

Ombudsman's Determination

Applicant	Mr D
Scheme	Firefighters Pension Scheme (FPS)
Respondents	Government Actuary's Department (GAD)

Outcome

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

Complaint summary and background

Background

3. Mr D was employed by Strathclyde Fire Authority. He retired on 15 November 2001. Mr D's pension on retirement was £15,404.00 p.a. He opted to commute part of his pension for a tax free lump sum of £56,471.21. Mr D's residual pension was £11,564.10 p.a.
4. At the time of Mr D's retirement, rule B7 of the Firemen's Pension Scheme Order 1992 (SI1992/129) (as amended) provided:

"B7 Commutation - general provision

 - (1) This rule applies to an ordinary, short service, ill-health or deferred pension under this Part; ...
 - (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 ..."
5. The tables used to calculate Mr D's lump sum and commuted portion had been provided by GAD in 1998.

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6. Mr D originally submitted an application form to the Pensions Ombudsman (**TPO**) on 3 March 2010. His complaint was stayed pending the outcome of a judicial review brought by GAD in connection with another case¹. This was finally decided in July 2013 when GAD's appeal was dismissed. The then Ombudsman issued a determination of the case in May 2015².
7. On 13 June 2016, Mr D's solicitors (**Walkers**) wrote to TPO requesting that the stay on his complaint be lifted.
8. Mr D's complaint initially concerned GAD's failure to review commutation factors used by the FPS under rule B7. In *Milne*, the 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). Since this aspect of Mr D's complaint had been covered in the *Milne* decision, he was asked to clarify what his remaining complaint comprised. Mr D subsequently confirmed that his current complaint is as stated in Walkers' letter of 13 June 2016.

Complaint summary

9. Mr D's complaint, as set out in Walkers' letter of 13 June 2016, is summarised below:-
 - His claim is for compensation for maladministration.
 - GAD should have resolved its relationship with the Department for Communities and Local Government (**DCLG**) and, if it had done so correctly, it would have concluded that it had an independent duty to prepare commutation tables without waiting for a commission from the DCLG.
 - Recognising that duty, GAD should have put simple administrative systems in place to ensure that the tables were revised at appropriate intervals.
 - Even if it believed it required a commission from the DCLG, it should still have had an administrative system in place to ensure it had a commission so that it could provide revised tables of factors at appropriate intervals.
 - GAD has, itself, said that the appropriate interval is three years. (See GAD's letter of 16 June 1998) The burden of proof should be on GAD to explain why this means three years and six months.
 - For the purposes of assessing Mr D's remedy, the relevant question is what his position would have been if there had been no maladministration. The 1998 factors were produced in June 1998. GAD accepts they should have been updated in 2001. If GAD had had the appropriate administrative system in

¹ *Government Actuary's Department v Pensions Ombudsman* [2013] EWCA Civ 901

² *Milne* PO-1327

place, work on reviewing the factors would have been completed by June 2001.

- It disagrees with the reasons put forward by GAD for choosing 1 December 2001. It describes them as speculative and not supported by the available evidence. In particular:-

GAD has said it would have analysed the demographic experience of the relevant schemes, but there was no system in place for collecting data about firefighter pensioners and their dependants. Correspondence from GAD, in 2002 and 2006, stated such data had not been collected. If no such analysis had been undertaken between the mid-1980s and 2006, it would not have been undertaken in 2001. GAD would have had to have used standard life tables; as it did in subsequent years.

GAD has referred to data collected over periods of 12 months ending on 31 March. This data was not collected and, therefore, the 31 March 2001 date is irrelevant.

GAD has referred to developments in knowledge about mortality. It would have used the then current life tables, the 1992 series, which were published in 1999. It was not waiting for something new.

GAD's decision regarding the discount rate should not have taken long. It routinely uses the standard Government discount rate. It used this rate in an update of scheme costs prepared in November 2002.

The July 2001 report referred to by GAD dealt with cause of death not age at death, amongst other things. It would not have detracted from using the 1992 series tables. In fact, GAD used the 1992 series in 2002, 2004 and 2005.

