GAD said it would probably adopt assumptions in line with other uniformed public servants.
26. Later that month the Department specifically asked GAD whether it should be looking at unisex factors for all ages, not just in relation to additional benefits and commutation, but with regard to other aspects such as allocation and transfer values. Reference was made to complaints received about the male/female commutation factors under Rule B7 which it understood were last updated in 1987.
27. GAD responded on 28 November 2002. It commented on the different factors applying to male and female members for the purposes of commutation, added years and allocation. It said that the current commutation factors had in fact been introduced with effect from July 1998, had been used regularly (as almost all firefighters commuted part of their pension) and that it would be possible to consider unisex commutation factors. Various options were suggested as to how this could be done and the Department was asked if it wanted to discuss any of these. However, GAD did not specifically express a view as to whether or not it was then necessary to reconsider the actuarial factors for commutation purposes. In relation to allocation factors it did not recommend the use of unisex tables. The factors

for added years it said were similar for men and women unlike those for commutation purposes because the factors represented the value of members' and survivors' benefits.

28. On 28 January 2003 the Department wrote to GAD asking for confirmation that the allocation tables were still correct as it was reviewing amendments to the Scheme.
29. On 19 February 2003 GAD apologised for the fact that the provision of the allocation tables had been overlooked and said that the Department may wish to take the opportunity "to update previous tables slightly, in line with current assumptions about life expectancy". The writer said he would be investigating further and would write again. Between March and September GAD advised on the allocation tables concluding that they had been reviewed from time to time and that the factors prepared in 2000 remained suitable.
30. In response to a formal request from the Department to review and update the assumptions underlying GAD's estimate of the costs of the Scheme, GAD reported to the Department on 7 April 2004 on evidence collected and its review of assumptions and costings. The writer commented that GAD had had less data than needed to undertake a comprehensive review of the Scheme but that its work had been assisted by data collected earlier in the year about firefighter pensions. He referred to the fact that recent general improvements in life expectancy had exceeded all previous expectations. In relation to commutation he said that GAD had recognised the requirement of Rule B7(3) by assuming that commutation factors would be updated from time to time so that they were actuarially neutral when firefighters entering service reached retirement. He suggested that the current commutation factors would probably be found to be too small against the requirements of the Rule. He concluded that the cost of the Scheme was estimated some years ago at 34.75 % of pensionable pay and that, on the basis of the assumptions referred to, the estimate was 36.4% mainly due to the increase in assumed life expectancy although other factors had mitigated the increase. Finally he said the review had been a large piece of work, the more so because of the long intervals since the previous assessment.
31. A further letter on the subject from GAD to the Department of 18 June 2004 mentioned that GAD had reviewed the mortality assumptions and had concluded that these should be strengthened further so as to take account more fully of continuing trends towards increased longevity. Adopting this change would result in a set of assumptions that were unlikely to be reviewed again in the short term and should provide a solid platform for

comparing the costs of different scheme designs. On the basis of these revised longevity assumptions the cost estimate of the Scheme was 37.5% of pensionable pay and not 36.4% as previously indicated.

32. Internal GAD emails in November 2004 refer to commutation and Rule B7(3) and possible claims for higher factors. One email said that there: “Must be a strong case to review current [commutation factors for the Police Pension Scheme and the Firemen’s Pension Scheme]” that it would be sensible to review them together and that a convenient starting date for the new commutation factors would be April 2006.
33. An exchange of internal emails on 8 November 2004 referred to the fact that the allocation tables had not yet been issued meaning that allocations taking place after September 2004 were not in accordance with the relevant rule and that “...it would be far from ideal if the SPPA (and HO?) did not introduce the appropriate tables. We don’t want to upset the client with constant reminders but there would seem to be an important issue here, even though allocation is relatively rare these days”.
34. There were discussions within GAD in November and December 2004 about mortality assumptions in relation to various public sector schemes. Another internal email of 8 November 2004 said “The problem with commutation in the police is not so much the basis in use as the frequency of review. However, this could embarrass us if we have not kept reminding HO/OPDM [the Home Office and the then Office of the Deputy Prime Minister] of the need to revisit.”
35. According to a note of a meeting of the “Firefighters Pension Committee” dated 12 September 2005 the representative of GAD, commenting on GAD’s actuarial assumptions for the new pension scheme, said that the Department had carried out a survey amongst the Fire and Rescue Service in 2004 and that GAD had amended its assumptions (as described in June 2004) to reflect some of the findings of the survey. He was quite comfortable that the actuarial assumptions they used were within the parameters of reasonableness.
36. On 23 December 2005 the Department wrote to GAD regarding factors for the new scheme and commented that more firefighters were choosing to stay in service longer because of changes in the compulsory retirement age and that the current commutation factors were clearly a disincentive for those who wanted to remain in service longer. The writer asked GAD to review the factors to see whether a change would be appropriate.

Finally he referred to exchanges a while before about a service level agreement and asked GAD to let him have a draft based on one that GAD had with another scheme.

37. On 1 February 2006 GAD received an email from a member claiming that the commutation factors had not changed since he joined the Scheme 21 years previously. He queried why the factors had not been reviewed in line with the Government's statement that people were living longer which was causing pensions to become too expensive. At the same time a complaint was made in relation to the Police Pension Scheme about commutation factors used for female officers. GAD sent an email to the Home Office regarding the Police Pension Scheme on 11 May 2006 saying: "You are probably slightly exposed ...because the commutation factors are now out of date and we have recommended that they be reviewed but you have not commissioned a review...". On 12 May 2006 the Home Office responded saying that it had not done so "so far since you have had enough to do with other issues. We are still awaiting some factors for the new scheme. Once we have cleared all this I would want you to review the commutation factors."
38. On 22 August 2006 GAD wrote to the Department having reviewed the commutation factors and apologised for the delay. The letter mentioned that the current factors dated from 1998 when there was a recommendation for slightly higher commutation factors for males aged 52 and over and for females aged 56 and over as a consequence of assuming longer life expectancy than at previous reviews but that this was offset at younger ages by using higher interest rates to discount future payments. Illustrative commutation factors were given resulting from the review alongside existing factors. These were greater than existing factors at all ages because of the new assumptions for longer life expectancy and lower real discount rates. For men, illustrative factors were some 23% to 27% higher and for women some 6% to 11% higher.
39. At a meeting between GAD and the Department the following day it was noted that these factors would increase outgoings on retirement by around 25% because most firefighters commuted the maximum amount of pension into a tax free lump sum. This was a direct consequence of Rule B7(3).

