

DFRDB 29(b)

To Whom It May ConcernFACTUAL BRIEF ON THE ADMINISTRATION OF
THE DEFENCE FORCE RETIREMENT AND DEATH BENEFIT (DFRDB)
SPOUSES ENTITLEMENT BY THE DFRDB AUTHORITY

1. The purpose of this paper is to acquaint ex-service widows/widowers, in receipt of “DFRDB Retired Pay”, with information I received from the DFRDB Authority to a query as to my wife’s “Spouses Retired Pay” in the event of my death.

2. At this stage I cannot take the matter further with the Ombudsman, the Minister responsible, seek community support, go to the courts, etc until my wife qualifies for “DFRDB Spouses Retired Pay”. As I am not all that keen to see this happen for a few years yet I would be pleased to receive information from anybody currently in receipt of DFRDB Spouses pay who is prepared to take action to redress what I perceive to be a scandalous situation, plus a breach of contact, and trust, by the Government in respect to the ex-service community.

Background

3. In March 2009 as I wished to get my affairs in order, and was concerned to ensure that my wife was provided for in the event of my death, I wrote to ComSuper asking:

“If I pass away in 2009 what is:

- (a) the value of my wife’s annual DFRDB pay entitlement,
- (b) the quantum of my pre-commutation retired pay as at February 2009”.

4. I received a prompt reply from the DFRDB Authority, dated 18 March 2009, signed by   informed me that in the event of my death:

- my uncommuted retired pay entitlement was - \$1521.44 per fortnight, and
- my spouse’s benefit would be \$950.90 per fortnight.

5. However, I had calculated that the level of my uncommuted retired pay as at 1 January 2009 was \$1630.75 per fortnight not \$1521.44. As this was a significant discrepancy, which had a substantial effect on his wife’s long term retirement pay entitlement, on 4 May 2009 I wrote requested the DFRDB Authority to adjust their figures and asked the questions how, and in what way, my figures differed from the calculations made by the DFRDB staff?

6. The reason for the question related to the fact that I had established the un-commuted entitlement figure of \$1630.75 using the following authoritative documents current at the time I retired in December 1976. Accordingly, I could not understand how, or why, the DFRDB Authority had come up with different figure. The documents I used as my reference were:

DFRDB Authority Circular, 1973/7, dated August 1973, from the Secretary of the DFRDB Authority, R. L. Perriman to all Service Departments,

Section 39 of the DFRDB Act, and

DFRDB Authority Brochure “Widows Widowers and Children’s Benefits dated October 1973.

7. DFRDB Authority Circular, 1973/7 dated 2 August 1973. DFRDB Authority Circular, 1973/7 reads: inter alia....

“85. A widow or widower of a member who dies while in receipt of retirement or invalidity pay is entitled to a pension at a rate equal to five-eighths of the rate **at which retirement pay or invalidity pay was payable to the deceased member**. Where a recipient, member had commuted, benefit is payable to the widow or widower at a rate equal to five-eighths of **the rate at which retirement pay would have been payable if the member had not commuted.**

8. The wording of DFRDB Authority Circular, 1973/7 is quite clear - “the **rate at which retirement pay would have been payable if the member had not commuted**”. This can only be one figure, i.e. full retired entitlement in accordance with Section 23 of the DFRDB Act.

9. SECTION 39 of the DFRDB Act. SECTION 39 of the DFRDB Act reads:

SECT 39 - Spouse's pension on death of recipient member.

(1)

Where a member of the scheme who is a recipient member dies and is survived by a spouse, then, subject to sections 47 and 75, the spouse is entitled to a pension at a rate equal to five-eighths of the rate at which **retirement pay** or invalidity pay was payable to the deceased member or, if the member had commuted a portion of the member's retirement pay under section 24 or a portion of the member's invalidity pay under section 32A, at a rate equal to five-eighths of the rate at which retirement pay or invalidity pay, as the case may be, **would have been payable to the member immediately before the member's death if the member had not so commuted** a portion of the member's retirement pay or invalidity pay, as the case may be.

10. Again the wording is clear.....” **would have been payable to the member immediately before the member's death** if the member **had not so commuted** a portion”. Again this can only mean one figure full retired entitlement in accordance with Section 23 of the DFRDB Act.

11. DFRDB Authority Brochure “Widows Widowers and Children’s Benefits dated October 1973. DFRDB Authority Brochure “Widows Widowers and Children’s Benefits dated October 1973 reads, inter alia:

4. Commutation

If a retired member in receipt of retirement pay **had commuted** (i.e. received a lump sum pre-payment of a portion of future retirement pay) the pensions payable to eligible dependants are **not affected in any way**; pensions are assessed as if the retired member **had not commuted.** Future increases in these pensions that may occur are likewise not affected.

12. The wording of the brochure is clear..... **"If a retired member** in receipt of retirement pay **had commuted (i.e. received a lump sum pre-payment of a portion of future retirement pay)** the pensions payable to **eligible dependants are not affected in any way.**

13. Thus, in accordance with DFRDB Authority Circular 1973/7, Sect 39 of the DFRDB Act DFRDB Authority Brochure "Widows Widowers and Children's Benefits dated October 1973 the uncommuted figure on which a Spouse's entitlement is based should be the **full Section 23 Retired Pay entitlement** figure, adjusted year by year in accordance with the official movement of the CPI from the date retired pay became effective up until the date of the DFRDB Recipient's death regardless of whether a service man/women elected to commute or not.

