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Quote Ref: IFW/FBU commutation/T0860177

11 May 2010

Dear Mr Strachan

**FIREFIGHTERS' PENSION SCHEME (FPS): W MILNE AND OTHERS**  
**Your ref. 79609/1/PSTR**

We act for the Fire Brigades Union. Sean Starbuck has provided us with a copy of your letter dated 27 April and asked us to reply on the union's behalf.

**DCLG's submissions**

We have two responses to make:

- 1 Whatever role the DCLG *ought* to have, as a matter of its statutory remit in relation to the FPS, it did *in fact* take the role of an administrator when the commutation factors were reviewed.

Unless the Ombudsman conducts an investigation he will not be in a position to know whether the DCLG was an administrator. Declining jurisdiction on that basis assumes the very issue which will not be determined unless there is an investigation

- 2 The DCLG's role in relation to the FPS goes well beyond "doing administrative acts" as outlined by the Court of Appeal in *R (Britannic Asset Management) v Pensions Ombudsman* [2002] EWCA Civ 1405 (referred to below as "*Britannic*"). It was in fact "concerned with the administration of the scheme" in the events that lie at the heart of the current complaints.

We agree with DCLG that the High Court did not have the Ombudsman's jurisdiction in mind when analysing the role of the Home Office in relation to the Police Pension Scheme (*R (Police Federation of England and Wales) v Secretary of State for the Home Department*) [2009] EWHC 488 (Admin) (referred to below as "the *Police Federation case*"). The views expressed by Cox J in that case provide little or no assistance in

deciding whether the DCLG is an “administrator” for the purposes of establishing whether or not the Ombudsman has jurisdiction to investigate the present complaints.

### **The DCLG’s role in fact (if not in law)**

A considerable body of correspondence was placed before the Court in the *Police Federation* case. Sean Starbuck asked for a copy of the equivalent correspondence passing between the DCLG and GAD in the period leading up to the review of the commutation factors, by a letter dated 15 July 2008 (**page 1** of the attached bundle). The DCLG declined to provide copies of anything but a letter dated 23 December 2005 (**page 3**). It did provide a synopsis of its involvement in the review (**page 4**). The Secretary of State was asked the same questions in a Parliamentary Question (**page 4a**) but the answer given was uninformative.

The letter and synopsis reveal that:

- (i) “Discussions took place” in 2005 which resulted in the review;
- (ii) Those discussions led to the formal request for a review in December 2005;
- (iii) The DCLG declined to answer the question whether the initiative came from DCLG or GAD.

The formal request in the letter dated 23 December 2005 (**page 5**) indicates however that the initiative came from DCLG (see the penultimate paragraph). That was also the evidence placed before the Court in the *Police Federation* case (see paragraph 64), although the need for a review had already been identified by GAD (paragraph 61).

DCLG had a service level agreement with GAD (**page 7**). GAD is defined as the service provider, and DCLG as the client. It says GAD will provide services which are requested by DCLG. The schedule of fees on page 4 shows that the work contemplated by the agreement included a review of the commutation factors.

DCLG declined to provide a copy of GAD’s response to the letter dated 23 December 2005 but GAD did so following a formal Freedom of Information Act request (**page 19**).

The High Court, in the *Police Federation* case, outlined in detail the history of the reviews of the factors in the Police Pension Scheme. In earlier years, as the recitation of the facts in the *Police Federation* case shows, the reviews were conducted in parallel for the Police and Firefighters’ schemes. The Court found (paragraph 53) that in 1989 there was significant change in the nature of the relationship between GAD and the Home Office relating to the commissioning of work: the charging arrangements made meant that GAD could not undertake any work unless commissioned by the Home Office to do so. It appears that the same relationship was made between GAD and the DCLG, with the result that there could not be a review of the commutation factors unless the DCLG commissioned one.

The history as outlined in the judgement (paragraphs 61 et seq) shows that GAD was increasingly concerned that the factors were out of date and that the Home Office needed to commission GAD to revise them. GAD had recommended, when the 1998 tables were produced, that the factors for both schemes should be reviewed every three years (paragraph 58). It appears from the *Police*

*Federation* case that the reason why there was no review until the review at the heart of this complaint was that DCLG did not commission GAD to conduct one.

After the tables were produced in August 2006 there was a further lengthy debate regarding the date from which they should be effective. Because the *Police Federation* case concerned the Police Pension Scheme and the Home Office's role, the part played by the DCLG is not spelled out; but specific mention is made of a letter from the Secretary of State for Communities and Local Government (paragraph 88) that shows she was involved in the debate regarding the effective date of the new tables.