40. A Report of the Actuarial Profession Member Options Working Party dated December 2006 referred to commutation factors and stated that its data indicated that for most members of pension schemes the cash sum received on commutation was likely to be substantially less than the cost to the member of replacing the pension surrendered. It commented that the background to setting commutation terms had changed over time and that over the past five years long dated interest rates had fallen substantially and expected longevity had increased both of which implied that the cost of pension benefits had increased materially. Terms for cash commutation had generally not increased by the same proportion, if at all. Other factors were also mentioned. The Report recommended that: where an actuary had an explicit or implied obligation to advise trustees and sponsor clients on terms for member options, changes in market conditions (i.e. long dated interest rates and expected longevity) may make it appropriate for the actuary to advise that the terms may be out of date and should be reviewed if this has not taken place in the past two or three years; it may be helpful to clarify the actuary's ongoing obligation by setting out terms for reviewing member option terms of engagement and by establishing a policy or trigger for future reviews.
41. An email from the Police Pensions and Retirement Policy Section of the Home Office, to GAD headed "pensions" of 29 October 2007 mentioned that it relied on GAD to advise when the factors needed to be reviewed but would not expect GAD to deliver new tables for immediate use. The writer remarked that: the practice of infrequent reviews may well have been built up because mortality rates did not change in the past; there were also good policy reasons for continuing with this practice in order to avoid constant speculation about change; GAD had notified the Home Office on 1 December 2006 of the need for changes with recommendations but that there was no need for immediate change although time was running out; the Home office had considered whether there were alternatives and, having concluded that there were none was preparing to implement them, and GAD had not insisted on backdating. The writer commented that the wording of the police regulations (being "prepared by the Government Actuary") was quite vague but that by convention the regulations had been applied as meaning that the tables had been prepared for the scheme as a whole, not issued directly to each force, that the Home Office had control over how and when to promulgate them and that the exact date from which to bring new factors into effect was also a matter for the Home Office provided GAD agreed.

42. GAD responded on 31 October 2007. Its preference was for a regular cycle of reviewing the factors every three to four years in line with the actuarial valuation cycle even though not every review would necessarily result in a change in the factors. GAD favoured this preference because it was not otherwise clear who was responsible for the review. The writer said that the Home Office would need to rely on GAD to alert it when a review was required which was not problematic so long as it was understood where the responsibility lay. The problem occurred if GAD recommended a review but the Home Office did not agree to commission work as GAD would have difficulty doing the review without a paying client. It would also expose GAD “by the apparent obligation ...in the regulations to make sure that the prevailing rates were defensible”. GAD agreed that it was impractical to implement any recommendation with immediate effect and that it could reasonably take at least a few months to consider the implications and practicalities. It suggested that the wording of the regulation gave some scope to the Home Office to decide how and when the new table were to be implemented as it simply referred to “tables prepared” by GAD as opposed to “tables issued “ by GAD as in some other schemes which gave less room for manoeuvre.
43. An internal policy document (prepared by the Department for Ministers on 30 November 2007 referring to the issue of revised commutation factors) comments that the factors were last revised in 1998 and “responsibility for proposing any change rests with GAD”. The document made clear that the implementation and time had been discussed with the Treasury and the Home Office (the police pension scheme was said to be operated on a similar basis and had the same factors) and proposed that they be introduced on a date to be fixed in December and backdated to 1 October 2007. It was stated that there was no alternative to adopting the new factors proposed by GAD. In 1998 the new factors had been introduced with immediate effect after issue of the guidance circular but on this occasion matters had been delayed by discussion between the Treasury and the Home Office on the changes. The Home Office had agreed with the Treasury to implement the new factors from 1 October and given that the arrangements between the Police Pension Scheme and the Scheme were comparable and the factors the same the Department did not think there was an alternative to following their lead.
44. Revised tables for the Scheme were published on 21 May 2008, with an instruction to employers to backdate their application to retirements on or after 1 October 2007.

45. In 2009, following the outcome in the Police Federation Case, the application of the revised tables was further backdated to the date on which they were produced by GAD, namely 22 August 2006.

### **Summary of Mr Milne's position**

46. Mr Milne's submissions, particularly as to remedy, take into account that there are other firefighters across the UK with similar complaints. For the purposes of his complaint I only need to decide that revised commutation factors should have been in operation by the date of his retirement. However, as there are a large number of others who have an interest in the outcome of this matter he asks me to decide whether the factors should have been revised in 2001, 2004 or any particular date before he retired. If the commutation factors had been updated the lump sum he would have received would have been greater.

### *Maladministration*

47. He accepts that a mistake of law is not automatically maladministration. It is important to examine GAD's conduct as a whole to decide whether he has suffered injustice as a consequence of GAD's actions. It is wrong to isolate the elements which amount to maladministration and to compensate for injustice caused by those elements alone.
48. He gives various examples of maladministration (including knowingly giving advice which is misleading or inadequate; ignoring valid advice or overruling considerations which would produce an uncomfortable result for the over-ruler; faulty procedures; failure by management to monitor compliance with adequate procedures) and argues that the documents reveal that GAD was culpable in a number of these respects.
49. He accepts that sound actuarial practice as well as practicality means that factors are generic and not calculated on an individual basis and that once new factors have been adopted they will remain in place for a period of time.
50. GAD should have taken the initiative in reviewing the assumptions underlying the commutation tables. There was maladministration as there was neither a service level agreement between the Department and GAD, nor any other proper administrative arrangement that would ensure periodic review of the commutation tables.

51. It appears that no arrangements were put in place prior to 2006 to formalise that relationship, to monitor service levels or to ensure that the Scheme was proactively managed to meet good actuarial practice. The Department hoped that GAD would advise when action was needed to ensure that the Scheme complied with the law and rules. GAD hoped that the Department would commission work as required. But no-one was actively managing the need to update allocation or commutation tables and other matters as required by the rules.
52. In previous reviews, it was clearly recognised that GAD had the responsibility to determine when commutation factors should be reviewed. That changed when the relationship between GAD and the Department became a relationship of adviser and client.
53. When a review was conducted in 1998 GAD advised that the factors should be reviewed again in 2001. However, there were no procedures in place to ensure that the 1998 advice was followed up. GAD's practice, until the changes to the relationship in the early 1990s, was that GAD initiated the review. GAD should have continued to assume that responsibility, or should have ensured that someone would do so if GAD did not.
54. Nonetheless, the Department did ask if the factors in use were appropriate when it wrote to GAD in November 2002. The question was prompted by concerns over the use of gender-specific tables. The advice given was inadequate, because it dealt only with the question of gender-specific tables. The author knew that mortality improvements meant that the tables were out of date.
55. If GAD had read its own advice, it would have recognised that the three year review was already overdue. GAD did look at the previous correspondence, at least to the extent of checking when the factors were last reviewed, but did not prompt the Department to commission a review.
56. GAD conducted a mini-valuation in April 2004. Its assumptions about mortality are not fully-explained, and it went to some pains to avoid disclosing them when later requested. It clearly stated that the commutation factors were out of date, but it did not go on to say that (i) either the costings provided were inaccurate because they assumed an unjustifiable saving if members commuted or (ii) that they were accurate because the costings were calculated on the basis of actuarial neutrality if a member commuted – in which case new factors should have been produced. At this point the Department and GAD both knew

that the tables were out of date, and that commutation lump sums were being calculated on a basis that did not comply with the rules.

57. The Department and GAD considered factors other than “actuarial equivalence” when discussing the production of the tables in 2005.

