

Ombudsman's Determination

Applicant	Mr N
Scheme	Police Pension Scheme (PPS)
Respondents	Government Actuary's Department (GAD)

Outcome

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

Complaint summary

3. Mr N has complained that errors were made concerning the revised commutation factors issued by GAD in April 2011. He considers that the errors relate to when the factors were prepared, how often they were prepared and how they have been implemented.

Background information, including submissions from the parties

Background

4. Mr N retired in January 2011. In April 2011, GAD issued revised commutation factors for use by the PPS. Mr N has calculated that, had the revised factors been available at the time of his retirement, his lump sum would have been approximately £25,000 higher than the amount he received.
5. As at the date of Mr R's retirement, regulation B7(7) provided:

“Where the person retires or has retired and a notice of commutation given by him becomes or has become effective, the police authority shall reduce the pension to which the notice relates in accordance with the notice as from the time from which the notice is effective and shall pay him a lump sum of such amount as is the actuarial equivalent of the surrendered portion of the pension at the date of his retirement, calculated from tables prepared by the Scheme actuary ...”

6. GAD says it began its review on 25 March 2011. It has explained it was prompted to initiate the review by a change in the discount rate used to determine employers' contributions announced in the Budget on 23 March 2011. The commutation tables were ready for publication on 20 April 2011. GAD has confirmed that it only consulted the Government departments responsible for the management of the PPS; in England and Wales, this was the Home Office.

Mr N's position

7. Mr N's position, as set out in his complaint to GAD dated 31 July 2015, is summarised below:-
- GAD has a statutory duty to update the commutation tables on a regular annual basis or when it becomes apparent to it that the tables are no longer "actuarially acceptable".
 - In a previous High Court case¹, evidence had shown that GAD's preference was for a review every three to four years. Mr N has also referred to a GAD technical bulletin² in which he says the Ombudsman had expressed the view that reviews should be undertaken every year.
 - Government statistics issued annually showed that people were living longer and the tables should have been revised regularly to reflect this.
 - In the period between 2006 and 2011, it was widely recognised that life expectancies were improving and long-term interest rates were falling. Mr N has referred to the 2008 "banking crisis" and says he invested £20,000 in 2011 and has seen no appreciable return on this. He also says that the lump sum he received on his retirement was meant to provide him with an income and it has failed to do so.
 - GAD should have taken responsibility for reviewing the commutation factors. It should have had proper administrative arrangements in place to ensure a periodic review took place.
 - The tables were last revised in December 2006. The next update should have been in December 2009 or December 2010.
 - The revised tables were not circulated until April 2011 with no prior warning to members.
 - The April 2011 tables reflect a big change in life expectancy. This indicates that the tables should have been revised much earlier than they were. He has

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

² <https://www.gov.uk/government/publications/commutation-factors-pensions-ombudsmans-determination-a-gad-technical-bulletin>

calculated that he received a pension equivalent to someone aged 59 under the revised tables, rather than aged 49 under the previous tables.

- Mr N has referred to a report by the National Audit Office (**NAO**): HC 986 20016/17, dated 1 February 2017³
- Mr N asserts that, had he been aware that the tables were going to be revised, he would have delayed his retirement. He says he did not have to retire when he did.
- Mr N is of the view that the tables were drawn up some time before they were circulated and they should be implemented from the earlier date; in line with the *Police Federation* case. He argues that the date of circulation cannot, in reality, be the same as the date of preparation. He suggests that they will have been prepared several months in advance of the approved date of circulation. He points out the GAD took a year to do its 2006 review.
- Mr N is of the view that GAD should have provided new commutation factors each year. He would like the Ombudsman to direct GAD to do so.
- Mr N has questioned GAD's independence.

GAD's position

8. GAD's position, taken from its response to Mr N's complaint and its later correspondence with TPO, is summarised as follows:-

- Where suitable data is available to enable an analysis of the experience of the actual retired membership to be undertaken, this is likely to give the best view of the current rates of mortality. Suitable data is generally only available around the time of a scheme's actuarial valuation.
- Expected changes in mortality rates over the future are a matter of judgment. A range of assumptions could reasonably be made. One source of information it uses is the National Population Projections published on a two-yearly basis by the Office for National Statistics.
- Since June 2010, pension increases for pensions in payment have been based on increases in the Consumer Prices Index (CPI). Previously they were based on increases in the Retail Prices Index (RPI). Since increases in the CPI are generally expected to be lower than increases in the RPI, a significant downward movement in the value of benefits occurred at this time. This would naturally lead to a reduction in commutation factors.

