

## Ombudsman's Determination

Applicant	Mr S
Scheme	Financial Assistance Scheme ( <b>FAS</b> )
Respondent	Pension Protection Fund ( <b>PPF</b> )

## Outcome

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

## Complaint summary

3. Mr S has appealed the decision of the Board of the PPF (**the Board**) to reduce the pension he had been in receipt of for 15 years.

## Background information, including submissions from the parties

4. The relevant regulations are the Financial Assistance Scheme Regulations 2005 (SI2005/1986) (as amended) (**the FAS Regulations**). References to regulations and/or paragraphs below are to regulations and/or paragraphs contained in the FAS Regulations.
5. Mr S was a member of the Foremans Limited Pension and Life Assurance Scheme (**the Scheme**). The Scheme commenced winding up on 1 August 2001. Mr S was a pensioner member of the Scheme at that time, as he had taken early retirement in March 2001, at the age of 55.
6. On 21 October 2003, the Trustees of the Scheme wrote to Mr S and informed him of the developments within the Scheme. The letter informed Mr S that:

“Wind-up means that the Scheme’s only mission is to use the assets of the Scheme to buy an insurance policy for you or to allow you to transfer your benefits to another Inland Revenue approved arrangement. The responsibility for paying your pension payments will then pass to the relevant insurance company, or if applicable, the scheme you transfer to.”

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7. On 28 August 2007, the Scheme Managers wrote to Mr S. It informed him that “The Scheme has sufficient funds to purchase your pension at its current level but cannot afford to purchase future increases...The Trustees will be entering into an agreement with [another annuity provider]...to continue to provide your pension at its current level.”
8. On 10 September 2009, the Scheme Managers sent Mr S a further letter informing him that they had made an application for the Scheme to join the FAS. It said:

“As your pension commenced before [the] issues with the scheme arose, your pension is above the level that the FAS will provide to the members subsequently drawing pension this being broadly 90% of the full benefit entitlement. Your benefits will remain in payment at the current level.”
9. On 12 November 2013, the FAS wrote to Mr S and informed him that the Scheme had been transferred to the FAS and that he would now receive a monthly payment from the FAS instead of from his old Scheme. The letter also stated:

“We have recently received data from the previous administrators of your scheme. Unfortunately our system cannot currently calculate your FAS entitlement as your data does not fit the standard scheme data format. We are working hard to enhance our systems. In the meantime, we will continue to pay you what you were receiving under the scheme...to ensure you receive a regular income.”
10. On 22 November 2016, the FAS wrote to Mr S and informed him that it had received revised data from his former scheme’s administrators. Consequently, it had to recalculate his benefits and this resulted in his future FAS payments being reduced. The FAS explained why Mr S’ payments were going to be reduced and also explained how his annual FAS payment was calculated.
11. On 30 November 2016, Mr S appealed the FAS’ determination regarding the overpayment. He was unhappy that after being in receipt of the pension for over 15 years, it was going to be reduced to recover the alleged overpayment.
12. On 25 January 2017, the FAS replied to Mr S’ appeal. It provided a background to how his asset share was calculated and explained how the overpayment occurred. The letter also explained that the FAS had discretion to waive overpayments and, it explained the circumstances that could result in the overpayment being waived.
13. Between 31 January 2017 and 3 May 2017, there was further correspondence between Mr S and the FAS regarding the repayment of the overpayments and Mr S appealed the FAS decision to the Ombudsman.
14. On 5 May 2017, the FAS wrote to Mr S and informed him that the Department for Work and Pensions (**DWP**), had agreed to waive the balance of the overpayment. On 11 May 2017, the FAS sent Mr S a further letter informing him that because the overpayment was being written off, his FAS annual payment would increase.

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15. Between 7 July 2017 and 28 September 2017, there was further correspondence between Mr S and the FAS regarding the calculation of his FAS annual payment.

### **Grounds for appeal**

16. Mr S' submission is summarised below:-

- The Scheme was a final salary scheme allowing members to retire from the age of 50. He took early retirement at age 55, in March 2001, and his pension benefit was calculated by the scheme's actuary. An actuarial reduction was applied to his benefits because he had taken them earlier than his normal retirement age.
- Some years after his retirement, the Trustees and Scheme Managers advised members that the scheme was in negotiations with the FAS to have the Scheme transferred.
- In 2013 the Scheme transferred and he received correspondence informing him that future pension payments would be made by the FAS. The FAS informed him that it was unable to calculate his FAS entitlement at that time because his data did not fit the standard scheme data format but it would continue to make him payments at the level he was currently receiving.
- In November 2016, he received a letter from the FAS informing him that he had received an overpayment. The overpayment was eventually revoked, but his pension payment remains as calculated by the FAS' actuary. It is based on the FAS 2010 Regulations and the Scheme's under-funding. This was the situation when the Scheme went into wind-up, which was much later than when he started receiving his benefits.
- It is unacceptable that the FAS can change the 'rules' in relation to pensioners receiving pension payments as a result of changes in the Pension Act introduced years after he started receiving his pension.
- Had his pension been bought as an annuity in 2009, prior to the 2010 amendment, he would now be in receipt of his full entitlement as calculated in 2001.
- The FAS has not only reduced his pension by 10% to bring it in line with the Regulations allowing it to pay 90% of the calculated entitlement, it has applied the 90% to the reduced pension that it has calculated based on the underfunding when the Scheme commenced winding-up in 2001.