10. Walkers said:

“The issue is not whether it would constitute maladministration to select 1 December instead of some earlier date. The maladministration (which GAD has accepted took place) was the failure to review at all in 2001. What matters now, as [GAD] has accepted, is reconstructing the sequence of events that should have taken place in 2001. That is a straightforward factual analysis – what probably would have happened – and not a second separate investigation into maladministration.

I submit that GAD would probably have done what it said in June 1998 should be done: publish new tables three years later, in June 2001.”

11. Having seen an Adjudicator's opinion, Walkers made a further submission. Additional points not covered by the above summary are summarised below:-

- Mr D's complaint is the same as the complaint made by Mr Milne.

- Mr D's complaint is that the commutation factors should have been reviewed and updated between June 1998 and 15 November 2001, when he retired. Had this happened, a higher factor would have applied in his case.
- He is not making a complaint about a review in 2001 because there was no review in 2001.
- The factors which were produced in 2006 should have applied in his case.
- The decision in the *Milne* case did not address the maladministration for which Mr D is now seeking redress. That decision was that there should have been a review before November 2005, when Mr Milne retired.
- The factual analysis required in Mr D's case should cover the following:-
 1. Was GAD guilty of maladministration because it failed to act consistently with the FPS rules? The answer in the *Milne* case was yes and the same conclusion should be reached in Mr D's case.
 2. If GAD had not done anything which constituted maladministration, what would it have done? The answer is that it would have ensured that a review was conducted before 2008.
 3. The critical question in Mr D's case is when GAD would have conducted its review. If the answer is some date after 15 November 2001, GAD might be guilty of maladministration but Mr D would have suffered no loss as a result. If the answer is some date before 15 November 2001, GAD is guilty of maladministration and Mr D would have suffered a loss as a result.
- The decision to review the commutation factors, or the failure to do so, between 16 June 1998 and 15 November 2001, is an administrative act (or omission).
- It is accepted that the decision whether or not to revise the tables is a judgment call requiring actuarial expertise. Had a review been conducted in 2001, the choice of assumptions and methodology would have been for GAD to make.
- The relevant question is whether there was a failure, on the part of GAD, to review the commutation factors between 16 June 1998 and 15 November 2001. The following points are relevant:-
 1. On 16 June 1998, GAD recommended that the factors should be reviewed in three years' time. The frequency of reviews is a matter for actuarial judgment and Mr D does not contend for a review before June 2001.

2. GAD has conceded that there should have been a review with an effective date of 1 December 2001.
 3. In *Milne*, the then Ombudsman found there should have been a review in 2001/02. The reason for the wide band of time was that the Ombudsman was looking at lost opportunities to review in response to specific prompts, which GAD did not seize upon.
 4. These were opportunities to act on its own June 1998 advice which GAD lost. It overlooked its own previous advice and failed to appreciate its role.
- GAD has not said that the phrasing in the June 1998 was imprecise and has not explained why a review was not diarised in accordance with its 1998 advice.
 - GAD expressed a view, in 1998 advice, that a review should take place in three years. If it did not mean three years, it should now explain why it meant three years and six months.
 - Ignoring its own advice amounts to maladministration on GAD's part.
 - Any issues arising under the *Edge*³ judgment should not prevent an investigation of Mr D's complaint, any more than they did in the *Milne* case

GAD's position

12. GAD's position is summarised as follows:-

- Maladministration relates to defective administration rather than the exercise of its professional judgment.
- In its letter of 16 June 1998, it recommended that the factors be reviewed again in three years' time. This statement cannot justify an allegation that it was maladministration for it not to review the factors, revise them and ensure they came into effect prior to 15 November 2001. The decision as to when new factors should have taken effect necessarily rests on professional actuarial judgments and is not only a matter of good administration.
- The Ombudsman found that a review of the factors should have been carried out in 2001/02, as recommended. It has accepted the Ombudsman's finding.
- Any chosen date would likely lead to those members who retired prior to the effective date of the new factors feeling aggrieved. Neither this, nor the fact that those retiring after the effective date would benefit from more

³ *Edge v Pensions Ombudsman* [2002] Ch 602

advantageous terms, is sufficient to show that Mr D's complaint is one of injustice arising out of maladministration.

