PO-13339

Ombudsman's Determination

Applicant	Mr M
Scheme	The Fire Brigades Union Retirement and Death Benefits Scheme (the **FBU Scheme**)
Respondents	The Fire Brigades Union (**FBU**)

Outcome

1. Mr M's complaint is upheld and to put matters right the FBU should pay him a lump sum equivalent to the difference between the lump sum he was paid at retirement and the lump sum he would have received had the appropriate commutation factors been available at the time.

2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr M has complained that his contract of employment stipulated that his pension provision should be comparable to the Firefighters' Pension Scheme (**FPS**) but the FBU has declined to apply revised FPS lump sum commutation factors.

Background information, including submissions from the parties

Background

4. Mr M was employed by Greater Manchester Fire and Rescue Service from 1966 to 1979 and was a member of the FPS. He was employed by the FBU from 1979. Mr M retired in September 2005. He received a tax free cash sum of £142,594.11.

5. Mr M's 1979 contract of employment stated "The Pension arrangements for National Officials shall be that determined by Resolution of the 1966 Annual Conference". A document headed "Officials Pension Scheme" stated:

> "The title of the scheme shall be the Fire Brigades Union Officials Pension Scheme. Retirement benefits shall in general be similar to those provided in the Firemen's Pension Scheme Order except where specific conditions are set out in the Fire Brigades Union Officials Pension Scheme."

6. Under the sub-title “Commutation and Allocation”, the document stated,

> “The terms and conditions governing allocation and commutation shall not be inferior to those obtaining under the Firemen’s Pension Scheme Order.”

7. Mr M’s contract of employment was revised in 1985, 1986 and 1992.

8. In 1986, Mr M prepared a report for the FBU’s Executive Council which set out a history of the union’s pension provision from 1966 onwards. Its key points are summarised below:-

- At the 1966 Annual Conference, the union rules had been amended to include reference to the Fire Brigades Union Officials’ Pension Scheme. Membership became a condition of employment for officials under the age of 45 and they were required to pay a contribution of 5% of salary. It was for the Executive Council to decide whether liabilities would be covered by life policies.

- Following discussion with the Inland Revenue, the rules had been amended in 1970. There appeared to have been no pension scheme between 1970 and 1975. Insurance policies were purchased for those members who became beneficiaries in this period.

- In 1975, the FBU announced the establishment of a money purchase arrangement with a target to provide 40/60ths of final salary after 10 years’ service. Members were required to contribute 6.75% of salary in line with contributions to the FPS. A members’ booklet was published in 1976. A trust deed had been executed in 1977 but the scheme had been run in accordance with the booklet.

- There was further discussion in 1979 and 1980 relating to contracts of employment. The approved contract of employment referred to the 1966 resolution.

- In June 1984, a further definitive deed was executed which amended the 1975 scheme.

- The current position was that officials were covered by the June 1984 deed but had additional rights under their contracts of employment for which the trustees were not liable. These included: commutation above Inland Revenue limits; post-retirement increases; retirement at age 55 after 25 years’ service; early retirement after election defeat; and ill health provisions.

9. The report recommended continuation of the existing retirement and death benefit scheme with amendments to bring it into line with the FPS. The report then went on to discuss funding.

10. The 1992 “Written Particulars of Employment of National Officials” states that the FBU operates a retirement and death benefit scheme under a trust deed dated 25 June 1984. Paragraph 10 states,

> "The Union intends that all pensioners under the Union's Retirement Scheme who have remained members of the Firefighters' Pension Scheme … during their previous service with the Fire Service shall receive a pension comparable to equivalent Officers of the Fire Service. To that end, the Union undertakes to augment the Pensions in payment under the Union's Scheme to cover any shortfall between the benefits provided by the FPS and the Union's Scheme,
>
> PROVIDED:-
>
> (a) That you were still a member of the FPS … at the time of your election to office;
>
> and
>
> (b) that you have remained in the Union's Scheme up to the date of your retirement."

11. At the time of Mr M's retirement, the FBU Scheme was administered by Friends Provident. It sent the FBU a cheque for £73,977 in respect of Mr M's tax free cash sum in September 2005. Mr M received a total lump sum amounting to £142,594.11.

12. In 2010, a retired firefighter, Mr Milne, brought a complaint to the Ombudsman concerning the Government Actuary's Department's (**GAD**) responsibility to review the commutation factors used by the FPS. GAD unsuccessfully challenged the Ombudsman's jurisdiction to investigate this complaint and a determination was issued in 2015.

