

Ombudsman's Determination

Applicant	Mr S
Scheme	BASF UK Group Pension Scheme (the Scheme)
Respondent	BASF PLC (BASF)

Outcome

1. Mr S' complaint is upheld and to put matters right BASF should make the discretionary decision afresh, without taking into account Mr S' pre-employment medical or the questionnaire, and pay Mr S £500 for the significant distress and inconvenience he has suffered.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr S' ill health retirement has been refused at his employer, BASF's, discretion, despite the Trustees agreeing that he meets the permanent incapacity criteria set out in the Scheme Rules. He has complained that BASF has not properly exercised its discretion, and that there was no clear process for appealing the decision not to award him ill health retirement.

Background information, including submissions from the parties

4. This matter has a long and complex background. Therefore, the history and issues involved in this matter have been summarised as concisely as possible.
5. On 30 July 2012, Mr S was employed by BASF as a shift manager and became a member of the Scheme. Mr S was required to have a pre-employment medical assessment (**the assessment**) with Occupational Health, which took place on 2 July 2012, where he completed a pre-employment medical questionnaire (**the questionnaire**) in which he confirmed in the section asking about muscular skeletal problems that he had previously had "Back pain in 2009".
6. In section C under additional information for completion by Occupational Health the nurse who conducted the pre-employment medical recorded 'back injury – moving and handling. S/B –osteopath. No further problems'. This is labelled as a cross reference to Mr S's declaration of his back pain in section B. At the foot of section C

of the form the nurse was invited to select whether the applicant requires/does not require any restrictions/adjustments as specified. She did not select either option. She did complete select two options below that. In response to 'medical examination completed and satisfactory' she circled 'yes'. In response to 'referred to Occupational Health Physician' she circled 'yes'. The form was then signed and dated.

7. Since January 2013, Mr S has been absent from work with a back condition. In February 2013, following an MRI scan, this was diagnosed as spinal stenosis. At the instigation of the BASF's HR department, Mr S applied for a Severe Incapacity Pension in September 2014, providing medical evidence and a personal statement to, Occupational Health Physician, Dr Robson. Dr Shackleton, another Occupational Health Physician, reviewed the medical evidence and Dr Robson's report and concluded that there was the possibility that Mr S might work again before his Normal Retirement Age (**NRA**) of 65, Mr S was aged 50 at the time. On 2 December 2014, the ill health committee declined Mr S' application on that basis. The ill health committee did not review other evidence provided. The decision was made based on the opinion of Occupational Health Physicians alone which is consistent with the Scheme Rules.
8. Mr S appealed this decision, and after initial uncertainty about whether an appeal was permitted, his appeal was accepted for consideration. BASF's Pension Manager reviewed the decision on behalf of BASF, and wrote to Mr S on 20 July 2015 notifying him that the original decision had been upheld. This letter informed Mr S that any further appeal would be considered by the Pensions Management Group (**PMG**).
9. Mr S subsequently raised an appeal with the PMG. The PMG upheld the original decision in its meeting of 28 October 2015, and notified Mr S on 9 November 2015. However, the PMG had decided that, as Mr S was still employed and had not returned to work, bearing in mind the age of the medical evidence they were now considering, new medical evidence should be sought to see if Mr S' condition had deteriorated to the extent that he then met the Severe Incapacity criteria.
10. BASF sought a new medical opinion and arranged for Dr Staines, an independent GP who had Occupational Health experience and had previously worked for BASF, to visit Mr S. Dr Staines stated that, in his opinion, Mr S was permanently incapacitated and met the criteria for Severe Incapacity retirement.
11. Mr S told Dr Staines that he had declared his back problem at the assessment, therefore BASF's Pension Manager requested Mr S' permission to obtain a copy of the questionnaire, a document that BASF would not usually see. Mr S consented and, once a copy was obtained, BASF questioned what they regarded as discrepancies between the information declared on the questionnaire, the medical information submitted to support his Severe Incapacity retirement application and the personal statement that BASF stated Mr S had supplied to this Office. It appears that BASF was not aware that Mr S had previously provided the same personal statement to Dr Robson.