- Mr D (via Walkers) has asked the Ombudsman to determine on what date in 2001 GAD would have produced revised factors if there had been no maladministration. The Ombudsman is not able to do so on the basis of a consideration of good administration only. The Ombudsman would also have to consider GAD's assessment of what its professional judgments would have been had the review taken place; that is, its professional judgments relating to what needed to be considered in order to conduct the review.
- It has a clear view of the process which would have been followed had a review been undertaken in 2001. This is based on the process followed for subsequent reviews undertaken for the FPS and the Police Pension Scheme. It would have ensured that all relevant information was taken into account and the appropriate professional standards and guidelines were followed. It would have liaised with clients.
- It did not say, in June 1998, there should be a review in 2001 which should be timetabled to ensure any revised factors came into effect in June 2001. It is more usual to timetable a review in terms of when it will start, rather than when it will be completed. This is because the time taken for a review depends on a number of variables. It would have been impossible to say, in 1998, whether a review in 2001 would lead to revised factors or when any revised factors would need to take effect.
- It disagrees with Walkers' objections to its choice of 1 December 2001. In particular:-

The fact that there was no system for collecting mortality data for firefighters and their families in 2001 does not mean that, had a review been carried out, it would not have asked for such data to be collected. In all likelihood, it would have asked for such data to be collected which would have taken time. Had it not been possible to collect this data, it would have had to have carried out an analysis from other pension schemes and the general population as a proxy. This is supported by the reference, in its June 1998 letter, to the desirability of such an analysis.

The choice of mortality tables is not simply a matter of choosing which standard tables the assumptions should be based on. It would have had to have derived adjustments to be applied to the standard tables. The Continuous Mortality Investigation report published in July 2001 would have formed part of its mortality analysis.

The fact that it would not have taken long to consider developments in interest rates does not undermine the fact that consideration of a suitable discount rate would have formed part of the review process.

13. In the *Milne* case, the then Ombudsman found that a review should have taken place in 2001/02. This is not consistent with a review having concluded by June 2001. The Ombudsman was aware that GAD would likely choose 1 December 2001 as the 2001/02 review date at the time of his determination.
14. The Ombudsman has acknowledged that the fact that the choice of another month might result in injustice for some does not mean that the exercise of judgment in choosing a month amounts to maladministration. This was acknowledged by Walkers in its letter of 13 June 2016.

Adjudicator's Opinion

15. Mr D's complaint was considered by one of our Adjudicators who concluded that no further action was required by GAD. The Adjudicator's findings are summarised briefly below:-
 - The Ombudsman had been asked to decide a preliminary issue relating to his jurisdiction. Having reviewed the initial submissions made by the parties, the Adjudicator was of the view that the jurisdictional elements of Mr D's case were so interwoven with the merits of his complaint that it would be necessary to have some consideration of the latter in order to decide the former. Mr D's complaint was accepted for investigation on the understanding that the jurisdictional aspects of his case would remain under review.
 - Mr D's complaint initially concerned GAD's failure to review commutation factors used by the FPS under rule B7. This complaint was stayed because the then Ombudsman was already dealing with a similar complaint (*Milne*) and the outcome of that case would affect Mr D's. In *Milne*, the Ombudsman found the failure to undertake reviews of the commutation factors amounted to maladministration on the part of GAD. Amongst other things, the Ombudsman said a review should have been undertaken in 2001/02 (para. 141). Since this aspect of Mr D's complaint had been covered in the *Milne* decision, he was asked to clarify what his remaining complaint comprised. This was set out in Walkers' letter of 13 June 2016. Mr D had confirmed that this letter sets out what he wishes the Ombudsman to investigate.
 - Essentially, Mr D had asserted that the date chosen by GAD as the date in 2001 from which the commutation factors should be revised was incorrect. GAD has chosen 1 December 2001. Mr D sought to argue the date should be 1 June 2001.
 - In its letter of 13 June 2016, Walkers stated the maladministration was the failure to review the commutation factors in 2001. It said that what Mr D now sought was a factual analysis of what would probably have happened in 2001.
 - Under section 146, the Pension Schemes Act 1993, the Pensions Ombudsman may investigate and determine a complaint of maladministration