13. Although Mr M was retired, he followed the progress of the *Milne* case through newsletters and circulars. In January 2010, he wrote to the General Secretary of the FBU asking if the Executive Council had considered how retired officials should be treated. He noted the then FBU advice to its members to apply to the Ombudsman but said he did not think was appropriate in his circumstances, or an option which he would like to pursue. He followed his enquiry up in April 2010. On 21 June 2010, the General Secretary wrote to Mr M saying the Finance Sub-committee and Executive Council had considered the matter and he could confirm "there is no intention to alter the commutation arrangements relating to the Officials' Pension Scheme".

14. In September 2015, Mr M contacted the FBU. He said he was aware GAD had issued guidance on calculating redress following the Ombudsman's determination in the *Milne* case. He said he was surprised not to have received any indication from the union as to when payments would be made.

15. Following further correspondence, Mr M wrote to the FBU, on 15 November 2015, setting out his claim in detail. Amongst other things, Mr M said a separate fund had been set up within the FBU's accounts for the purposes of funding any shortfalls between the benefits provided by the FBU Scheme and any contractual obligations. Mr M said the most significant benefit which could not be matched by the FBU Scheme was the commutation option offered by the FPS. He said the FBU's accounts

would show that payments to retiring officers were not met in full by the FBU Scheme and had been paid out of the FBU's funds.

16. On the basis of the guidance published by GAD, Mr M calculated that his lump sum should be increased by £32,930.22, to which interest should be added. Mr M said he was formally applying for redress.

17. On 29 April 2016, the FBU wrote to Mr M informing him it had considered the matter and concluded it had met all its obligations, and no further payments would be made. In a subsequent letter, the FBU said it had been advised that its members were not due any compensation because they were not members of the scheme which had been found by the Ombudsman to have been mal-administered. It went on to say the *Milne* decision resulted in the payment of compensation but had not resulted in any alteration to the FPS itself. The FBU said it had been advised there was no contractual obligation for it to pay any compensation. It said the Executive Council had, therefore, taken the decision it could not pay compensation and any other decision would have been outside the union's rules.

18. Mr M applied to the Ombudsman on 23 June 2016.

Mr M's position

19. Mr M's submission is summarised below:-

- He was a member of the FBU Scheme at the time of his retirement. It provided for him to be paid a pension comparable with that paid under the FPS and his pension was calculated in accordance with the terms of the FPS.
- The FPS commutation tables were used to calculate his lump sum. A factor of 1.45 was applied.
- Guidance from GAD, published after the *Milne* decision, contained reconstructed commutation factors. This, in effect, changed the factor which should be used to calculate his lump sum.
- He has calculated the difference in the amount of lump sum to be £32,930.22, to which interest should be applied in accordance with the GAD advice.
- He was employed by the FBU in 1979 on a contract of employment which stipulated that his pension arrangements were as had been determined by resolution at the 1966 Annual Conference.
- The 1966 resolution stated, "retirement benefits shall in general be similar to those provided in the FPS". In particular, paragraph 9 stated, "the terms and conditions governing allocation and commutation shall not be inferior to those obtaining under the FPS".
- His contract of employment was revised in 1985, 1986 and 1992. Paragraph 10 of the 1992 contract provides for him to receive a pension comparable to

equivalent officers in the fire service. It also contains an undertaking that the FBU will augment pensions in payment under the FBU Scheme to cover any shortfall.

- The commitment to pay a pension comparable to that paid by the FFPS could not be met by the FBU Scheme. The FBU, therefore, set up an "Officials' Pension Fund" in 1986. This was closed in 2009 and the difference in pension payments is now paid from the FBU's General Fund. Payments are made by Friends Provident to the FBU to cover the difference in benefits.

- In 2010, he was able to access his deferred FPS benefits and the FBU reduced the benefits he received from it by an equivalent amount.

- Throughout the time he was a member of the FBU Scheme, he paid the same contributions he would have done if he had been a member of the FPS.

- At the time of his retirement, his pension was indexed by reference to the Retail Prices Index. When the FPS changed to the Consumer Prices Index, the FBU changed the indexing which applied to his pension.

- In 2010, the FBU's General Secretary confirmed there was no intention to alter the commutation arrangements relating to the FBU Scheme.