12. Mr S confirmed to BASF that the personal statement was supplied to Dr Robson at the point of his initial application for incapacity retirement along with all the medical evidence. He also explained the pre-employment medical assessment form in the following terms. He said that he declared that he had experienced back problems since 1997 at the pre-employment medical assessment, however there was insufficient space to detail this on the questionnaire so the nurse told him to state the most recent episode. He also confirmed that his back issues were discussed in length with the nurse and says it is not his fault that she did not record this, possibly due to the lack of space on the questionnaire. Mr S also said that his spinal stenosis was only diagnosed in 2013 so he could not have declared it in 2012.
13. On 28 July 2016, the PMG held a meeting to discuss Dr Staines report. It was agreed by the Trustees that Mr S met the Severe Incapacity criteria. However, the PMG decided not to award a Severe Incapacity Pension on the basis that Mr S had not disclosed the severity of his medical conditions at his pre-employment medical and, if he had done so, it was likely he would not have been employed.
14. BASF's position is shown below:-
 - BASF says that proper consideration has been given to Mr S' Severe Incapacity application.
 - When his application was first considered the criteria was not met.
 - In 2016 the criteria was met but BASF used its discretion to decline the award of a Severe Incapacity Pension which it believes is a decision that any reasonable employer might arrive at.
 - BASF says that it is not suggesting that Mr S should have declared an undiagnosed condition but that, had he recorded the extent of his back pain on the questionnaire, and discussed it with the nurse, he would have been referred to the Occupational Health Physician for further examination.
 - BASF says that it is unlikely that anyone with back pain to Mr S' extent would have been employed in his role and that Occupational Health were aware that a further assessment was needed for someone with back pain applying for the role of shift manager.
 - The questionnaire is relevant to the exercise of discretion. There was a failure on Mr S' part to complete the questionnaire with the openness that BASF would expect. The questionnaire conflicts directly with his personal statement. The personal statement also refers to mobility issues but on the pre-employment assessment questionnaire Mr S ticked "No" to having, or ever having had, mobility problems.

15. Mr S' position is shown below:-

- BASF has used hindsight to refuse to grant a Severe Incapacity Pension. Mr S says he was not aware of his condition when he began employment with BASF so he could not declare it. He was not to know that the previous back issues he had experienced would deteriorate to the point that he was incapacitated.
- BASF appears to have overlooked numerous medical reports that confirm the reason for incapacity is spinal stenosis diagnosed in 2013, and instead decided that his incapacity related to the intermittent back problems experienced from 1997.
- BASF has changed the appeals process during the appeals process. There has been no clear framework followed and it has not worked to its own deadlines.
- BASF's Pensions Manager has been too involved with the whole process for her review to be impartial, the documents supplied by BASF suggest that she was on the ill health committee, therefore, how can she review her own decision. She was also involved in preparing information for the PMG meetings and was present at them.
- All of the evidence submitted in the final appeal, bar the medical evidence dated after the initial decision, was presented to Dr Robson for review at the time of the original application. However, BASF only reviewed this evidence at the review done in 2016, on receipt of Dr Staines report.

Adjudicator's Opinion

16. Mr S' complaint was considered by one of our Adjudicators who concluded that further action was required by BASF. The Adjudicator's findings are summarised briefly below:-

- When first considering Mr S' eligibility for a severe incapacity pension the ill health committee did not review all of the evidence available. In this particular case the Scheme Rules do not require that the decision maker reviews the evidence submitted, instead allowing for full reliance on the opinion of the medical advisor. The Adjudicator is of the view that this first decision was made in line with the relevant Rules.
- The Adjudicator is satisfied that the available medical evidence was considered by the PMG at the second stage of the appeals process, once an up-to-date medical report had been obtained. This led the Trustees to agree that Mr S met the Severe Incapacity criteria.