### **Adjudicator's Opinion**

17. Mr S' appeal was considered by one of our Adjudicators who concluded that no further action was required by PPF. The Adjudicator's findings are summarised briefly below:-

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- Regulation 17(8)(g) requires the Board to determine whether the “notional pension” calculated by reference to Mr S’ share of the Scheme assets, is higher or lower than the annual FAS payment he might receive; referred to as “standard assistance” by the Board.
- Regulation 22(1) of the FAS Regulations requires that the Board obtains a valuation of the Scheme’s assets and liabilities at the calculation date. Regulation 22(2)(a) of the Regulations requires that the Board obtain a valuation of Mr S’ asset share within the Scheme.
- Mr S’ asset share was calculated as £174,560. On this basis, the Board calculated that Mr S’ notional pension at the date the Scheme commenced wind-up was £6,077.54 per annum.
- The basic methodology for calculating FAS payments is contained within schedule 2 of the FAS Regulations. Mr S was in receipt of a pension from the Scheme at the time that the Scheme commenced winding-up proceedings. His FAS payments must be calculated in accordance with paragraph 3 of schedule 2 of the FAS Regulations.
- Paragraph 3 provides that the annual payment shall be:  
(expected pension x 0.9) – actual pension.
- The “expected pension” is Mr S’ accrued pension at the date the Scheme commenced winding-up proceedings, revalued to his FAS Eligibility date. Mr S’ expected pension was calculated to be £7,619.53.
- The “actual pension” is calculated in accordance with paragraph 2, schedule 2 of the FAS Regulations. It is defined as the annual rate of annuity which has been, can be or could have been paid to Mr S, on the date he became entitled to a FAS payment, from the assets available to discharge the liability of the Scheme. In other words, any benefits which have been or could be otherwise secured for members of transferring schemes must be taken into account.
- In addition, paragraph 2(3F) provides for the Board to determine how any payments from the Scheme made before Mr S reached his normal retirement age should be accounted for. Mr S took early retirement in 2001, and started receiving a pension from the Scheme. It is these payments which must be accounted for in calculating his “actual pension”. The Board has done so by converting the total amount of the pension payments Mr S received into a notional annuity.
- Mr S received a total of £95,243.12 in pension payments from the Scheme and £27,944.99 from the FAS between 1 August 2001 and 21 November 2016, making a total of £123,188.11. The Board has calculated that Mr S should have actually received £103,155.56. Therefore, he was overpaid by £20,032.55. The Board has agreed to waive this overpayment. However, Mr S remains dissatisfied that his

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FAS payments are less than the pension he was previously in receipt of from the Scheme.

- When Mr S retired in 2001, he received his full pension entitlement from the Scheme. However, at the time that the Scheme was transferred to the FAS its liabilities outweighed its assets. Therefore, the Scheme could not afford to secure 100% of his asset share. It could only secure 86.82%.
- Mr S was entitled to an annual FAS payment from October 2005. The basic calculation of an annual FAS payment is based upon the member's expected pension at normal retirement age. In Mr S' case, this is the pension he would have received from the Scheme at his normal retirement age; not the reduced pension paid from 2001. The reduction to his FAS payment recognises that Mr S had already been receiving a pension from the Scheme before his normal retirement age. It takes the total amount he received and converts this into a reduction to the annual FAS payment going forward. If this adjustment is not made, Mr S would receive the same FAS payment as someone who had not retired early. In effect, he would then receive more, by way of Scheme payments and FAS payments, than an equivalent member who had not retired early.
- Mr S says that he was previously informed by the Scheme's Trustees and Managers that his pension would remain the same. However, as per the FAS Regulations, once the Scheme is transferred to the FAS the Board's actuary must value Mr S' asset share to determine what his FAS annual payments should be.
- The FAS has waived Mr S' overpayment but going forward, has reduced Mr S' annual pension so that it is what he is entitled to receive from the FAS. The Regulations enable the FAS to do so.

18. Mr S did not accept the Adjudicator's Opinion and in response made the following points:

- The Adjudicator has failed to accept that the DWP's draft FAS Regulations 2010 have not been actioned in arriving at his pension payments.
- The Adjudicator failed to acknowledge or accept that at the time of the transfer of his pension to the FAS, he was advised by the DWP that as an existing pensioner, his pension would "be paid broadly in line with the pension scheme rules where the payment is higher than what would be paid under the FAS rules."
- He was advised this in writing and was assured that as a pensioner his pension payments would not change. The FAS under the FAS Regulations, has failed to accept and act upon the promises made by DWP to scheme members.