The FBU's response

20. The FBU's response to Mr M's complaint is summarised below:-

- The payment sought by Mr M would be paid from its General Fund which is not a pension fund[1].

- In order to ensure that its officials, who come from a firefighting background, are not disadvantaged by being in the FBU Scheme instead of the FPS, a contractual arrangement is made with them via their contracts of employment. If a benefit payable under the FBU Scheme is less than that which is payable under the FPS, a top-up payment is made out of the FBU's funds.

- When Mr M retired, in 2005, he received a commutation payment calculated and paid in accordance with the rules.

- Mr M's claim arises out of the *Milne* decision in 2015.

- In his determination, the then Ombudsman acknowledged that there were other members of the FPS who had an interest in the outcome of the *Milne* case and would have liked to see a more wide-ranging decision. He said he

[1] Mr M's complaint was accepted for investigation on the basis that the FBU's arrangement meets the definition of "pension scheme" under Section 1(5), the Pension Schemes Act 1993; being a scheme or other arrangements, comprised in one or more instruments or agreements, having or capable of having effect so as to provide benefits to or in respect of people – (a) on retirement, (b) on having reached a particular age, or (c) on termination of service in an employment.

could only reach direct conclusions concerning Mr Milne and did not have the power to make a determination binding on persons who were not party to the complaint. The Ombudsman could not decide where liability fell and invited the interested parties to resolve it between themselves to avoid mass individual litigation.

- It understands that a compensation scheme was set up by the Department for Communities and Local Government (**DCLG**). Members of the FPS, who retired between 1 December 2001 and 30 November 2006, could apply for compensation.

- No changes were made to the terms of the FPS as a result of the *Milne* decision.

- The principal remedy ordered by the Ombudsman was for GAD to inform the relevant FPS authorities of the commutation factor which would have applied, in Mr Milne's case, if it had reviewed the relevant tables in December 2004. This was not a direction to GAD to publish new commutation factors; instead it was a direction to say what factor would have applied.

- Mr M has referred to clause 10 in his contract of employment (see above).

- Mr M was the FBU's Assistant General Secretary at the time of the 1986 discussions. He was, therefore, at the heart of the changes made to the FBU's pension provisions. Legal advice was taken as to the wording of the contracts. This was received, considered and acted upon by Mr M.

- There is no suggestion, in the 1986 report, that it was ever the FBU's intention to match payments other than those defined in clause 10, arising out of the terms of the FPS. Had it been, some mention of it in the report or in the contract of employment would be expected and there is none.

- The onus is on Mr M to establish that he has a contractual right to require the FBU to match a payment made not by the FPS but under the DCLG compensation scheme. It does not believe that he can.

- Clause 10 deliberately limited the top-up to cover any shortfall as a result of "benefits provided by the FPS". The FPS was not amended by the *Milne* decision and nothing further is payable under the FPS as a result of it. The DCLG compensation scheme is not the FPS and is outside the ambit of clause 10. The compensation payments came from a wholly separate government fund and were available only to members of the FPS who applied.

- Because of the need for FPS members to apply for compensation, there is no general standing entitlement which Mr M could rely on.

- Mr M has assumed that he would have been entitled to a payment from the DCLG compensation scheme. It does not accept that he has established this.

- It accepts that, had the revised commutation factors been in place in 2005, they would have applied in calculating Mr M's lump sum. His contractual entitlement to a top-up would have been triggered. However, they were not and it was not.

- In *Milne*, the Ombudsman found a sufficiently close relationship between Mr Milne and GAD to form the basis for wrongdoing and a chain of events leading to compensation. The relationship between Mr M and GAD is much more tenuous. He is not a member of the FPS and is not entitled to any benefit under it.

- Mr M's claim would be for breach of contract. The time limit for bringing such a claim is six years from the date of the breach. Mr M's pension was commuted for a lump sum payment 11 years ago.

21. Having been provided with an opinion by one of our Adjudicators, the FBU made the following further submissions:-

- The commutation factor tables provided by GAD were for the quantification of post-judgment redress and not for the purpose of administering the FPS. They were not apt for incorporation into the FPS and the clause 10 obligation is not triggered.

- In its Technical Bulletin of 15 May 2015, GAD stated it had prepared the tables for use in the calculation of redress.