- It is up to the company to decide on an appropriate appeals process and who should be involved in it. While BASF could have been more transparent with the appeals process from the start, it is not required to have a different individual carry out the review at each stage of the appeal, however it may be prudent to do so.
- Mr S' severe incapacity pension was refused due to non-disclosure of the extent of his medical history at the pre-employment medical, and BASF's claim that if the full history of his back condition had been declared it is unlikely that Mr S would have been employed.
- The Adjudicator considered whether Mr S can be said to have declared his intermittent back condition. Mr S could be expected to complete the questionnaire to the best of his ability. He is not a medical professional, nor was he aware what BASF was looking for. It is clear from the questionnaire that Mr S has ticked yes to having back problems. Mr S has said that due to lack of space on the questionnaire he was advised by the nurse to put the latest occurrence, which was in 2009. This seemed like a reasonable possibility after examining the questionnaire; there was not space to write in any detail.
- Mr S also maintains that he did discuss the nature and history of his back pain with the nurse, and that he cannot be held liable for her not recording this conversation. There is also limited space on the questionnaire for the nurse to write her notes, which could reasonably explain why there were no other occurrences mentioned. The note relating to back issues is numbered and linked to a number by the section where Mr S declared the back pain experienced in 2009. It is reasonable that she only noted discussion on back pain in relation to the incident noted.
- BASF has told this office that it is satisfied that the nurse carried out her work diligently and that Occupational Health were aware that, for the role for which Mr S was applying, anyone with back problems could be unsuitable, and referral to the Occupational Health Physician should take place. It has not, however, been able to provide evidence of any specific instructions to the nurse and/or its Occupational Health advisers which would indicate that back problems were a 'red flag'. Had this been the case, it would be reasonable to expect the nurse would, or should, have probed Mr S for a history of back pain or other occurrences, regardless of whether Mr S had offered this information or not.
- Since making its decision, and contrary to what it originally believed to be the case, BASF has confirmed that Mr S was referred to the Physician, however it claims that this was not as a result of him declaring back pain. Dr Robson said "This would, I believe, have been a result of a routine referral for me to consider and sign off various test results; such as lung function, hearing, drug screening and a neurothesiometer reading." It does not appear that Dr Robson is confident as to the reason for referral. If back problems were to be flagged and referred to an Occupational Health Physician this should either have been made clear on the questionnaire, so that the applicant was fully aware, or the nurse should have

been required to flag anyone who has declared back problems to the Physician without exception.

- It follows that, if BASF is satisfied that the nurse was diligent, then her assessment of Mr S was completed satisfactorily and should be accepted. It is important to note that Mr S had not been diagnosed with a back condition at this time. Intermittent back pain does not always lead to more complicated issues and there is no medical evidence to suggest that it was expected to do so for Mr S. In any case there is no evidence to suggest that Mr S withheld any information. Therefore, the adjudicator concluded that, on the balance of probabilities, Mr S declared his back pain to the best of his ability and that no more could have been expected of him.
- If back pain was to be an issue for this role, such that it called into question the decision to employ an individual, it would have reasonably been a routine referral. The fact that it does not appear to have been treated as a reason for referral to the Physician calls into question the assertion that Mr S would not have been employed on the basis of his past experience of back pain.
- BASF has also raised concerns over Mr S' personal statement which was written in 2014 and submitted with his first Severe Incapacity application. BASF says that it conflicts with the information provided in the questionnaire, in that it is much more detailed and makes his back problems sound more severe than the information recorded in the questionnaire. Also the personal statement refers to him becoming immobilised and leg pain limiting his walking ability. Yet Mr S did not say in the questionnaire that he had any mobility problems.
- Again, there is no evidence to suggest that Mr S did not discuss the extent of his back pain with the nurse. Mr S wrote the personal statement with the benefit of hindsight. With regards to mobility problems it is clear from his personal statement that he is referring to becoming immobilised as a direct result of his back pain, and that his mobility issues cleared up when his back problems cleared up. He did not, at the time of completing the questionnaire, have any ongoing mobility problems. Therefore, this would not necessarily prompt someone to record this immobility as a separate mobility issue. In addition, the limited walking ability to which Mr S refers clearly began occurring in September 2012, after he had completed the questionnaire. Therefore, the differences between the two documents is not considered significant, and their differences should not be considered.
- At the time of completing the questionnaire, Mr S (in common with 80% of the UK population) had suffered occasional episodes of back pain which had cleared up. There was no medical evidence, at that time, to suggest there was anything more serious to come. He completed the questionnaire in this light. He wrote his personal statement, however, with the benefit of the later diagnosis, which caused him to view the earlier episodes in a different light.