or a dispute of fact or law. The maladministration for which Mr D was seeking redress had already been determined by the previous Ombudsman in the *Milne* case. That decision was accepted by GAD and it had taken steps to carry out the Ombudsman's directions. It is not clear that what Mr D was now seeking was provided for in section 146. In other words, carrying out a factual analysis, other than as part of an investigation into a complaint of maladministration or a dispute of fact or law, is not a function of the Pensions Ombudsman.

- Mr D's application to the Pensions Ombudsman could be framed in terms of a complaint of maladministration; that is, the review/revision date of 1 December 2001 was outside the timeframe for such matters. The objections put forward by Walkers to the reasons proffered by GAD for choosing 1 December 2001 would fit within such a reframing of Mr D's complaint.
- Mr D's complaint, however, faced a jurisdictional problem even if it were to be reframed. For Mr Milnes' case, the Court of Appeal⁴ ruled that GAD was an administrator for the purposes of the jurisdiction of the Pensions Ombudsman. It stated that GAD has a proactive role which is 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 can be said to be an administrative act. However, Mr D's complaint is about the date chosen by GAD to revise the factor tables, which is considered to be primarily an actuarial function. Reconstructing the sequence of events which should have taken place in 2001 would require an actuarial analysis of what should have happened.
- As at the date of Mr D's retirement, Rule 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 commuted portion at the date of retirement, calculated from tables prepared by the Government Actuary". In a previous High Court case⁵, Cox J had 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 ...

⁴ *The Government Actuary's Department v The Pensions Ombudsman* [2013] EWCA Civ 901

⁵ *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)

... 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 ...”

- Cox J said 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 found that it was “changes in actuarial conditions (mortality assumptions and discount rates) which may lead the Government Actuary to revise the tables from time to time”. The Adjudicator was of the opinion that the decision to revise the tables was 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) was not within the Ombudsman’s jurisdiction.
- Setting aside the jurisdictional issue for a moment, the Adjudicator was of the view that it was unlikely that there were grounds for upholding Mr D’s complaint even if it could be accepted for investigation.
- It might be possible to separate out purely administrative elements of the 2001 review. For example, it might be possible to consider whether there was any undue delay on GAD’s part in completing the review. This, in itself, was fraught with difficulty because what data was required for the review and where it should have come from were, primarily, actuarial decisions.
- Since rule B7 does not specify the frequency at which the tables are to be reviewed, Mr D was relying on GAD’s own recommendation, in its June 1998 letter, that the next review should be “in three years’ time”. In addition, he relied on the Ombudsman’s finding, in *Milne*, that a review should have been undertaken in 2001/02 (para. 141). The Adjudicator was of the opinion that neither of these supported a finding that the revised tables should have been prepared by 1 June 2001. Mr D had picked 1 June 2001 because this was exactly three years since the previous review/revision of the tables. However, GAD’s reference to three years did not lend itself to finding that this meant by 1 June 2001. The somewhat imprecise phrasing suggested that the June 1998 letter’s author had in mind that a review would take place at some point in 2001; rather than at a fixed date. The Adjudicator noted that the previous review had taken place in 1994. She was of the view that it was not possible, therefore, to say that there was an established pattern of undertaking reviews at exactly three year intervals.