*Delay*

58. When discussions regarding a review started in 2005, there was an inordinate delay before the new tables were produced on 22 August 2006. There was also delay between 23 December 2005 when the review was commissioned and when the new factors were produced on 22 August 2006. The only evidence of work done during this period was an email exchange in June 2006 which shows that the work was largely completed by then.
59. He accepts that a review requires a detailed process to form a judgment on longevity and discount rates but thereafter, as Cox J said, the calculation of the factors is largely a mechanical process.
60. The review was commissioned eight months after the mini-valuation which was said to be a large piece of work. But what was a “considerable amount of work” for the Police Pension Scheme in December 2005 had already been completed in the Scheme. The financial assumptions had been set and were the same as used for assessments of other public service pension schemes and mortality rates had been determined in June 2004.
61. According to the undated ministerial briefing consultation was not required or appropriate.

*Remedy*

62. The Pensions Ombudsman’s jurisdiction of maladministration causing injustice has been described as creating a statutory tort. The duty of care is implicit between him and the persons responsible for the Scheme, as set out in the statute i.e. in this case, GAD. GAD owed a duty of care to update the tables and he suffered a loss, because had that duty not been breached (i.e. the tables had been updated in 2004), he would have had higher lump sum. GAD caused that loss because until it updated the tables, Strathclyde Fire and Rescue Service had no choice but to apply the old factors.
63. The starting point must be to place him in the position he would have been in had there been no maladministration. He therefore seeks compensation based the loss he has suffered as a result of his commutation lump sum being smaller than it ought to have been. GAD accepts that a review in 2004 would have led to an improved factor and that is

enough to establish that he has suffered loss. Mr Milne accepts that the new factor applicable to him must be determined by GAD.

64. GAD should pay as GAD is the wrongdoer. The question is simply what commutation tables would have been in place if the reviews that GAD itself had advised should be undertaken had in fact been undertaken. The answer is that tables would have been reviewed in 2001 and 2004 with effective dates in 2001/2 and 2004/5.
65. There would be a breach of natural justice if the Pensions Ombudsman were to hold persons not party to the complaint liable for the shortfall: and it would be absurd to suggest, for example, that the Scottish Government or Northern Irish Executive could be made parties. The complaint is not the appropriate vehicle for GAD to seek to transfer liability to them or others (save perhaps the Department). There is no suggestion that his employer did anything other than follow the regulations. It would be unjust to ask them to pay, as they and other FRAs, have in fact already paid the contributions due to cover the cost of higher actuarially neutral commutation factors. He is not getting any younger and should not be expected to wait because GAD wishes to look to others to pay the shortfall.
66. If any part of the compensation is to be treated as a taxable payment, GAD should pay an additional amount to gross up the compensation payable for tax. Interest on the compensation should be payable.
67. If the remedy is merely declaratory (that is, in effect, a statement that the factors should have been recalculated), then it will be unenforceable (because the enforcement provisions in the Pensions Ombudsman's legislation envisage enforcement as if a County Court order or a Sherriff's warrant and are not apt to such a remedy).
68. Rule B7(3) says that the commutation lump sum that an FRA must pay is the lump sum calculated from the tables in force "at the date of retirement". That points to the payment of a single lump sum at the point of retirement. So a presumption against retrospective application of the revised tables, means that once an FRA has paid a lump sum in accordance with rule B7 and in accordance with the tables in force at that time, it has no further liability to pay a commutation lump sum.
69. Neither GAD, nor the Department nor the devolved administrations are in a position to dictate to the FRAs what rule B7 means. If an FRA denies having responsibility to pay any more, new proceedings will have to be issued to resolve the question about whether rule B7 permits the payment of a second lump sum and if so, requiring the FRA to pay.

70. The funding arrangements as currently applicable mean that an FRA [in England Wales and Northern Ireland] has to carry the cost of paying the increased lump sum and may have to wait up to two years before they are reimbursed in full. So although it is the Department and devolved government, and not the FRA who will in fact bear the cost, an FRA still loses the time value of funding them.
71. GAD wrote to DCLG on 22 August 2006 saying “The employer’s contribution rate is already calculated on the assumption of actuarially neutral commutation factors”. So FRA’s were already contributing before 2006 to fund increased commutation lump sums when in fact increased lump sums were not being paid.
72. Following *Edge v Pensions Ombudsman* [2000] Ch 602, any direction that I make that would have an adverse effect on an FRA means that an FRA should either be added as a party to my investigation and/or given an opportunity to state its case, which has not happened here.
73. Mr Milne does not think it would be inequitable for GAD to compensate him because it is not possible to make the Scottish Fire and Rescue Service do so, for the reasons explained above.

#### *Professional fees*

74. A thorough examination of GAD’s actions in the period between 1998 and 2006 has required a complex factual and actuarial analysis. Mr Milne needed actuarial advice to establish whether a different factor would have applied if there had been a review and why GAD did not conduct such a review i.e. to establish the reasonableness of GAD’s actions and actuarial standards. Accordingly a direction for the payment of the reasonable actuarial fees incurred would be appropriate.

#### **Summary of GAD’s position**

##### *No maladministration*

75. Mr Milne’s application is a complaint of maladministration and not a dispute; my jurisdiction does not extend to disputes between members and administrators. Therefore I need to first determine whether there has been maladministration and second whether Mr Milne has sustained injustice in consequence of it. The existence of an error of law as determined by Cox J in the Police Federation Case is not determinative. Mr Milne must show maladministration.

76. Since the early 1990s GAD, along with other relevant government departments, had operated on the basis that the responsibility to order the review of the commutation tables, and publish the tables produced, lay with the Department. GAD saw itself as an “actuarial consultancy working within the Government”, specialising in providing advice to public bodies in the UK and overseas.
77. The Regulations contain no express duty on GAD to review the commutation tables. That duty was implied by Cox J. There was no maladministration by GAD between 1998 and 2006 as its understanding of the legal position was a reasonable one until shown to be in error by the court.
78. Its understanding of the legal position was in line with other Government Departments (including HM Treasury, the Home Office and the Department).
79. Breach of legal duty does not equate to maladministration, which involves negligence, carelessness, “faulty or incompetent administration falling short of the breach of any legal duty or obligation”.<sup>4</sup> GAD also refers to the finding of Lewison J in *Arjo Wiggins Ltd v Ralph* [2009] EWHC 3198 (Ch) where he noted that maladministration could cover “bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness and so on; covering the manner in which a decision is reached or discretion is exercised; but not the merits of the decision itself: *R v Local Commissioner for Administration for the North and East Area of England, ex p Bradford Metropolitan City Council* [1979] QB 287, 311 (per Lord Denning MR).”
80. Although there may be some overlap, “maladministration” and “unlawfulness” are not coterminous. The concept of “maladministration” requires some element of carelessness or fault, whereas “unlawfulness” merely requires non-compliance with a legal requirement or rule, possibly on the basis of a reasonable (but ultimately mistaken) understanding of the legal position.
81. As was said by Robert Walker J in *Westminster City Council v Haywood (no1)* [1996] 3 WLR563 it is not necessarily maladministration for a decision maker to take a wrong view of the law. In that case he said:

“Taking and acting on a wrong view of the law may be maladministration if the decision-maker knows, or ought to know, that the state of the law is uncertain and that those who may be adversely affected by the uncertainty need to be warned about it.”