³ The full report can be read on the NAO's website at <https://www.nao.org.uk/wp-content/uploads/2017/02/Investigation-into-Police-and-Firefighters-Pension-Scheme-commutation-factors.pdf>

- The assumed discount rate translates projected future payments into a current monetary value. A lower discount rate leads to a higher current monetary value of projected future payments. This leads to a higher commutation factor. A higher discount rate leads to a lower current monetary value of projected future payments and a lower commutation factor.
- Had the commutation factors been reviewed between December 2006 and April 2011, the combination of the above factors might at times have led to an increase in the factors. At other times, they might have led to a reduction.
- Under the PPS regulations, GAD, in its capacity as Scheme Actuary, prepares tables of commutation factors which are the actuarial equivalent of the commuted portion of the pension.
- Following a change to the discount rate used to value public service pension schemes, announced in the 2011 Budget on 23 March 2011, GAD reviewed the PPS commutation factors. It completed the review on 20 April 2011 and sent the revised factors to the Home Office for dissemination. The factors were effective from that date.
- The *Police Federation* case provided greater clarity as to the responsibility for the commutation factors. GAD is responsible for deciding when to review the factors and carrying out the review. The judge found that the judgment on whether to revise the factors “calls for an entirely actuarial expertise and is to be exercised only by the Government Actuary⁴”.
- The PPS regulations do not require the Scheme Actuary to consult any other party when preparing the new factors. It has been advised that it has no duty to inform members when reviewing the commutation factors.
- In the *Police Federation* case, the judge said, “In my judgment the tables come into effect on the date when they are prepared”. As a result, the 2006 factors were backdated. The same principle has been used to determine the implementation date following the 2011 review.

Adjudicator’s Opinion

9. Mr N’s complaint was considered by one of our Adjudicators who concluded that no further was required by GAD. The Adjudicator’s findings are summarised briefly below:-
- Mr N sought to argue that the commutation factors published in April 2011 should be backdated. He was of the view that the tables had been prepared some time before the issue date and should apply from that earlier date.

⁴ The PPS regulations were amended with effect from April 2010 and now refer to the Scheme Actuary.

- The commutation factors had previously been reviewed in 2006. Those factors had been the subject of the *Police Federation* case. Updated tables had been produced by GAD on 1 December 2006 but were not introduced by the then Home Secretary until 13 May 2008, backdated to 1 October 2007. The Police Federation of England and two PPS members sought to challenge the date of application of the new factors.

- The judge had said:

“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 ..., at any given time, must be the actuarial equivalent of the surrendered portion of an officer’s pension ...

Whilst it is correct that there is an express obligation only on police authorities to use the tables ..., the Regulation clearly contemplates that there is a duty to prepare tables ... Since the actuarial equivalent is liable to change over time, a judgment must be exercised periodically as to whether to revise the existing tables, to ensure that the tables to be used in calculating the actuarial equivalent do in fact enable equivalence to be achieved ... That judgment calls for an entirely actuarial expertise and is to be exercised only by the Government Actuary ...”

- Having found that regulation B7(7) imposed a duty on the Government Actuary to prepare the commutation tables, the judge went on to consider the submission that there was a distinction to be drawn between preparing the tables and issuing them. She had said:

“... 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 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.”

- If it had been the case that the 2011 tables had been prepared by GAD at a date earlier than 20 April 2011, there might have been an argument for earlier implementation. However, there was no evidence that this was the case.
- There was evidence to suggest that the possibility of reviewing the existing commutation tables was likely to have been within GAD’s contemplation prior to 23 March 2011. For example, it had clearly contributed to the Independent Public Service Pensions Commission (**IPSPC**) Interim Report, 7 October 2010.

There were references in the interim report to it having provided projections. It would also have been aware of the HM Treasury consultation on the discount rate used in unfunded public service pension schemes.

- The IPSPC interim report had said:

“The discount rate used to set employer and employee contributions is critical in order to ensure that the costs of the future pension promises are being adequately allowed for in workforce planning and budgeting and that contributions required can be appropriately divided between the employer and the employee. The Commission believes there is a case for reviewing the current discount rate of RPI plus 3.5 per cent, which is clearly at the high end of the spectrum and recommends that the Government undertakes a review to establish the appropriate rate, preferably in time to inform the Commission’s final report.”
- However, the decision to review or revise the tables and when to do so was a judgment requiring actuarial expertise. It was a task to be undertaken by GAD “having regard to changing conditions relevant to the exercise of an actuarial judgment”. GAD had said that the review of the commutation tables had been prompted by a change to the discount rate announced on 23 March 2011. There was no evidence to suggest that the tables were prepared any earlier than this date and, in view of the work entailed in such a review, it was more likely than not that they were, indeed, prepared shortly before the date of issue.
- In the Adjudicator’s view, Mr N’s case for backdating the commutation tables could not succeed.
- Mr N sought to argue that a review of the commutation tables should have been undertaken by GAD at some point between December 2006 and April 2011. He suggested December 2009 or December 2010. Rule B7 did not specify the frequency at which the tables were to be reviewed. Mr N was relying upon an email, referred to in the *Police Federation* case, in which GAD had expressed a preference for a cycle of reviewing the factors every three to four years, in line with actuarial valuations.
- This aspect of Mr N’s complaint faced a jurisdictional problem. Previously the Court of Appeal⁵ had ruled that GAD was an administrator for the purposes of the jurisdiction of the Pensions Ombudsman. It had found that GAD had a proactive role which was central to the Scheme’s “proper operation” and, therefore, could not be considered to be incidental to the running of the Scheme. The decision to review the commutation tables could be said to be an administrative act. However, Mr N’s complaint was essentially about the date

⁵ *The Government Actuary’s Department v The Pensions Ombudsman* [2013] EWCA Civ 901

chosen by GAD to revise the tables, which was considered to be primarily an actuarial function.

- In the *Police Federation* case, the judge said:

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

... it is the changes in actuarial conditions (mortality assumptions and discount rates) which may lead the Government Actuary to review and revise the tables from time to time, in order to comply with this implied obligation. Whilst it is correct that Parliament has not specified the time which is to elapse between reviews, such express provision is in my view unnecessary. The express requirement in B7(7) that the tables must be such as enable a police authority to calculate a lump sum which is the actuarial equivalent of the surrendered portion is sufficient to enable the Government Actuary to determine whether, at any given time, changes are required to the existing tables ...”

- The judge said that GAD had a responsibility to exercise a judgment as to whether to revise the relevant commutation tables; a judgment which “calls for an entirely actuarial expertise”. This was because she had found that it was “changes in actuarial conditions (mortality assumptions and discount rates) which might lead the Government Actuary to revise the tables from time to time”. The decision to revise the tables was a matter of professional actuarial judgment on the part of GAD. As such, it did not fall within the Ombudsman’s jurisdiction.
- Mr N argued that he would have postponed his retirement if he had been aware that GAD were reviewing the commutation tables.
- In the *Police Federation* case, the judge agreed with a submission that GAD seemed to have accepted the Police Negotiating Board⁶ (**PNB**) was to be consulted when it intended to commence a review. She referred to correspondence between the PNB and GAD, in 1983, in which GAD had confirmed it would invite comments when it considered that the commutation tables should be reviewed. A 1983 note from the Home Office stated that GAD had undertaken to give notice of any intention to revise the commutation tables for the PPS. Members of the Joint Pensions Committee were to be invited to

⁶ The PNB was abolished by the Anti-social Behaviour, Crime and Policing Act 2014

comment before new tables were constructed, on the understanding that the principles upon which they were based were a matter for GAD. The commutation factors were reviewed again in 1998. The revised tables were sent to police authorities via a Home Office circular, which referred to the PNB having been notified of the intended changes and given time to comment.

- The judge had drawn a distinction between the power to make regulations relating to the PPS, under the Police Pensions Act 1976, and the operation of the regulations themselves. The power to make regulations, which was exercisable by the Home Secretary, was subject to statutory consultation. There was no equivalent statutory requirement for GAD to consult before it prepared revised commutation tables for the purposes of regulation B7(7).
- However, clearly GAD had been prepared to allow for consultation with the PNB in respect of decisions to review the commutation tables prior to 2011. It said that its approach changed because of the *Police Federation* case, which it considered to have clarified its responsibility under regulation B7(7).
- In a letter to the PNB, dated 16 January 2012, GAD referred to the *Police Federation* case and said it was responsible for deciding when to review the factors and for carrying out the review. It had gone on to say it would carry out a review as and when new information became available which it considered relevant. GAD said that such a review would not necessarily lead to a revision of the factors and the regulations did not require it to consult any other party when preparing new factors but also did not preclude consultation. It explained that it would not expect to consult where it was in possession of sufficient information to exercise the actuarial judgment required of it by regulation B7(7). GAD said that this was the approach it had followed in 2011.
- GAD's approach to consultation had clearly changed with the 2011 review. Whilst its approach, in 2011, was contrary to an undertaking it had previously given, it explained why the approach had changed. In the absence of a statutory requirement for GAD to consult the PNB before preparing revised tables, it was doubtful that the departure from its previous undertaking could be said to amount to maladministration. Particularly since GAD had been able to put forward a cogent reason for its decision to change the approach.
- In the Adjudicator's view, even under the previous undertaking, GAD would only have initiated consultation following the 2011 Budget announcement. It was at this point that it could have formed the view that the change in the discount rate was a factor which necessitated reviewing the commutation tables. Prior to this date, GAD may well have been aware that a change to the discount rate was possible or even likely. However, the Adjudicator did not consider it reasonable to expect GAD to have taken any action before the change to the discount rate had been announced.