- The method of redress settled upon by the government was an instruction to pensions administrators to make payments in accordance with GAD guidance issued on 28 August 2015.

- This instruction was issued for administrative convenience because there were some 34,000 potential cases. It was not an amendment to the FPS or to the published commutation factors. It was simply a compensation scheme.

- The GAD guidance referred to discharges being obtained from FPS members before payment was made. The discharges were to the effect that the payments were in full and final settlement of any claims arising from the commutation of their pensions.

- Withholding payment without a discharge is how settlements are administered; it is not how amended pension entitlements are administered.

- It does not agree that this compensation scheme was somehow transmuted, by virtue of rule B7, into a payment which was due under the rules of the FPS simply by virtue of the fact that GAD had calculated the factors.

- The proper interpretation of rule B7(3) requires the GAD tables to have been calculated specifically and exclusively for the purposes of administering the FPS; not for some other purpose, such as calculating compensation for a breach of statutory obligation. GAD acknowledged that the factors were a "best reconstruction" and not a "proper fit".

- In an earlier case[2], the High Court held that tables produced for the equivalent police pension scheme took effect from the date they were created. The tables produced by GAD could not take effect any earlier than August 2015. This is too late to profit any of the FPS members as a payable benefit under the FPS rules. The only logical conclusion is that they are a wholly freestanding calculation for a scheme of compensation.

- The principle of certainty in English law precludes retrospective changes in the law[3]. This is why the Firemen's Pension Scheme Order 1992 contains no provisions authorising back-dating.

- It agrees that the GAD factors produced higher lump sums. However, this was not an acknowledgement that FPS members had not received the actuarial equivalent of their commuted pensions. The *Milne* decision was the acknowledgement of this; the rest was simply dealing with the "necessarily consequential compensation element" in a way which avoided the Ombudsman being deluged by claims.

- It is not correct to say the fact that the payments were made from a separate fund is simply a question of funding.

- With regard to the Limitation Act 1980, the reference to "mistake" is to the doctrine of mistake in the law of contracts. This deals with two situations: (a) mistake as to the terms of or parties to a contract; or (b) a shared and fundamental misapprehension as to the facts or the law. Mr M's case clearly does not fall into the first category and it does not accept that it falls into the second.

- Mistake would make Mr M's contract void and unenforceable, which is not what he wants.

- It disagrees that it has been negligent. It reviewed the post-*Milne* position very carefully and took legal advice. It came to the conclusion that it was not obliged to pay a lump sum. The fact that Mr M was unhappy with the outcome does not make that assessment negligent. Nor would reaching a conclusion as to contractual obligations which a court later disagreed with.

[2] *Police Federation v Government Actuary's Department* [2009] EWHC 488 (Admin)
[3] *R (Nadarajah and Abdi) v Secretary of State for the Home Department* [2005] EWCA Civ 1363

Adjudicator's Opinion

22. Mr M's complaint was considered by one of our Adjudicators who concluded that further action was required by the FBU. The Adjudicator's findings are summarised briefly below:-

- Mr M is a pensioner member of the FBU Scheme. His entitlement to benefits arises under the rules of that scheme. However, he also has/had entitlement to supplementary benefits arising under his contract of employment.

- As at the date of Mr M's retirement, his 1992 contract of employment applied. This stated the FBU intended that pensioners who had remained members of the FPS would "receive a pension comparable to equivalent Officers of the Fire Service". It undertook to augment pensions in payment to cover any shortfall between the benefits provided by the FPS and the FBU Scheme. Consequently, the FBU augmented Mr M's lump sum when he retired. The lump sum paid by the FBU Scheme amounted to £73,977, as paid to the FBU by Friends Provident. Mr M received £142,594.11. This amounted to an augmentation of £69,617.11. This augmentation was based on the commutation factors in use by the FPS at the time, which have since been found to be incorrect.

- The relevant provision of the FPS is rule B7 of the Firemen's Pension Scheme Order 1992, as it applied at the date of Mr M's retirement. Extracts from rule B7 are provided in an appendix to this document. Rule B7 provided that the lump sum payable under the FPS should be "the actuarial equivalent of the commuted portion [of the member's pension] at the date of retirement". It was/is to be calculated from tables prepared by GAD.