The DCLG's argument rests on the judge's conclusion in the *Police Federation* case that:

*It is therefore incorrect, in my view, to describe the Home Secretary as 'the administrator of the scheme', as Mr Humphrey does. There is no provision in either the 2007 Regulations or the Police Act which gives her such a role, and there is no single scheme identified anywhere in the legislation. There is a clear distinction, as it seems to me, between the power to make Regulations under the 1976 Act, after consultation with the Police Negotiating Board and the Treasury, and the operation of the Regulations themselves.*

[Paragraph 96]

The context of this conclusion is all-important. Mr Humphrey was a member of the GAD team responsible for the Police Pension Scheme. He said in his witness statement:

*The GAD does not operate independently of the Home Office, but acts as its actuarial adviser to carry out specific tasks when they are commissioned by the Home Office. This is the context for GAD's relationship with the Home Office and its role in preparing commutation tables for the PPS under Regulation B7(7) of the 1987 Regulations. The GAD's role in the practical implementation of new commutation factors to the PPS is mainly concerned with undertaking the necessary research into appropriate commutation factors, making recommendations as to those factors, and responding to specific actuarial questions posed by the Home Office. The Home Office is the administrator of the PPS not the GAD.*

[Paragraph 54]

What the Court said therefore was that the Home Secretary, as a matter of the construction of the legal framework of the Police Pension Scheme, did not have a role in administering the Scheme as Mr Humphrey said. The Court did not consider whether the Home Secretary did in fact act as an administrator (within the meaning of that term as used in defining the Ombudsman's jurisdiction). The Court said nothing on the question whether the Home Secretary did in fact act as an administrator in *any* sense.

The Court did look at the role of an administrator in *Britannic*. The Court also looked at the role of a "manager" in *Century Life v Pensions Ombudsman [1995] PLR 135*. What is clear from both cases is that the proper inquiry is to look at the role that the putative administrator (or manager) actually performed, and not the role that they should have performed, or were entitled as a matter

of law to perform in relation to the Scheme in question. In both cases there was a lengthy factual examination of the role that they actually played.

It would be an error of law to discount the possibility that the DCLG was not an administrator without investigating what role they actually performed. As the Court of Appeal said in *Britannic*:

*If all that the judge were saying, in that passage, is that the power to investigate a complaint under regulation 2(1) of the 1996 Regulations arises only where the complainant alleges that he has sustained injustice in consequence of maladministration in connection with an act or omission of an administrator of the scheme, no criticism could be made of his observations .... But, if the judge is to be understood as saying that it is irrelevant whether or not the insurance company is an administrator in the present case because the only act of maladministration alleged is that of the former trustees, then there would be force in the criticism made on behalf of the Pensions Ombudsman that the judge is assuming the very matter which (if the ombudsman has jurisdiction to investigate) will not be determined until there has been an investigation.*

[Paragraph 38]

In the same way, if the Ombudsman declined to investigate what the DCLG did in the present case, on the jurisdictional basis that it is not an administrator, he would be assuming the very issue that cannot be decided until there has been an investigation.

### **Doing an administrative act or concerned with the scheme's administration?**

DCLG refers in its letter to the distinction between doing an administrative act and being concerned with the administration of a scheme (page2-3). The point being made, as we understand it, is that the DCLG clearly has some role in relation to the FPS (by issuing guidance, consulting on proposed changes and drafting the legislation), but in the present context all that the DCLG could lawfully do was ensure that Fire and Rescue Authorities were properly informed when GAD produced new tables.

We do not dispute that this is all DCLG should have done; but what DCLG actually did went well beyond that. It commissioned the review (when it had no power to do so, and when GAD had already advised some seven years earlier that the reviews ought to be conducted every three years). Once the tables were produced, it delayed their implementation and debated the back-dated effective date with the Home Office and the Treasury.

We repeat the points made above regarding the relevant inquiry: it is what the person concerned actually did, not what the person concerned was lawfully permitted or obliged to do. Moreover, as the Court of Appeal said in *Britannic*, to refuse jurisdiction on the basis that DCLG is not an administrator is to pre-judge the very matter that ought to be investigated.

What DCLG actually did went well beyond the performance of an administrative act as described in *Britannic* and *Suffolk County Council v Wallis* [2004] EWHC 788 (Ch). In the former, all the *Britannic* companies were responsible for was the notional allocation or cancellation of units in the *Britannic* fund. As the Court said, that amounted to little more than acting as a deposit-holder.