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<sup>4</sup> *Secretary of State for Health v Marshall* [2008] EWHC 909 (Ch).

82. GAD had no reasons to believe that the law was uncertain in any way. No-one had suggested, until the Police Federation Case, that GAD was under an implied duty periodically to review and update the tables. Neither the Fire Brigades Union nor any other body representing the interests of public sector workers had made any sort of complaint in relation to this matter.
83. It rejects the suggestions that there was maladministration because there was neither a service level agreement between the Department and GAD, nor any other proper administrative arrangement that would ensure periodic review of the commutation tables. The fact that there was no service agreement in place before 2006 is not relevant. Up to the Police Federation Case GAD and the Department had worked on the basis reflected in the later agreement.
84. Because of the new funding arrangements introduced in the 1990s GAD regarded itself as unable to carry out any work without receiving instructions from a client to do so. GAD honestly believed that it was for the Department to decide when to implement a review just as it believed it was for the Home Secretary to do so for the purposes of the Police Pension Scheme. Its position was based on a reasonable and good faith reading of the statutory requirements. Once it had recommended a review in 1998 it was for the client to decide whether to act on that recommendation.
85. Mr Milne or any other interested party would have been entitled to challenge the failure by GAD to review the tables by judicial review. The absence of any such challenge shows that it was reasonable for GAD to continue to hold the view that it did.
86. In any event on a number of occasions between 2004 and 2007 GAD drew the attention of relevant departments to the desirability of undertaking a review. This demonstrates that it did not act carelessly during the relevant period.
87. If it was not maladministration to make an error about its functions, it cannot be maladministration to adopt administrative practices suitable to the functions as GAD believed them to be. GAD understood itself to be performing the role of an independent provider of actuarial advice. It regarded itself as unable to carry out any work without instructions from a client to do so. Given this there was no need for it to have in place administrative arrangements designed to “prompt” the Department to act in any particular way. The fact that GAD did not in 2002 cause the Department to initiate a review flowed from its understanding of its proper function.

88. There is no evidence at all that GAD deliberately ignored the fact that the tables were out of date because it found this fact “uncomfortable”. On the contrary, the possibility that the current factors were “too small” was raised in terms in GAD’s letter of 7 April 2004.
89. GAD’s view that longevity was increasing was repeated in its letter of 18 June 2004. The emails of 4 November and 8 November 2004 from GAD evidence a genuine internal discussion about the strength of the case for a review. This is wholly inconsistent with a desire to sweep uncomfortable facts under the carpet.
90. Nor did GAD deliberately ignore the fact that the tables were out of date. Neither GAD, nor anyone working for it, would act in such an unprofessional fashion or benefit in any way from concealing the fact that commutation tables were out of date. Revising the tables might end up being costly to the relevant government department, but would not have any effect on GAD.
91. A direct read across from the concern expressed by GAD in emails of November 2004 regarding the allocation tables is unjustified as these would have been out of date having been prepared in 2000 as compared with the commutation factors which were reviewed in 1998.
92. Evidence was submitted to the court in the Police Federation Case from John Alexander Gilbert on behalf of the Home Office and Stephen Humphrey on behalf of GAD. In his statement Mr Gilbert expressed the view that because the trend in life expectancy had historically been upwards, if the tables were reviewed at regular intervals there would be a tendency for officers to time their retirements to coincide with the expected review date; for that reason there is an advantage for the police service in not having the tables changed too frequently; commutation was optional and the tables of commutation factors and worked examples of how much an officer may receive are in the public domain and available to them.
93. Although payment of commutation lump sums is made on an “actuarially neutral” basis in that the cost of the lump sum is offset and recouped by savings made in the annual pension payments over the remainder of the member’s lifetime, payment of lump sums requires an immediate cash payment. Additional costs and staff retention are legitimate subjects for scrutiny by ministers (including the Treasury) and the taxpayer.
94. In his statement, Stephen Humphrey who at the time was a Chief Actuary at GAD said: the reference in GAD’s email of 11 May 2006 to factors being “out of date” meant that a

review of the factors was due, not that the commutation factors in force no longer met the requirement of the regulations; the email advice was an example of GAD providing general feedback to its client based on the type of knowledge and awareness that it had acquired through access to general information in the course of its day to day work; at any given time there will be a range of values for the lump sums that may reasonably be considered to be “the actuarial equivalent of the surrendered portion” for a particular pension; there is a range of assumptions as to longevity and discount rate that can be legitimately adopted by an actuary.

95. Mr Humphrey said that GAD considers a wide range of evidence when making a judgment on longevity assumptions and avoids placing undue emphasis on a single piece of new evidence. However, the latest longevity projections published by The Office of National Statistics on 23 October 2007 had the effect of making the 1998 factors harder to reconcile with the requirement that they should represent the actuarial equivalent of the pension given up. This was only one, albeit important piece of new evidence.

*No delay*

96. There was no delay in the production of updated tables. A request for a review was made on 23 December 2005 and they were produced on 22 August 2006. The eight months taken to revise the commutation tables was not only appropriate but entirely predictable.
97. Cox J made no criticism of the time it took to prepare the tables. She acknowledged that when a review is carried out GAD must follow a detailed process in order to reach a judgment as to the appropriate assumptions to adopt and that this constituted the bulk of the work.
98. Although GAD had a statutory duty to revise the commutation tables it had a discretion as to how to go about the formulation of the revised figures.
99. While the implementation of prepared tables may only take a few months, the preparation of the tables is a more an onerous and complex task. It requires the collation of data, consultation across government and the exercise of independent professional judgment. It did not take into account irrelevant factors.
100. GAD was not able simply to use the financial and mortality assumptions used for the mini-valuation in 2004. Commutation factors are designed to be used for those at or close to retirement. These are likely to require a different allowance for improvements in life

expectancy from the figures used for valuation purposes (which assess the cost of accrual over the working life of a recruit, who would be likely to retire 20 or 30 years later).

101. An analysis of the figures shows that the mortality assumptions used when revising the figures were not the same as those used in the mini-valuation in 2004. Although the financial assumptions used in the revised commutation tables were in fact those used in the mini-valuation in 2004, this could not be assumed. The review included a reconsideration of the financial assumptions.

*Retrospective application of the tables*

102. It is a general principle of law that statutes and instruments made under them should not be construed as conferring power to affect past transactions in a manner which is unfair to those concerned in them unless they say so in express terms.<sup>5</sup>
103. Neither the Scheme, nor the Acts under which it was made, confer any express power to make tables with retrospective effect. Nor is there any such suggestion in Cox J's judgment, which makes plain that firefighters' entitlement to enhanced payments based on updated factors applies to those who retired on or after the date when the tables were prepared.
104. The effect of preparing tables with retrospective effect could be to alter the entitlement of retiring firemen to lump sum payments after (and potentially long after) the date on which those sums were paid. There is, of course, no guarantee that the retrospective application of commutation factors would be beneficial to the retiring member. So any retrospective application of the tables could be adverse to the member.
105. There would also be substantial financial outlay and steps needed to meet the cost which would impact on departmental budgets and on current members.