- GAD's role and responsibilities were the subject of the *Milne* determination and an earlier Court case relating to the Police Pension Scheme. The Police Pension Scheme contained practically the same provision for commutation as the FPS. In that case, the judge said:

  "… in my judgment, the wording of Regulation B7(7) is clear. Where the requisite conditions are fulfilled and a commutation notice is served, Regulation B7(7) places an obligation upon the relevant police authority to do two things: firstly, to reduce the pension … and secondly, to 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.

  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 ...

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 …"

- A lump sum payable under the FPS should be the actuarial equivalent of the pension commuted. If not, the member will not receive the pension to which he or she is entitled. A lump sum derived from commuted pension is, in essence, early payment of that portion of the member's pension.

- The FBU undertook to augment Mr M's pension to cover any shortfall between the benefits provided by the FBU Scheme and the benefits which would have been payable under the FPS, had Mr M remained a member of that scheme. If the commutation factors applied to Mr M's augmented pension did not result in a lump sum which was the actuarial equivalent of the pension he was giving up, he has not received, and is not now receiving, the benefits he was promised. In other words, by paying a lower lump sum at the date of Mr M's retirement, the FBU would have failed to augment his pension to the extent promised under his 1992 contract of employment. This is because the lump sum paid to Mr M at retirement would not have been the actuarial equivalent of the pension he would, but for the commutation, receive over his lifetime.

- Following the *Milne* determination, GAD reviewed the commutation factors which should have applied under the FPS and provided revised factors applicable from 1 December 2001. These factors produced higher lump sums. In other words, it was acknowledged that members retiring under the FPS from 1 December 2001 to 21 August 2006 had not received the actuarial equivalent of their commuted pensions. It follows that Mr M had also not received the actuarial equivalent of his augmented pension since the FBU had calculated his FPS equivalent lump sum by reference to the pre-revision GAD factors.

- The question therefore arose as to whether, now that this is known, the FBU had any obligation to recalculate Mr M's lump sum using the revised GAD factors. In the Adjudicator's view, if it did not do so, it would not have fulfilled its undertaking to cover the shortfall between the benefits paid by the FBU Scheme and those provided by the FPS in Mr M's case.

- The Adjudicator noted the FBU's assertion that no changes were made to the FPS as a result of the *Milne* determination and agreed. The affected members'

claims arose out of the existing terms of the FPS which had not been complied with. The additional lump sums paid to qualifying members are paid under the existing terms of the FPS; that is, the requirement under rule B7 that they should be paid the actuarial equivalent of the commuted portion as a lump sum. There was no requirement to amend the FPS either to implement the revised commutation factors or to provide the members with the revised lump sums. Therefore, the additional lump sum which Mr M is now seeking arises out of the provisions of the FPS regulations in existence at the time of his retirement.

- The Adjudicator noted also that the FBU was of the view that the qualifying members received compensation from a separate fund, established by the DCLG, which was not part of the FPS. In her view, this was a question of funding and did not alter the fact that the members' claims were founded upon their rights under rule B7. The FPS is funded partly by member and employer contributions and partly by grants from the DCLG (now the Home Office, following a transfer of responsibility). The DCLG may well have made specific funding arrangements to deal with the additional lump sum payments but the members' claims arose out of and were paid under the terms of the FPS.

- The FBU had also referred to the Limitation Act and asserted that Mr M was outside of the six year time limit to bring a claim. It was of the view that Mr M's claim was for compensation for a breach of contract which occurred in 2005.

- It is the case that section 5 of the Limitation Act requires a claim for breach of contract to be brought within six years of the breach. There is some provision for this period to be extended in cases of fraud, concealment or mistake (section 32). In such cases, the limitation period starts to run from the date the claimant has (or could, with reasonable diligence, have) discovered the fraud, concealment or mistake. Mr M might argue that this is a case of mistake on the part of the FBU inasmuch as it used actuarial factors which were out of date. Arguably, this mistake was not discovered until GAD issued revised retrospective factors in 2015. The breach of contract could, therefore, be said to have occurred in 2015.

- Prior to 2015, the FBU had calculated Mr M's benefits in line with the FPS, using the commutation factors in place at the time. However, in 2015, GAD issued revised factors which were to be implemented retrospectively. Arguably, the breach of contract occurred when the FBU then failed to apply the new commutation factors. In so doing, it failed to honour its undertaking to provide Mr M with benefits equivalent to those he would have been entitled to had he remained in the FPS.

