

Ombudsman's Determination

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

Outcome

1. I do not uphold Mr R'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 R has complained that GAD failed to provide revised commutation factors for retirements prior to 1 December 2001.

Background information, including submissions from the parties

Background

4. Mr R was employed by Strathclyde Police until 6 May 2001. He retired on the grounds of ill health. He was a member of the PPS. Mr R elected to commute £6,246.18 of his annual pension. This provided him with a lump sum of £93,692.70 and an annual pension of £18,728.31. The Scottish Public Pensions Agency (**SPPA**), which administers the PPS in Scotland, has confirmed that a commutation factor of 15.0 was used to calculate Mr R's lump sum.
5. As at the date of Mr R's retirement, regulation B7(7) of the Police Pensions Regulations 1987 (SI1987/257) (as amended) provided:

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

6. The provision of commutation factors for the PPS by GAD was the subject of a High Court case¹ in 2009. GAD's role in the provision of commutation factors for the Firefighters' Pension Scheme (**FPS**) was also the subject of a complaint to the Pensions Ombudsman in 2010. GAD initially queried the Ombudsman's jurisdiction and this point was decided by the Courts in July 2013. The then Ombudsman issued a determination of the FPS case in May 2015². The PPS and FPS have practically identical provisions relating to the commutation of pension for lump sum.
7. In *Milne*, the then Ombudsman found the failure to undertake reviews of the commutation factors amounted to maladministration on the part of GAD. The Ombudsman said a review should have been undertaken in 2001/02 (para. 141). Following the *Milne* decision, GAD prepared tables for use in the calculation of redress, based on a best reconstruction of the commutation factors which would have applied if the factors had been reviewed and revised at 1 December 2001 and at 1 December 2004. The revised factor for an individual of Mr R's age at retirement was 17.0. However, the revised factors took effect from 1 December 2001. The SPPA subsequently confirmed that Mr R's lump sum would not be revised because he had retired before 1 December 2001.

Mr R's submissions

8. The key points submitted by Mr R are summarised briefly below:-
 - His retirement was not of his doing. He was not due to retire until 2004.
 - Reference has been made to mortality rates which are not relevant to him. He has led a healthy lifestyle, despite his medical condition, and has always had a good level of fitness.
 - 1 December 2001 is a strange date for a review and was, without doubt, suggested to minimise costs.
 - The fact is GAD did not carry out a review in 2001 and this date should not be applicable.
 - Following his retirement, he was able to secure employment in local government and has been a member of the Local Government Pension Scheme. He has paid contributions into this scheme. He has also paid National Insurance contributions and has been a higher rate tax payer. This was not taken into account by SPPA.
 - All members of the PPS should have been treated equally.
 - There is no reference to 1 December 2001 in the PPS regulations.

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 *Milne* PO-1327

Ombudsman's decision

9. There have been a number of applications to my office relating to the provision of commutation factors for the PPS and the FPS by GAD. My jurisdiction in these cases is not as straightforward as with the majority of applications I receive. It is important, therefore, to be clear about what it is that I can consider.
10. For Mr Milne's case, the Court of Appeal³ ruled that GAD was an "administrator" for the purposes of the Pensions Ombudsman's jurisdiction. It found that GAD has a proactive role which is central to the FPS' "proper operation" and, therefore, cannot be considered to be incidental to the running of the FPS. The same must apply for the PPS.
11. The decision to review the commutation tables can be said to be an administrative act. However, Mr R's complaint is about the date at which to revise the factor tables. This is primarily an actuarial function. Reconstructing the sequence of events which should have taken place in 2001 required an actuarial analysis of what should have happened. In coming to this view, I am guided by the judgment in the *Police Federation* case.
12. As at the date of Mr R's retirement, regulation B7 provided him with the option to commute part of his pension for a lump sum. The lump sum was to be "the actuarial equivalent of the surrendered portion of the pension at the date of his retirement, calculated from tables prepared by the Government Actuary". In the *Police Federation* case, Cox J said:

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

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

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

13. The decision to revise the tables is a matter of professional actuarial judgment on the part of GAD. As such, the conduct of the 2001 review (as opposed to the decision to review) is not within my jurisdiction.
14. I should make it absolutely clear at this point that, despite Mr R's misgivings, neither I nor my predecessor had any hand in deciding that the revised commutation factors should take effect from 1 December 2001. This date was determined by GAD following its analysis of what should have happened in 2001. It is true that there is no reference to 1 December 2001 in the PPS regulations. Cox J found it was unnecessary for the regulations to be that specific and that the requirement was for GAD to determine when changes to the factors were required.
15. Although, it might be theoretically possible to separate out purely administrative elements of the 2001 review, for example, it might be possible for me to consider whether there was any undue delay on GAD's part in completing the review, this, in itself, is problematical. For example, what data was required and where it should have come from were, primarily, actuarial decisions and would have had a major impact on the progress of the review.
16. In addition, as noted above, regulation B7 does not specify the frequency at which the tables are to be reviewed nor was there an agreed timetable for GAD to undertake a review. In the *Milne* case, it was accepted by both parties that no review of the FPS commutation factors had taken place between 1998 and 2006. My predecessor upheld Mr Milne's complaint and determined that a review should have taken place in 2001/02. However, when that review might have started and concluded are essentially matters of retrospective hypothesis and speculation. If there had been a review, the date at which the revised factors were produced would have been largely governed by actuarial analysis, which is outside the scope of this office.
17. Following the *Milne* determination, GAD produced revised commutation factors which were to take effect from 1 December 2001. As a result, members of the PPS who had retired after this date were eligible for further lump sum payments. Mr R's argument is, in essence, that the revised factors should have taken effect across the board.
18. As I have said, the effective date of any commutation factors is an actuarial judgment. If the review had been completed by May 2001, Mr R would most likely have been better off. On the other hand, there would still have been others who would not have benefitted. Whichever date was chosen, there would be a 'cliff edge' with members on either side. This is inevitable and would have been the case even if GAD had actually undertaken a review in 2001. Whenever actuarial factors are revised, there are those who fall the 'wrong' side of the effective date.
19. It has already been determined that the failure to undertake a review before 2006 amounted to maladministration on GAD's part. In 2015, my predecessor found that a review should have been undertaken in 2001/02. If he had felt able or thought it was appropriate to do so, it is likely that he would have been more specific at that time. Mr R would like me to find that the revised commutation factors should apply in cases

where the individual retired before 1 December 2001. I do not find that there are grounds for me to make such a finding.

20. I acknowledge that Mr R's retirement was not of his choosing and it must have been distressing for him to have to give up a promising career. However, this does not alter the fact that the revised commutation factors do not apply in his case. I also acknowledge Mr R's comments concerning mortality rates. When considering mortality, GAD does so on a scheme wide basis, rather than on an individual basis. Mr R's own experiences are not directly relevant to this. Mr R's membership of the Local Government Pension Scheme is also not relevant; his PPS benefits must be calculated by reference to the PPS regulations only.
21. Therefore, I do not uphold Mr R's complaint.

Anthony Arter

Pensions Ombudsman
26 January 2018