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<sup>5</sup> Secretary of State for Social Security v Tunncliffe [1991]2 All ER 712; L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd [1994] IAC per Lord Mustill at 525

*Possible outcome of reviews*

106. GAD has recently been undertaking more detailed work on the factors that it considers should have been issued in December 2004. GAD's more detailed work has indicated that as if there had been a review in 2001/2, as at 1 December 2001, the increase in the factors would more likely have been around 12% on average. It follows that had such a review been carried out on 1 December 2001 it is more likely that GAD would in fact have issued new factors at that time. And any factors that would have been issued in 2001 would have been replaced by more updated factors in 2004 prior to Mr Milne's retirement.
107. GAD has done this work so that it is in a position to swiftly respond to any final Determination should any persons be adversely affected by my Determination so that GAD can ensure that those persons receive any extra monies that they are due.

*Remedy*

108. If I find against GAD, a direction that GAD calculates Mr Milne's lump sum on the basis of a review in December 2004 would be appropriate so long as there is no direction that GAD is liable for any shortfall (with interest) arising. A finding that there has been maladministration by GAD in failing to review the tables does not on its own make it appropriate that GAD should make up any shortfall. It was the Scheme not GAD that was responsible for the payment of pension or commuted lump sums.
109. Had a different and higher commutation factor been used in 2005 Mr Milne would have received a higher lump sum. But the question where any current liability to compensate Mr Milne should lie is a separate one. It is open to the Pensions Ombudsman to direct "any person responsible for the management of the scheme to which the complaint relates" to take steps to remedy the loss. So far the Pensions Ombudsman has only considered the actions of GAD as a person responsible for the management of the Scheme. Who should make good the shortfall is a complex one and affects a number of stakeholders across the Government who may also be persons responsible for the management of the Scheme e.g. the Department, HM Treasury, the Scottish and Welsh Governments, Northern Ireland Executive and the FRAs. Prior to April 2006 pension expenditure was paid for by the employers from their operation accounts.
110. If there is a shortfall, a period of time should be allowed for cross-Government agreement as to how the shortfall should be made good and by whom. Only if agreement is not reached should the Pensions Ombudsman consider which of the persons responsible for

the management of the Scheme should make up the shortfall. The existence of an unresolved complaint against the Department constitutes a further reason why it would be inappropriate to order that GAD should make good any shortfall to Mr Milne.

#### *Professional fees*

111. GAD should not be liable for any professional fees arising by Mr Milne.

#### **Conclusions**

112. Mr Milne has asked for clarification about the Department's role. At the outset of Mr Milne's complaint, my office expressed doubt as to whether we could include the Department to the complaint as an 'administrator'. In the Police Federation Case, the Home Office, which had a similar role in that matter to the Department in this, was represented. I do not think that if I had been able to include the Department as a respondent it would have been able to add to the central issue, already decided in the Police Federation Case, of what GAD's obligation was. Also, for the reasons explained below, I do not need to include the Department for the purpose of the directions I am making in Mr Milne's case.
113. Under section 146(1)(c) of the Pension Schemes Act 1993 I can consider a dispute of fact or law between Mr Milne and "a person responsible for the management of the Scheme" as defined by section 146(3). GAD, as an administrator of the Scheme, does not fall within the necessary definition as it is the Secretary of State for the Department and the individual fire authorities which are the persons responsible for the management of the Scheme. I do not, therefore, have the jurisdiction to investigate and determine a dispute of fact or law between Mr Milne and GAD.
114. However, the pure dispute of law at the heart of the matter has already been decided by Cox J. GAD had an obligation to produce tables of factors to ensure actuarial equivalence. I am now dealing with a complaint that follows that finding which, while it may involve consideration of legal points, is in my view in an area where maladministration and legal matters overlap (as GAD concedes that they can).
115. There is no definition of maladministration in law. The list referred to by GAD (see paragraph 79) has its origins in the so-called "Crossman catalogue" set out in a speech in the House of Commons by Richard Crossman during the debates preceding the creation of the Parliamentary Ombudsman – more properly, the Parliamentary Commissioner for Administration – in 1967. (Parliament undoubtedly had that legislation in mind when

defining the Pensions Ombudsman's power to deal with maladministration causing injustice.) The Crossman Catalogue was expressly a non-exhaustive list and, to modern ears, is put in terms that is somewhat of their time ("turpitude" for example).

116. As long ago as 1993, Sir William Reid, the then Parliamentary Ombudsman felt a need to update the list, setting out a further catalogue adding:
- rudeness (though that is a matter of degree);
  - unwillingness to treat the complainant as a person with rights;
  - refusal to answer reasonable questions;
  - neglecting to inform a complainant on request of his or her rights or entitlement;
  - knowingly giving advice which is misleading or inadequate;
  - ignoring valid advice, or overruling considerations which would produce an uncomfortable result for the overruler;
  - offering no redress or manifestly disproportionate redress;
  - showing bias whether because of colour, sex , or any other grounds;
  - omission to notify those who thereby lose a right of appeal;
  - refusal to inform adequately of the right of appeal;
  - faulty procedures;
  - failure by management to monitor compliance with adequate procedures;
  - cavalier disregard of guidance which is intended to be followed in the interest of equitable treatment of those who use a service;
  - partiality; and
  - failure to mitigate the effects of rigid adherence to the letter of the law where that produces manifestly inequitable treatment.
117. It is unlikely that either list would have been exactly the same had its author been contemplating a jurisdiction, such as the Pensions Ombudsman's, which is designed to be effective in relation to private sector pension schemes and businesses as well as public authorities. And the 1993 list itself is now out of tune with the present (see, for example, *NHS Business Services Authority v Leeks* [2014] EWHC 1446(Ch) in which it was decided that limitations of automated systems could give rise to maladministration).
118. As I have said, there is no clear dividing line in jurisdictional terms between disputes of law and maladministration. They overlap. As I think GAD accepts, it certainly cannot be the case that where there is a potential breach of the law the automatic consequence is that I am unable to deal with the matter under my jurisdiction concerning complaints of

maladministration. That would render my jurisdiction in relation to administrators almost impotent. Take, for example, a typical case in which a scheme administrator fails to pay benefits of the right amount, or on time or at all. The scheme member is likely to have legal rights as against the administrator (they may also have rights as against the trustees or managers, but that is beside the point). The fact that the failure to pay correctly or timeously may amount to a legal wrong cannot mean that it is outside my jurisdiction. Parliament must have intended that I could deal with such matters, which are the bread and butter of many an administrator's work.

119. The overlap was recognised by Robert Walker J in *Westminster* (the point was important because at the time disputes of fact or law were excluded from jurisdiction in relation to public sector pension schemes). He said:

“43 That leaves the more difficult question of the relationship between a complaint of maladministration under section 146(1) and a dispute under 146(2). There is a considerable degree of overlap between the two subsections. Most complaints of maladministration will involve disputed questions of fact and law (including, it may be, the proper ambit, in a pensions context, of "maladministration"). That is reflected in the terms of section 150(7) of the 1993 Act.

...