- Mr M might, as an alternative, have a claim for compensation for negligence; that is, the FBU had failed to exercise due care in refusing to recalculate his lump sum by reference to the revised factors. In so doing, it had failed to

ensure that he is in receipt of the benefits promised to him. The limitation period for claims arising out of negligence is six years from the negligent act or omission or three years from the date of the claimant's knowledge of such, if this is later (section 14A). The negligent act giving rise to Mr M's claim occurred in 2015, when GAD issued revised factors and the FBU failed to review his lump sum.

- Either way, in the Adjudicator's opinion, the Limitation Act did not prevent Mr M from bringing his claim for a revised lump sum.
- The Adjudicator noted the FBU's reference to Mr M's relationship with GAD. It argued there was not a sufficiently close relationship between Mr M and GAD for him to claim compensation for its failure to review the actuarial factors in question. However, Mr M was not complaining about maladministration on GAD's part; he was complaining about maladministration on the part of the FBU in failing to review his lump sum.
- In the Adjudicator's view, Mr M's complaint could be upheld on the basis that, by refusing to review his lump sum in the light of the GAD guidance relating to the FPS, the FBU had failed to fulfil its undertaking to cover the shortfall between the benefits provided by the FBU Scheme and those which would have been paid under the FPS.

23. The FBU did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. The FBU provided its 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 the FBU for completeness.

Ombudsman's decision

24. The key in determining Mr M's case lies in the source of his claim to an additional lump sum payment. Under the terms of Mr M's 1992 contract of employment, the FBU undertook to augment the pension in payment under the FBU Scheme to cover any shortfall between the benefits payable under that scheme and those payable under the FPS. I do not consider this to be a one-off exercise and neither, it seems, does the FBU since it amended post-retirement increases in line with the FPS.

25. Rule B7 requires a lump sum to be the actuarial equivalent of the commuted portion of a pension. It is to be calculated from tables prepared by GAD. At the time of Mr M's retirement, the FBU calculated his lump sum by reference to the tables then being used by the FPS. However, these tables did not produce a lump sum which was the actuarial equivalent of the pension which had been commuted. This is the basis upon which all the FPS members' claims were founded and it is the basis for Mr M's claim.

26. The FBU argues that the fact that the tables subsequently prepared by GAD produced higher lump sums was not an acknowledgment that FPS members had failed to receive the actuarial equivalent of their commuted pensions. It argues that

the *Milne* decision was an acknowledgement of this and the rest was simply dealing with the "necessarily consequential compensation element" in a way which avoided my office being deluged by claims. By the rest, I take it to mean GAD providing tables of factors to be used to calculate additional lump sums and pensions for affected FPS members.

27. I can see no other reason for the calculation and payment of the additional lump sums and pensions other than an acknowledgement that the FPS members in question had not received the actuarial equivalent of their commuted pensions. In other words, they had not received what they were entitled to under rule B7. The FPS members' claims and the payments they received were founded firmly upon their entitlements under the FPS and, more specifically, under rule B7.

28. Since the FBU calculated Mr M's lump sum by reference to the commutation factors used by the FPS, it follows that he too did not receive the actuarial equivalent of the commuted pension. He was entitled to receive either a higher lump sum or a higher pension because the FBU had undertaken to augment his pension in payment to meet any shortfall between his FBU Scheme pension and the FPS pension he would have received.

29. The FBU seeks to argue that the payments made to the affected FPS members are compensation paid under a separate scheme. Whether or not this is the case does not alter the fact that the payments arose because of the members' entitlements under rule B7. Mr M has an entitlement to a higher lump sum under the terms of his 1992 contract by virtue of the fact that the FBU undertook to augment his pension in payment by reference to the equivalent entitlement under the FPS. It has so far failed to fulfil this undertaking.

30. The affected members of the FPS have received payments calculated by reference to the factors produced by GAD in 2015. GAD described the factors as its "best reconstruction" of the factors which would have been prepared if it had undertaken reviews in December 2001 and December 2004. The FBU argues that these factors cannot take effect any earlier than 2015. It has referred me to the earlier judgment concerning the Police Pension Scheme.

31. In that case, the judge said,

> " … 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.

> 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.
>
> 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."