DFRDB Letter dated 13 May 2009

14. The reply to my letter dated, 4 May 2009, to the DFRDB Authority (please see paragraph 5) is dated 13 May 2009 and signed by [REDACTED] (copy available on request). [REDACTED] indicated quote:

"We have noted your calculation, however, **full CPI does not apply** to your uncommuted **amount**, only the **notional amount or your current pension amount receives full CPI.** Then, this portion amount (or the CPI figure) is added to your uncommuted pension. The following example was given:

Notional or Current Pension	$\$1452.07 \times 2.7\% = \39.21	$\$1452.07 + 39.21 = \1491.28
Uncommuted Amount	$\$1482.23 + \39.21 (CPI figures)	$= \$1521.44$

In the event of your death, based on uncommuted amount, your spouse is entitled to \$950 per fortnight (5/8th of \$1521.44).

15. The information that **"full CPI does not apply** in respect to the calculation of **uncommuted amount**" is **CONTRARY** to information promulgated in DFRDB Authority Circular, 1973/7, and the wording of the DFRDB Act, when I became part of the DFRDB scheme on 30 September 1972.

16. This revelation prompted me to write to the Chairman of the DFRDB Authority (a copy of this letter, dated 15 October 2009, is available on request). After some five months the Authority replied to my letter – their letter of 23 March 2010 refers (copy available on request).

DFRDB Authority Letter dated 23 March 2010

17. The DFRDB Authority reply was signed by [REDACTED]. For reasons best known to herself [REDACTED] ignored the factual information I provided regarding DFRDB Circular 1973/7. Referring to Section 98B of the DFRDB Act she advised:

"Under section 98B **a CPI percentage increase is not applied to the full value of the uncommuted retirement pay.** Instead, the CPI increase is applied only to **"notional retirement pay"** - **this is a person's retirement pay had they elected to commute 4 times.** The resulting dollar amount is then **added to the uncommuted retirement pay** to finalize the CPI increase.

In your case the **"notional rate of retirement pay"** is the same as the actual pension you receive due to the fact **you commuted.**

18. In regard to [REDACTED] use of the term **notional rate of retired pay** she referred to Section 98B of the DFRDB Act. Section 98B of the DFRDB Act reads:

Sect 98B

(5)

For the purposes of subsection (4):

(a) a notional rate of retirement pay is applicable to a recipient member **if and only if** that member **has not elected** under section 24 to commute a portion of his retirement pay equal to or greater than 4 times the amount per annum of the retirement pay to which he was entitled upon his retirement, and the notional rate of retirement pay applicable to the member at a particular time **is the rate** at which retirement pay would have been payable to him at that time if **he had** immediately upon his retirement **commuted a portion** of his retirement pay equal to 4 times the amount per annum of the retirement pay to which he was entitled; and

Comment – there are two separate parts to this sentence:

First part - “a notional rate of retirement pay is applicable to a recipient member if and only if that member has **not** elected under section 24 to commute a portion of his retirement pay equal to or greater than 4 times the amount per annum of the retirement pay to which he was entitled upon his retirement,....”

To this can only mean the rate in accordance with Section 23 of the DFRDB Act at the time of retirement.

Second part – “and the notional rate of retirement pay applicable to the member at a particular time is the rate at which retirement pay would have been payable to him at that time if **he had immediately upon his retirement commuted a portion** of his retirement pay equal to 4 times the amount per annum of the retirement pay to which he was entitled; and

This means the **reduced actuarial based rate** if a person commuted equal to or greater than 4 times the amount per annum of the retirement pay to which he was entitled.

19. Thus, the way the Act is drafted, the term notional rate of pay can have two separate and different meanings. However, it seems that the DFRDB Authority has taken, and used, notional rate of pay to mean the **reduced actuarial based rate**.

NOTE: In this I have been informed by a DFRDB retiree that Section 98(5) (a) needs to be read in conjunction with Section 98 (4) (b) and that the DFRDB Authority is acting within the provisions of the Act. Although, I admit that, personally, I can make no sense out of Section 98 (4) (b). However, in order to present a full, and balanced, picture herewith is Section 98 (4) (b):

“(b) in relation to a pensioner who is a recipient member to whom retirement pay is payable—the rate at which retirement pay was payable to the pensioner immediately before the commencement of the relevant prescribed half-year or, if a notional rate of retirement pay is applicable to the pensioner in accordance with subsection (5) and the notional rate of retirement pay so applicable immediately before the commencement of that half-year is lower than the rate at which retirement pay was payable

to the pensioner immediately before the commencement of that half-year, the notional rate of retirement pay so applicable immediately before the commencement of that half-year;”

Conclusion

20. The drafting of Section 98 (B) of the DFRDB Act, **either by design to confuse** or through incompetence, is ambiguous in regard to the term notional rate of pay. Thus, it is difficult to accept that there is a solid basis, legal or otherwise, that cannot be challenged in regard to the method currently used by the DFRDB Authority to calculate **spouse’s pay** as set out in the DFRDB Authority letter to James Treadwell dated 13 May 2009.

21. In addition, the situation is even more uncertain when Section 39 and Section 3 (Interpretation) 3 of the DFRDB Act are considered because no mention is made of “Notional or Current Pension” in either Section.

22. However, DFRDB Authority Brochure “Widows Widowers and Children’s Benefits dated October 1973 (please see paragraph 11) makes it abundantly clear that commutation should have no effect on the pensions payable to eligible dependants.

J. A. Treadwell


5 April 2011