19. The FAS did not have any comments in response to the Adjudicator's Opinion but in response to Mr S' submissions it made the following points:-

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- In order to establish if Mr S is entitled to receive FAS payments which are equal to the pension instalments he was receiving from the Scheme, Mr S must establish that the FAS is estopped from reducing his FAS payments.
- In order to establish estoppel by representation, Mr S must show:
  - (a) a clear representation or promise by the FAS on which it was reasonably foreseeable that he would act;
  - (b) an act on his part that was reasonably taken in reliance on the representation or promise; and
  - (c) he will suffer detriment if the FAS is not held to the representation or promise.
- The general statement in the DWP information dated 20 August 2009 that members currently in receipt of a pension will continue to receive payments broadly in line with the pension scheme rules, where this is greater than the FAS standard assistance, is correct. If a member is receiving a pension which has been correctly cut back in accordance with the statutory order of priorities, the member should not be worse off in the FAS because they should receive a pension which is at least equal to their notional pension.
- As the general statement is correct as a matter of law, it cannot be construed as misrepresentation.
- The error in this case appears to have arisen because Mr S' pension was not correctly cut back in accordance with the statutory order of priorities. This is because the Trustees proceeded on the basis that there were sufficient scheme assets to provide pensions in payment at the date of scheme wind-up (DOSW) at the 100% level, whereas the FAS actuary calculated that there were only sufficient assets to provide these pensions at 86.82% level.
- His asset share in monetary value amounted to £174,560. The FAS actuary converted Mrs S' asset share into a notional annuity of £6,077.54 per annum, payable from the date of scheme windup (**DOSW**).
- As Mr S' pension had been miscalculated by the Trustee and was higher than the pension he was entitled to under the Scheme Rules, in practice, Mr S' pension would reduce once his FAS entitlement had been calculated (and Mr S would be treated as having received over payments over the period since DOSW).
- As Mr S has not established requirement (a), it is not necessary to consider whether requirements (b) and (c) are established. As such, Mr S has not established that the FAS is estopped from reducing his FAS payments.

20. The complaint was passed to me to consider. I agree with the Adjudicator's Opinion summarised above and I will therefore only respond to the key points made by Mr N for completeness.

## Ombudsman's decision

21. My jurisdiction is restricted to considering Mr S' appeal regarding the calculation of his FAS benefits.
22. The first payment Mr S received from the FAS was not a pension payment, it was a FAS payment as his pension payments ceased when the Scheme was wound up.
23. The Financial Assistance Scheme (Miscellaneous Amendments) Regulations 2010 (SI2010/1149) are an amendment of the FAS Regulations. Therefore, the FAS Regulations (as amended) are still the governing legislation of the FAS.
24. Mr S considers that the FAS failed to adhere to the promises made by the DWP, when it calculated his FAS payment to be less than the pension he was in receipt of, prior to the DOSW and that he should therefore be entitled to the higher amount. This is because he says he was advised by the DWP that as an existing pensioner, his pension would "be paid broadly in line with the pension scheme rules where the payment is higher than what would be paid under the FAS rules."
25. What the DWP informed Mr S was a correct statement of the way the FAS rules work. Had his pension been reduced correctly by the Trustee, to reflect his correct asset share, prior to the transfer of the Scheme to the FAS, Mr S would have been in receipt of his correct benefits. Had this been done, when the Scheme was transferred to the FAS, it would not have resulted in such a difference between the FAS annual payment he is entitled to and the pension he was receiving from the Scheme.
26. When the Scheme was transferred to FAS, FAS told Mr S that they could not calculate his FAS entitlement at that time. Therefore, it continued to pay him the higher, incorrect pension.
27. While I accept that Mr S would have expected his FAS payment to be more or less the same as the pension he was receiving from the Scheme, I find that Mr S did not rely on the quoted statement in paragraph 24 to make any life changing decisions, such as retiring early.
28. What Mr S was told in paragraph 24 cannot create an estoppel against or demonstrate any wrongdoing by the FAS. So, I can find no basis to hold that the FAS is estopped from paying the benefits to which Mr S is entitled under the Regulations. In relation to this appeal, I had to consider if Mr S' FAS payments were calculated in accordance with the FAS Regulations. I am satisfied that they were.
29. FAS is required to provide reasons which explain how Mr S' FAS payments have been calculated, with reference to the Regulations applied (and cite the Regulations which say they must). The reasons FAS provided in this case were not sufficient for Mr S to understand how his FAS payment had been calculated. However, I am satisfied that FAS has now provided full reasoning by reference to the Regulations and I find no error in the way they have been applied.

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30. Therefore, I do not uphold Mr S' appeal.

**Karen Johnston**

Deputy Pension Protection Fund Ombudsman  
7 August 2019