- The perceived deficiencies in the pre-employment medical and the questionnaire are irrelevant due to the points explained above. In addition, regardless of whether Mr S did or did not disclose his intermittent back problems in the questionnaire, which the Adjudicator believes on the balance of probabilities he did, he was employed by BASF.
 - The Adjudicator found that irrelevant information has been taken into account and Mr S has suffered significant distress and inconvenience as a result of this. To put matters right the Adjudicator recommended that BASF should look at the matter afresh without taking into account Mr S' pre-employment medical or the questionnaire, also paying Mr S £500 as compensation for the significant distress and inconvenience that the matter has caused him.
17. BASF did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. BASF provided its further comments which are set out below. These do not cause me to conclude that there should be a different outcome. However, there are points where my reason for arriving at that outcome differs from that of the Adjudicator and I explain my reasons below.

Ombudsman's decision

18. BASF has said that it is more likely than not that Mr S failed to disclose the extent of his back and other medical problems in the questionnaire and assessment, and had Mr S disclosed the extent of his medical issues, it is unlikely that he would have been employed. Therefore, BASF maintains that its decision not to award the ill health pension was rational and unimpeachable. BASF has given a number of reasons for reaching this view.
19. BASF says that Mr S should have been aware of the importance of the questionnaire and what BASF were looking for due to the statements and declarations on the questionnaire itself. In a general sense I agree, the purpose of the form is evident. It says it is to 'assess suitability in your proposed role' which was in a chemical factory. Section B asks about a very wide range of physical functions and habits. There is one line for detail about every 'yes' answer. It covers previous hazardous substance exposure in some detail, but does not ask for a similar level of detail about manual handling. The declaration BASF has referred to is a standard one. There is not any indication from the form, or any evidence to suggest that the nurse informed him, that back issues were a particular cause for concern.
20. It is reasonable in my view that Mr S would have viewed the questionnaire as an assessment of his capacity to do the job he had applied for and given his answers in that context. He had done a number of similar roles and was aware of what the role would entail. There is no evidence to suggest that Mr S had any reason to suspect that any of his previous medical issues would affect his future ability to carry out his job.

21. I do not think it is reasonable to expect a lay person going through a list of three muscular skeletal problems to declare mobility problems separately from a back problem which had in the past caused a temporary mobility problem. The mobility problems that Mr S had experienced at the point of completing the questionnaire and assessment had all been as a direct result of back pain. I would not expect a lay person to note this as a separate issue. Mr S claims that the leg pain, which BASF refers to, began in 2011 and did not result in mobility problems. I have no reason to doubt this, as his personal statement references mobility issues in respect of the back pain but none in respect of the leg pain. Therefore, it was reasonable that Mr S did not tick mobility problems. The answers Mr S gave in the questionnaire should be viewed within the context of what he knew at the time. His evidence is that he had experienced back pain in the past but it had cleared up, he was not experiencing any back pain at that time, and he had no reason to expect more serious problems in the future. I have seen nothing to refute that evidence.
22. I agree with BASF's view that the content of the pre employment questionnaire is relevant to the exercise of discretion as is the personal statement. However, I do not consider that any reasonable decision maker could draw from a comparison of those documents the inference that Mr S withheld information from the company.
23. I do not agree with BASF's position that occupational health was unaware of the need to carry out a full assessment of physical fitness of the role of shift manager because of a want of disclosure by Mr S. He told the company he had a back issue. In my view it had a declaration sufficient to allow it to assess whether or not to conduct further enquiries and it chose not to. There is no question of doubting the nurse's professional competence. I am happy to accept that the nurse did what was required of her at the time and noted Mr S's history within the confines of the questionnaire. There is no indication that she considered the back issue was so significant she needed to complete a separate sheet of paper as BASF has said was customary.
24. In retrospect BASF may wish they had refused employment but it did not. The fact that it did not and the fact that the nurse's referral to occupational health produced no further focus on muscular skeletal issues in my view significantly undermines the retrospective assessment that back problems presented such a risk in his role that Mr S would probably not have been employed at all. There is simply no evidence to support that conclusion. There is also no evidence to support the inference that BASF have then drawn from it i.e. that Mr S withheld relevant detail to avoid BASF drawing that conclusion. That inference was at the heart of the reason for refusal and was in my view arbitrary and irrational.
25. Therefore, I uphold Mr S' complaint.

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Directions

26. Within 21 days of this determination, BASF should make the discretionary decision afresh.
27. Within 14 days of this determination, BASF should arrange to pay Mr S £500 as compensation for the significant distress and inconvenience that the matter has caused him.

Karen Johnston

Deputy Pensions Ombudsman
26 July 2017