32. If, as the FBU argues, the factors provided by GAD could not take effect before 2015, it would be impossible to put right the wrong identified in the *Milne* case; namely, that the affected FPS members had not been paid the actuarial equivalent of their commuted pensions. However, the judge's decision referred to above arose in the context of a delay in implementing the December 2006 factors. Her view was that the tables in question represented the Government Actuary's best assessment of the factors which would enable the calculation of actuarial equivalence as at December 2006. It was for this reason that she found that the tables should have applied from that date.

33. In the current circumstances, the factors in question also represent the best assessment by the Government Actuary of those factors which would enable the FPS employers to comply with their obligations under regulation B7. The difference being that they are intended to apply retrospectively. They represent the Government Actuary's best assessment of the factors which would, most likely, have been prepared and issued in 2001 and 2006 if reviews had been carried out in those years.

34. The FBU argues that the principle of certainty in English law precludes retrospective changes. It argues that this is why the Firemen's Pension Order does not provide for retrospective changes. However, this argument overlooks the fact that the redress required by the *Milne* case, and subsequently provided by the GAD factors, did not

involve a change to the law or the Firemen's Pension Order. The member's entitlement to receive the actuarial equivalent of the commuted pension was already provided for in the FPS regulations. Equally, Mr M's entitlement to the actuarial equivalent of his commuted pension was already provided for in his 1992 contract by reason of the undertaking to augment his pension in payment.

35. The requirement for the lump sum to be the actuarial equivalent of the commuted pension recognises that it is, in effect, the early payment of that part of the pension. The factors provided by GAD seek to put a value on receipt of that part of the pension at an earlier date. If the FBU fails to recalculate Mr M's lump sum, it will not only have failed to pay him the benefits to which he was entitled over the period from his retirement to date but will continue to do so over the coming years. It will be paying Mr M less by way of pension over his lifetime than he is entitled to because the lump sum it paid to him does not adequately replace the commuted portion of his pension. It will continue to be in breach of its contract with Mr M.

36. The FBU seeks to argue that Mr M is out of time to bring a claim for breach of contract under the Limitation Act 1980. Clearly, this can only be argued for past breaches of the contract.

37. Section 32(1)(c) provides for the limitation period to be postponed where the action is for relief from the consequences of a mistake. The FBU argues that Mr M's claim is for breach of contract and, therefore, the mistake must fall within one of two categories; (a) mistake as to the terms of or parties to a contract; or (b) a shared and fundamental misapprehension as to the facts or the law. I agree with the FBU that the circumstances do not fall within the first category.

38. The question is whether Mr M has a cause of action which can be described as being for relief from the consequences of mistake. Mr M's claim is that he received less by way of a lump sum than he should have. To put it another way, Mr M gave up more by way of pension than the value of the lump sum he received. Arguably, Mr M has a claim in restitution on the basis that the FBU has been unjustly enriched as a result. The situation is similar to cases involving the overpayment of pensions but, in Mr M's case, involves the saving of a necessary expenditure on the part of the defendant, the FBU. The limitation period is six years from the date the defendant received the benefit. In Mr M's case, this would have been September 2005 and each pension payment date thereafter.

39. However, under section 32 the limitation period does not start to run until the claimant has discovered the mistake or could, with reasonable diligence, have discovered it. In view of the fact that the mistake, in Mr M's case, relates to the use of inappropriate commutation factors, I find that he could not have discovered it until the *Milne* decision was issued in 2015. His claim is not statute barred.

40. Therefore, I uphold Mr M's complaint on the basis that the FBU has failed to pay him the benefits he is entitled to under the terms of his 1992 contract. He has suffered injustice because he has not received the pension and lump sum to which he is entitled.

Directions

41. Within 21 days of the date of this Determination, the FBU shall review Mr M's pension and lump sum in line with the guidance provided by GAD dated 28 August 2015. It shall then pay Mr M any arrears of pension or additional lump sum, together with interest at the base rate quoted for the time being by the reference banks.

Anthony Arter

Pensions Ombudsman
15 November 2017

Appendix

The Firemen's Pension Scheme Order 1992 (SI1992/129) (as amended)

42. As at the date of Mr M's retirement, rule B7 provided,

> "(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.
>
> (4) The commuted portion must not in any case exceed a quarter of the full amount of the pension.
>
> (5) In the case of an ordinary pension, unless -
>
> (a) when the person retires he is entitled to reckon at least 30 years' pensionable service, or
>
> (b) he retires at, or after, normal pension age.
>
> the commuted portion must not be such that the lump sum exceeds two and a quarter times the full amount of the pension …"