- Mr N retired in January 2011. The Adjudicator expressed the view that it would not be unreasonable to suggest that he would have made his decision to retire at some time in December 2010, at the latest. This was some time before the change to the discount rate had been announced. She did not find that there were any grounds to uphold this aspect of Mr N's complaint.

10. Mr N did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr N provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mr N for completeness.

Ombudsman's decision

11. It is, by now, well established that GAD has a statutory responsibility to periodically review and, when appropriate, revise the commutation factors used by the PPS. However, the actual timing of reviews is not specifically provided for in the relevant regulations.
12. Mr N has suggested that my predecessor was of the view that reviews should be undertaken on an annual basis. Mr N has referred me to a technical bulletin issued by GAD. The technical bulletin summarised my predecessor's findings in the case before him (*Milne* PO-1327). In neither the *Milne* determination nor the technical bulletin is it said that the then Ombudsman was of the view that the commutation factors should be reviewed annually. He did find that a review should have taken place in 2001/02 but this was based on GAD's own recommendation. If he had felt able, or it was appropriate to do so, it is likely that he would have been more specific at the time.
13. The NAO report Mr N has referred me to relates to the Government's liability arising out of the failure to review the commutation factors between 2001 and 2006. I do not find that this assists Mr N's case since it largely relates to the period before his retirement. It refers to GAD's failure to carry out reviews in the period 2001 to 2006 contrary to its statutory obligation. But this matter had already been considered and decided by the High Court and my predecessor.
14. In the *Police Federation* case, Cox J noted that "Parliament has not specified the time which is to elapse between reviews". She then went on to say that, in her view, such express provision was unnecessary. She considered that the timing of reviews would be led by changes in actuarial conditions (mortality assumptions and discount rates). It was for GAD to exercise the actuarial judgment necessary to decide when a review was appropriate.
15. Mr N has made reference to the financial climate in the years leading up to his retirement in 2011. In particular, he references the so-called banking crisis and the rise in mortality rates. It does not require any actuarial expertise to realise that these factors are likely to have an impact on matters such as commutation rates for pension schemes. I can also understand why Mr N is concerned by the extent of the change

to the factors between 2006 and 2011. He points out that the factor used to calculate his lump sum now applies to someone aged 59; some 10 years older than he was at his retirement. However, the extent of the impact of any financial matters, and whether they warranted a review and revision of the PPS commutation tables, would require an actuarial analysis which is beyond the scope of my office. I do not find that there are grounds for me to direct GAD to review the commutation factors on an annual basis, as Mr N would wish.

16. GAD issued revised commutation factors in April 2011. It has explained that it was prompted to do so by the change in the discount rate announced in the March 2011 Budget. I agree that, prior to this date, GAD may well have been aware that a change to the discount rate was possible or even likely. However, I do not find that GAD could have been expected to act before the change was made “official”.
17. In the *Police Federation* case, Cox J found that, once GAD has prepared the commutation tables, its statutory obligation under Regulation B7(7) has been discharged and the tables take effect from that date. GAD completed its preparation of the 2011 commutation factors on 20 April 2011 and they must take effect from that date. Mr N retired in January 2011. Therefore, the April 2011 factors do not apply to him.
18. Mr N has asserted that he would have deferred his retirement had he known that GAD was reviewing the commutation factors. It is the case that GAD had previously notified the PNB when it was considering reviewing the commutation factors. This was a voluntary agreement; there is no statutory requirement for GAD to consult before it reviews the commutation factors. It did not do so before the 2011 review and says it does not plan to in the future if it is possession of the necessary information for a review. I do not find that there was any requirement for GAD to consult any other party before initiating a review. No doubt, whenever GAD revises the PPS commutation factors, there will be some members who would have made different decisions had they known in advance. This does not, however, translate into a responsibility on GAD’s part to consult.
19. I note Mr N has questioned GAD’s independence. This matter was considered by the NAO and I note its references to tensions within the system. However, the fact remains that the PPS regulations place responsibility for the review and revision of the commutation tables with GAD.
20. Therefore, I do not uphold Mr N’s complaint.

Anthony Arter

Pensions Ombudsman
7 February 2018