- Given that there is no statutory timeframe for review and no agreed timetable, the Adjudicator expressed the view that it was difficult to see how the Ombudsman could find that GAD's completion of the review by 1 December 2001 amounted to maladministration. In the absence of an agreed date by which a review should have been completed, she considered it was not possible to find that there was undue delay on the part of GAD in completing its review.
 - The Adjudicator was of the opinion that, were the matter to be referred to the Ombudsman, it was likely that he would exercise his discretion to discontinue the investigation on the grounds that the complaint was likely to be outwith his jurisdiction and, in any event, unlikely to succeed.
 - Finally, as a matter of public policy, the Adjudicator expressed the view that the Ombudsman was unlikely to wish to substitute one revision date for another where other members, who were not party to this complaint, had not had an opportunity to make representations and would not be bound by his determination.
16. Walkers did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Walkers provided their further comments which do not change the outcome.
17. In deciding whether to discontinue this matter on grounds that it is in essence outwith my jurisdiction or determine it as a preliminary issue, I have taken into account that Mr D has expressly asked that I determine this matter. .

Ombudsman's decision

18. I agree with the Adjudicator's Opinion. In summary the Adjudicator found as follows. Mr D seeks a factual analysis of what would have happened in 2001 because he asserts that the review date ought to have been June 2001. I cannot carry out a factual analysis other than as part of an investigation into a complaint of maladministration or a dispute of fact and law. However, I could frame Mr D's application as a complaint of maladministration that the actual review date of 1 December 2001 was outside the review period that should have resulted in a review date of June 2001. But as explained by the Adjudicator, GAD is not within my jurisdiction for the purposes of that complaint. Finally, even if it was, there is no merit to the complaint.
19. It is accepted by both parties that a review of the FPS commutation factors did not take place between 1998 and 2006. This was essentially the basis for the complaint which was brought by Mr Milne and which was upheld by my predecessor in 2015. Mr D's complaint refines this slightly, inasmuch as he has particularly focused on the period from 16 June 1998 and 15 November 2001.

20. Following the *Milne* determination, GAD produced revised commutation factors which were to take effect from 1 December 2001. As a result of which, members of the FPS who had retired after this date were eligible for further lump sum payments. Mr D's argument is, in essence, that the revised factors should have taken effect from 1 June 2001. He argues this on the basis of a letter from GAD dated 16 June 1998, in which the author said,

“We recommend that the factors are reviewed again in three years [*sic*] time.”

21. In the *Police Federation* case, Cox J said GAD had a responsibility to exercise a judgment as to whether to revise the relevant commutation tables; a judgment which called for an entirely actuarial expertise. This was because she found that it was changes in actuarial conditions which might lead GAD to revise the tables from time to time. In view of this, the decision to revise the tables should be viewed as 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.
22. As explained by my Adjudicator, there was no statutory timeframe for the review of the commutation factors and no agreed timetable. When it might have started and concluded are essentially matters of retrospective hypothesis and speculation. If there had been a review, the final date would have been largely governed by actuarial analysis, which is outside the scope of this office. Moreover, having regard to GAD's submissions there is no evidence to support that there were significant pure administrative delays.
23. Mr D has no alternative support for his argument; other than GAD's letter of 16 June 1998.
24. Even if I were to find that GAD's letter amounted to a commitment to 'review' the commutation factors by June 2001, there are no grounds for me to find that the revised factors should have come into effect before 1 December 2001. The effective date of any commutation factors is an actuarial judgment; something which Walkers and Mr D appear to have accepted. As it is, I do not find that GAD's letter of 16 June 1998 did amount to a commitment to review the FPS commutation factors by June 2001. The language used does not lend itself to such a precise meaning.
25. If the review had been done by June 2001, Mr D would have been better off, others would have been worse off. Whatever date might have been chosen, there would be a 'cliff edge' with members on either side. I have not heard representations from those on the opposite side of that cliff edge to Mr D. Accordingly, notwithstanding the actuarial issue above, I would in any event consider it unreasonable and inappropriate for me to attempt to choose that cliff edge date.
26. It has already been determined that the failure to undertake a review before 2006 amounted to maladministration on GAD's part. My predecessor found that a review should have been undertaken in 2001/02. If he had felt able or it was appropriate to do so, it is likely that he would have been more specific, as Mr D would like me to be.

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Mr D wishes me to find that the review should have taken place by June 2001. I do not find that there are grounds for me to make such a finding.

27. Therefore, I do not uphold Mr D's complaint.

Anthony Arter

Pensions Ombudsman
8 November 2017