In *Wallis* the medical practitioner did nothing more than provide expert evidence<sup>1</sup> which other parties then acted upon.

Here, the core of the complaints is that the DCLG took an actual part in the working of the legislative scheme of the FPS. The breach of law and/or maladministration alleged is that this interference was not legitimate. If the Ombudsman concluded that there was interference in breach of the legislation it follows that the DCLG was doing something more than performing an act of administration. But the real point is that until an investigation has been conducted there is no basis for a finding one way or the other: the issue would be pre-judged as a decision on jurisdiction and not the substance of the complaints.

### **Time limits**

I enclose a time-line which shows the steps that the Complainants and their union took to find out how the review was conducted that led to the back-dated publication of new factors, and to press DCLG to provide an answer to the grievances that were raised. Even now, the DCLG has not provided any detail of the discussions conducted that led to the formal request for a review in 2005, or the discussions that followed their production in 2006 and eventual publication in 2008. What detail there is has been supplied by the Home Office in the *Police Federation* case.

You have asked why the Complainants did not become aware of the fact that the factors were out of date before the publication of revised factors in 2008. What emerges from the *Police Federation* case is that:

- (i) The compilation of the factors is based upon GAD's assumptions about longevity and discount rates (paragraph 27). There is no basis upon which an ordinary firefighter could know what views GAD held on any assumption at any stage. Importantly, there is no process by which the members of the FPS have an opportunity to discuss the assumptions before they are used as there is in the Police Pension Scheme, where GAD's views are discussed before revised factors are determined (see paragraph 50 of the *Police Federation* judgment). If there was an initial discussion then the complainants' representatives would know if and when a review was contemplated. In practice the factors are simply handed down.

In a parallel context, the FBU asked for details of the assumptions that would be used when considering a revision of the FPS in 2004, and again when the formal valuation was conducted as at 31 March 2007, eventually published in October 2009. The union prevailed upon an MP to ask a Parliamentary Question in the context of the 2007 valuation (**page 25**) but that too was rebuffed.

- (ii) Until the *Police Federation* judgment was published, there was no way of knowing that GAD had recommended a review in 2001 (paragraph 58 of the judgment).

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<sup>1</sup> We suggest, in any event, the real basis of the decision made in that case (paragraph 16) was that there had been no thorough analysis of the roles of the medical practitioner and the County Council.

- (iii) Again, until the judgment was published, there was no way of knowing that GAD was becoming increasingly concerned that the Police Pension Scheme factors ought to be revised (paragraph 61). The complainants still do not know if GAD expressed similar concerns regarding the FPS factors because the correspondence has not been published.
- (iv) Is pre-supposes too much to expect a firefighter or their union would know that the factors used should be revised regularly or that, when they are reviewed that they ought to be changed. Indeed, the judgment shows (paragraph 56) that there was a review in 1994 that led to no change in the factors used.

You have also asked what steps the complainants took after the responses to the grievances were published in September 2009 and January/February 2010 when the complaints were presented to the Ombudsman.

- (i) The first point that I would make is that regulation 5(2) says that, in cases where the complainant could not reasonably have known that there had been an act or omission that could found a complaint, the three year time limit runs from the date of knowledge, not the date of the act or omission. If you accept that the complainants could not have known that there had been no revision until the new factors were published in May 2008 then the complaints are clearly in time.
- (ii) Secondly, DCLG are hardly in a position to complain that they have suffered any prejudice by the passage of time. Their reluctance to provide details of what they did at all relevant times and to deal with the grievances led to the asking of (unanswered) Parliamentary Questions, repeated chasing and eventually a complaint to the Fire Minister.
- (iii) Thirdly, the complainants have been aided and assisted by their union. The FBU has had to consider the position that it will adopt against the knowledge that the liabilities of the FPS were the subject of a formal valuation and that there was a commonly held perception that public sector schemes are too expensive. The union had to make an informed judgement, at the highest levels in the organisation, whether it was (i) justifiable as a matter of law and (ii) justifiable in view of the potential cost consequences to assist the complainants in proceeding further. Finally, as you will recognise, making arrangements for the complainants to present their complaints in a sensible and co-ordinated manner takes a lot of administration, the consequences of which, I would suggest, have been to the benefit of all the parties involved.

I hope that this letter is helpful; I apologise for its length. Needless to say if I can provide any further answers to your questions then please let me know.

Yours sincerely

IVAN WALKER