45 In practice, it is probably only a small minority of individuals who, in approaching the Pensions Ombudsman, specify whether their approach is with a complaint under section 146(1) or a dispute under section 146(2). But in practice the Pensions Ombudsman probably has little difficulty in classifying most approaches as falling naturally under one head or the other; and it seems likely that what he classifies as complaints under section 146(1) easily outnumber what he classifies as disputes under section 146(2). An obvious example of a simple dispute would be where trustees, without adopting or acting on any final view on an issue of fact or law, suggested to a member that it should be referred to the Pensions Ombudsman for decision, and the member agreed to make the reference (as he must under section 146(2)). That dispute might however have turned into a complaint, so as to fall under section 146(1), if the trustees had themselves taken a final view and acted on it in a way which was said to make the complainant sustain injustice in consequence of maladministration.

...

47 The only way of making sense of regulation 3(b) of the 1991 regulations is, it seems to me, by recognising that this sort of classification has to be made, in practice by the Pensions Ombudsman himself, and that most approaches will be properly classified as complaints even though they raise issues of fact or law. Otherwise the Pensions Ombudsman's jurisdiction over public service pension schemes would be so attenuated as

to be derisory (limited, perhaps, to complaints about indisputable rudeness or delay in correspondence).”

120. The overlap is also recognised in the Parliamentary Ombudsman’s legislation. The Parliamentary Ombudsman’s jurisdiction consists only of dealing with complaints of maladministration, but there is an express exclusion of matters for which there is a legal remedy – which can be set aside at the Parliamentary Ombudsman’s discretion in particular circumstances. Maladministration is therefore capable of including matters for which there is a legal remedy.
121. However, other than in cases of pure maladministration that a court could not deal with at all, I may not give a remedy that a court would not give if dealing with the same matter.
122. I can therefore consider whether GAD’s conduct in relation to the preparation of tables of commutation factors amounted to maladministration and whether Mr Milne suffered any loss as a result. My concern is not with GAD’s professional judgment in determining whether and when factors should change, but with the administrative matter of its reasonable actions in the context of Rule B7(3) .
123. Although there are many other members of the Scheme who have an interest in the outcome of Mr Milne’s complaint and who would like to see a more wide ranging decision about GAD’s actions, I can only consider the matter so as to reach direct conclusions concerning Mr Milne. I do not have the power to make a determination binding on persons who are not a party to the complaint.

#### *Maladministration*

124. Cox J found that the aim of the rule about commutation was to provide a certain statutory procedure for achieving actuarial equivalence and to provide clearly identifiable benefits in return for members’ service and payment of contributions. The rule expressly provided for tables to be prepared by the Government Actuary (and therefore GAD as the Government Actuary’s agent) which could be used to achieve this aim. This gave rise to GAD’s implied obligation “to prepare tables and, if necessary, to review and revise them” from time to time. Its role was central to the administration of the Scheme because the tables were needed to enable the authorities to comply with their express obligation to use them. GAD alone was responsible for discharging its express and implied obligations.
125. Until the early 1990s when new funding arrangements were put in place, GAD took the initiative in instigating the review and preparation of new commutation tables, in advising

the Department as to what had been decided and in forwarding new tables for dissemination to fire authorities. It was understood by GAD and the Department that the date of the conclusion of GAD's review was the trigger for the date that the tables came into force. Any delay was for the purposes only of the necessary administrative arrangements.

126. However, under the new funding arrangements, GAD considered that it had to wait to be commissioned by the Department to prepare tables. This was one of Cox J's findings from a review of the evidence even though there was no Service Level Agreement between GAD and the Department spelling out the specifics of the new arrangement until 2006.
127. The essential role of the Government Actuary (as office holder) in relation to the Scheme as distinct from the more general role of his department was obscured by these changes so that between the early 1990s and 2009, GAD wrongly acted on the basis that the responsibility for commissioning a review and for instigating a revision of the actuarial tables lay with the Department as its client and payer. This was an error of law on GAD's part and an improper surrender by GAD of its statutory function.
128. Whatever the reasons were for implementing the new arrangements and whoever was primarily responsible for them, such administrative arrangements were not capable of altering GAD's statutory function. As Cox J found, affordability and public expenditure implications were irrelevant to the discharge of GAD's statutory obligations.
129. The fact that GAD had been pro-active in revising commutation tables until the early 1990s implies that GAD did then understand its role and function under Rule B7(3) even if its full legal obligations had not been authoritatively spelt out. It is therefore hard to understand why GAD allowed its position to be undermined in such a fundamental way. It has not argued that it was concerned by this undermining of its position or that it put the point to the Department or even that it raised the difficulties with the arrangement later identified in correspondence in November 2004 and October 2007. GAD appears, simply, to have acquiesced in and/or been party to the change and to have overlooked its significance. I recognise that others may also have been partly responsible for this but the major responsibility must lie with GAD. It had a responsibility which it gave up. And it was best placed, particularly given its past experience, to identify the error.
130. I do not consider that the fact that the Department, the Home Office (in relation to the Police Pension Scheme) and the Treasury (in relation to both schemes) were all under the

same misapprehension as GAD as to its role indicates that GAD's misapprehension was a reasonable misconstruction of the law. The parties did not separately arrive at a considered misconception. All of them shared a single error. They collectively reinforced the acceptability of the mistaken approach. (I discuss below whether there was a *considered* error, on GAD's part at least.)

131. Nor do I think that the fact that no-one else questioned the approach being taken is particularly helpful to GAD. It does not amount to strong evidence of the reasonableness of any decision by GAD that the new approach was permitted under the Scheme. It is not suggested that the unions, for example, considered Rule B7 and decided that all was well - until later deciding to bring the judicial review of the Secretary of State for the Home Office. The Scheme members and their representatives could reasonably have assumed that the Scheme was being operated as its rules required.
132. GAD rightly points to the statement (referred to above at paragraph 81) of Robert Walker J, as he then was, in *Westminster City Council v Haywood* that "it is not necessarily maladministration for a decision maker to take a wrong view of the law". GAD has not however identified any point at which it did actively take a wrong view of the law. It acted in a way that was not consistent with the law, but that is not necessarily the same thing.
133. GAD departed from instigating the review and preparation of new commutation tables and advising the Departments as to what had been decided and forwarding new tables for dissemination to fire authorities. It changed to waiting to be commissioned by the Department to prepare the tables. It made that change without considering whether it could or should do so. So there was no active "taking the wrong view" – no misconstruction that followed deliberation and/or advice. GAD seems in the early 1990s simply to have fallen into the new way of acting as the provider of "actuarial consultancy within Government" in relation to the Scheme.
134. Arriving passively at a way of acting that is inconsistent with the law cannot in my judgment be regarded as "taking a wrong view". But even if it could, the phrase "not necessarily" must not be overlooked. That is, there are some circumstances in which it would be maladministration to arrive (by whatever means) at a wrong view and, in my judgment, doing so passively would be one such.

135. Cox J found that there had been a “fundamental misunderstanding”. But, as I have said, I see nothing in her judgment, or in the evidence I have been provided with, that suggests that the misunderstanding amounted to a “wrong view” in any real sense.
136. I find that there was maladministration, not by GAD taking a wrong view in *Westminster* sense, but in its acting inconsistently with the Scheme’s rules without having first properly considered whether it was permitted to act as it was.
137. To that I would add that even though GAD did not appreciate the full extent of its statutory obligations, on a fairly superficial analysis of Rule B7(3) it would have been obvious that it was for GAD to *prepare* tables, however that task was to be initiated, discharged and paid for. It must be assumed that had GAD addressed the issue and taken advice it would have reached a conclusion that was right in law. I say that, noting that there was in fact an issue of law which fell to be decided by a judge on which there were two strongly argued points of view. There are two reasons not to give significant weight to that.
138. First, GAD was defending its position in the Police Federation case. It had already acted as if there was no obligation to review the factors and was aware of the potential for additional cost to the scheme and police authorities. It was bound to argue its own case, given there was room for such argument. But had it considered its obligations when they arose, rather than having to support its behaviour after the event, it might well have identified the correct position. Indeed Cox J, at paragraph 111 said that the evidence indicated that GAD was aware in relation to the 1982 review, of the statutory obligation placed upon it under B7(7) to prepare the tables.
139. Second, and perhaps more importantly, it cannot be right to base a conclusion as to liability on an assumption that GAD would have actively made an error of law.
140. Irrespective of the constraints imposed by the new arrangements, GAD must have been aware that there was no specific mechanism or obligation in the rules or in its arrangements with the Department for the Department to initiate the review and revision of the tables. It was the actuarial expert and, as there was no other equivalent body, it had a professional duty to take steps to try to ensure that the essential function which it had previously discharged continued to be discharged in some way. Even if it had been right to think that it did not need to initiate the issuing of tables, at the very least it could have advised the Department of the need to arrange for the review of the tables, either at

regular intervals (as it later recommended in October 2007) or in the light of specific developments.

141. One such opportunity was lost in 2001/2002 when a review of the tables should have been undertaken as recommended by GAD in 1998. GAD does not refer to it in 2001/2 and appears to have overlooked its own earlier recommendation. Even if it considered that it was for the Department to initiate the review, it still had a professional duty to remind the Department of its earlier advice, given its on-going relationship with the Department and given that in 1998 it expected that there would be more information available three years later and the picture would be clearer.
142. Other opportunities arose between 2002 and 2004 as GAD was frequently considering and advising on assumptions relevant to commutation, albeit in the different context of allocation and unisex factors. Commutation and changing actuarial factors (such as the fact that mortality rates had improved in recent years) were therefore live issues. Yet GAD failed to recommend a review of the tables when asked by the Department to review and update the assumptions underlying GAD's estimate of the costs of the Scheme, even though GAD acknowledged that the then current commutation factors would probably be found to be too small against the requirements of Rule B7(3).
143. In addition given the contents of GAD's internal communications, its dealings with the Department in 2004 and the passage of time since the last review it was evident that there was a strong case for carrying out a review in 2004.
144. So I find there were failures amounting to maladministration by GAD in acquiescing in the changes to the responsibilities which it had previously (rightly) assumed, in failing to give due consideration to what its essential function under Rule B7(3) was, in failing to act, even within a more limited capacity, as the body responsible for producing the tables, in failing to follow through its recommendation for a review in 2001/2 and in failing to respond comprehensively when questions were raised by the Department.
145. Also, if GAD had actively considered its responsibilities under Rule B7(3) after the relationship between it and the Department changed than, as previously observed, it must be assumed that it would have come to the view that Cox J found was correct. It is possible, though not probable, that it would have come to an informed but wrong view – and that is not the basis on which Mr Milne's complaint should be decided.

146. I now need to consider the consequence for Mr Milne of GAD's failures in the respects identified.

*Should or could tables be produced or published retrospectively?*

147. In response to the possibility of revised tables being applied back to when Mr Milne retired, GAD says that there is a general presumption that statutes and statutory instruments should not be taken (in the absence of express terms) to confer power to affect past transactions in a way that could be unfair to those concerned. But this is not a case of retrospective application to before the time the statutory instrument was effective. In this case the power to affect the transaction (commutation in any particular case) was present at the time of the transaction. It had simply not been exercised because its existence was not recognised. If GAD had failed to do what it was required to do, then there can be no objection on the stated grounds to it complying with its duties belatedly in order to correct the matter.

148. Cox J decided that the revised tables should be effective from the date on which they were prepared, and not later. GAD points out that she did not suggest that the legislation contained power to make tables with retrospective effect. But she was not asked to consider what, if anything, should have happened before the revised tables were prepared. The decision under review was the decision not to bring the tables into effect until a date ten months *after* they had been prepared. She concluded that that decision, the only subject of judicial review before her, was based on a misapprehension as to GAD's obligations.

149. In support of the possibility that retrospective application of the statutory instrument would have unfair consequences, GAD say, firstly, that there is a possibility that the new tables would result in smaller lump sums. That may be so in principle – but in practice it seems highly unlikely. It also assumes that, if there are any people who had gained by use of out of date tables, they would unavoidably be affected by any remedy. Secondly they say that there could be serious consequences for the expenditure of fire authorities and government departments, with possible loss of jobs, and for the financing of the Scheme, with higher contributions from active members to pay for cash sums to retired members,

150. Given my view that this is not a case of retrospective application at all, the above points largely fall away. To the extent that they are general objections to a possible requirement to carry out a retrospective corrective action, I do not think they are relevant.

*Remedy – Mr Milne’s loss*

151. An opportunity to review the commutation factors was lost in 2001/2 and then again between 2002 and 2004. Mr Milne retired in November 2005. The obvious remedy is that Mr Milne should be put in the position he would have been in had those reviews taken place – that is, had his cash sum been calculated using the factor that would have applied to him on his retirement.
152. I make no finding as to what the factor would have been – that is entirely a matter for GAD’s judgment (it is not, for example, open to me to direct that an independent actuary should be consulted). Nor do I find that the factor would inevitably have been higher than the factor that was used, although it seems likely.
153. If the factor would have been higher, then the resulting payment will amount to late payment of the balance of the cash sum that Mr Milne should have received in 2005. Accordingly Mr Milne should receive interest.
154. I have every reason to hope that the payment before interest will be treated for tax purposes as it would have been had it been paid when due (that is, as free of tax). In the event that HMRC consider it taxable, then Mr Milne will need to be compensated in the sum of any tax liability he has.

*Remedy – costs*

155. Mr Milne asks that I direct that GAD pays actuarial fees occurred on his behalf. (I believe that the work was not commissioned or paid for directly by Mr Milne.) He says that a thorough examination of GAD’s actions in the period between 1998 and 2006 has required a complex factual and actuarial analysis, which TPAS could not have assisted with. I am not, however, satisfied that such an analysis was actually necessary. The case does not turn on the reasonableness or otherwise of GAD’s actuarial judgment, actuarial standards or what factors would have applied (at least not beyond a general view, not requiring complex analysis, that the factors would have been more generous). What I have investigated is whether there should have been a review of the factors. That is the essence of this case and is essentially an administrative matter.

*Remedy – liability*

156. Understandably, Mr Milne argues strongly for the liability to fall on GAD. The issue has been a live one for a very long time – and Mr Milne wants a resolution, not only for him but also for other affected firefighters. The quickest way to that might be a direction to GAD to pay the difference. (On the other hand GAD would of course be able to appeal such a direction, including on the ground that in their view it did not place liability where it should lie).
157. Mr Milne gives a number of practical reasons that a direction merely requiring GAD to notify FRAs of newly determined factors would be unwelcome. Essentially he says that payment by the FRAs would be unenforceable and, as they are potentially adversely affected, they should have been joined before such a direction is made. However, those difficulties, if rightly identified, would not make correct a direction for GAD to pay.
158. Taking the enforceability points first – though it was made in relation to “declaratory” relief, and my directions below go further – I do not consider that the enforcement mechanism specified in the legislation limits my directions to an award that could have been made by the court through which enforcement can be made. The power is to direct the relevant person to take or refrain from taking such steps as I may specify. Many directions are not for money awards (to recalculate a pension, or consider exercising discretion, for example). However, it is true that since the FRAs are not parties they cannot be forced to recalculate the cash sums for all affected members. But no FRA other than the Scottish Fire and Rescue Service could have been joined to Mr Milne’s complaint anyway.
159. Mr Milne also points to GAD having said that the contribution rates allowed for cost neutral factors. He says that the effect is that employers have funded a benefit that was not paid and because it was not paid, central government grants topping up the money required were less than they would otherwise have been. He says that may make FRAs resistant to paying additional lump sums. But I do not think that is a reason for GAD to pay. It is, however, a good example of why it is difficult for me to reconstruct what would have happened had new factors been calculated when they should have been.
160. As GAD points out, ordinarily it would not have been liable for the cost of benefits under the Scheme. Had the factors been calculated consistently with GAD’s obligations, they would have become the basis of calculations carried out by administering authorities, with

payments made as if from the Scheme. So there is a good argument that I should not place liability for any additional lump sum with GAD.

161. I have considered what the right approach is in this case. As a starting point one might assume that an administrator owes a duty of care to the members of the scheme it is administering. That is to say, the usual tests would be met as to foreseeability of loss, proximity of relationship and overall fairness of imposing a duty of care.
162. In this case though, GAD's responsibilities as administrator were very limited, and it was not required to do anything that involved a direct relationship with Mr Milne. GAD was in a very different position to an administrator or manager that calculates and pays benefits. So on one side of the balance it might seem that the relationship was not proximate and/or that the overall fairness test would not be met.
163. On the other side of the balance, if GAD's failure to prepare factors has caused Mr Milne harm over and above his benefits being lower than they would otherwise have been, where else can he turn to? Why ought the Scheme and its employers be held liable for any tax liability that Mr Milne might suffer? (Indeed, if Mr Milne has a tax liability because the payment is regarded by HMRC as unauthorised, then the Scheme may have a tax liability of its own.) And although the Scheme or its sponsors will have had the benefit of any money that is paid late, Mr Milne will have no automatic right to the addition of interest by the Scheme.
164. I have not been able to find any helpful precedent on the matter of a duty of care in this case.
165. But I consider that there is a sufficiently proximate relationship between GAD and Mr Milne, in that any loss in the form of additional tax and lost use of money would be a direct consequence of the factor in his case not having been reviewed. Such losses would be foreseeable, and given the background to the case it would certainly be equitable to impose a duty of care in relation to his not suffering harm in that form.
166. That does not, however, apply in relation to the payment of any additional lump sum under the Scheme, liability for which (as distinct from the mere fact that there would be additional payments) was not a foreseeable or equitable consequence of GAD's actions. GAD's doubtless owed a duty of care to the FRAs who had to calculate the benefits that required it to provide accurate and up to date factors for those calculations. But in my view it did not owe that duty of care directly to Mr Milne. GAD would reasonably have

believed that in the absence of bad faith or negligence, the consequence of permitting the use of inaccurate or out of date factors would be a later correction to benefits paid from the Scheme.

167. Also, if GAD were to make the payment directly, that would not only mean that it would pay what amounts to a Scheme benefit, for which it would not have been liable under the statutory scheme, it would presumably also mean, in Mr Milne's case (and the case of any firefighter who retired from employment in a devolved administration), that the payment was made by the UK Government instead of the Scottish Government (or the Northern Ireland Executive/Welsh Government).
168. If GAD had reviewed the factors and changed them, Mr Milne's lump sum would have been calculated in accordance with them by the predecessor FRA. That is what Rule B7 requires.
169. So a direction to GAD to notify the relevant Scheme administrator (which GAD tell me is the Scottish Public Pensions Agency) of the factor applicable to Mr Milne from the tables as they would have been will, unless the Scottish Fire and Rescue Service or other relevant authorities resist, as Mr Milne argues they may, result in an automatic payment (assuming the tables are revised in his favour).
170. I cannot wholly discount the possibility of such resistance, either in Mr Milne's case or in other cases, by other FRA's. There simply is no tidy solution available to me that would place undisputable liability for additional lump sums paid across the four national jurisdictions exactly where it would have been – or at least, not without considering each and every case and joining the relevant FRA – and perhaps the relevant executive body – to it (which is self-evidently impractical). The direction that follows, together with my closing remarks, is in my view the best option available, which I strongly hope will bring the matter to an end in the shortest time possible.

### **Directions**

171. Within 28 days of the date of this Determination, GAD is to inform the Scottish Public Pensions Agency and/or any other relevant Scheme authority of the factor for calculation of the commuted lump sum from the table that would have applied in Mr Milne's case if GAD had reviewed the tables in December 2004.

172. In the event that the resulting lump sum is higher than the sum Mr Milne received on retirement, GAD is to pay simple interest on the difference to Mr Milne. Interest at the base rate for the time being payable by the reference banks, from the due date to the date the additional sum is paid from the Scheme.
173. Should Mr Milne be told by HMRC that he has any tax liability as a result of the payment of an additional lump sum from the Scheme, GAD is to pay an equivalent sum to Mr Milne.

### **Wider implications**

174. As noted in paragraph 1, there are many other members of the Scheme with an interest in the outcome of this complaint. There are also members of the Police Pension Scheme with the same interest. They will have retired at different points in time, so the result in Mr Milne's case may not exactly apply to them. (The factors are also age and gender dependent, of course.) However, the principles are the same.
175. In theory every one of those retired members could complain to the Pensions Ombudsman Service – though there would be severe practical difficulties if they did, as mentioned above. However, bearing in mind GAD's recent detailed work on what the factors should have been in 2001, I have every hope and expectation that GAD, the Department and all other interested bodies, including those representing fire and police authorities, will swiftly jointly consider what steps should be taken to ensure that further determinations are not necessary. That may involve discussion as to where liability lies, particularly as following the division of liability above is likely to be administratively burdensome. However, the particular public sector pocket or pockets used to make payments from is of no significance to the members. So I strongly recommend that the question of where liability ends up should be regarded as secondary to the members receiving as soon as possible such payments as they will be due.

**Tony King**  
Pensions Ombudsman

13 May 2015