

Ombudsman's Determination

Applicant	Ms S
Scheme	British Airways Pension Scheme (the Scheme)
Respondent	British Airways Health Services (BAHS)

Outcome

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

Complaint summary

3. Ms S' complaint is that she has been refused ill health early retirement (**IHER**).

Background information, including submissions from the parties

4. On 31 May 1999, Ms S commenced employment at British Airways Plc (**BA**), as a cabin crew member.
5. Under Rule 14 of the Scheme:
6. (a) If a member's employment with a Participating Employer is terminated before Normal Retirement Age by that Employer on the grounds of Medical Incapacity and the Principal Company so notifies the Management Trustees, the Member is entitled to an immediate yearly pension...'
7. (e) ... Medical Incapacity means incapacity -
 - (i) from which the individual is unlikely to recover for the foreseeable future;
 - (ii) which prevents the individual from carrying out his normal duties even after reasonable adjustment; and
 - (iii) which prevents the individual from carrying out appropriate alternative employment where this is offered...'
8. (c) If a Member's employment with a Participating Employer has ceased before Normal Retirement Age, the Member may within three months of the date of cessation of his employment, make an application to the Principal Company for an immediate yearly pension on the grounds of Medical Incapacity.'

PO-14075

9. On 18 October 2012, following an accident at work regarding a fumes event, Ms S was referred to BAHS.
10. On 15 July 2013, Ms S was referred to Professor Cullinan by a respiratory physician that she had been seeing privately to provide an opinion on whether she would be eligible for IHER.
11. In November 2014 RC [Richard Caddis], a BA employee, determined that she was unable to return to her contractual role in cabin crew and set her termination date for the end of March 2015. On 12 January 2015, Ms S was referred to Dr Popplestone for BAHS to provide an opinion on whether she would be eligible for IHER. Dr Popplestone said that in his opinion, Ms S “does not meet the New Airways Pension Scheme (**NAPS**) medical eligibility criteria for an ill health pension.” The doctor ticked the boxes “is unfit to return to work” and “no” for meets the criteria for an ill health pension.
12. On 11 February 2015, BAHS wrote to Professor Cullinan asking for details of Ms S’ consultation in July 2013.
13. On 3 March 2015, Professor Cullinan wrote to BAHS and confirmed that when he saw Ms S on 15 July 2013, it was recommended that Ms S would undergo direct challenge testing with one of her triggers and embark on a programme of re-training. Professor Cullinan said that Ms S’ condition has a reasonable degree of therapeutic success, but it would be dependent on the patient accepting the approach. Ms S was left with the option of either going under Professor Cullinan’s care or pursue her current therapeutic line. Ms S did not contact Professor Cullinan.
14. On 11 March 2015, Ms S’ employment contract was terminated on the grounds of long term sickness under the EG300, Absence Management Policy (section 4).
15. On 2 April 2015, Dr Popplestone for BAHS told Ms S that she had not met the IHER criteria.
16. On 3 July 2015, BAHS referred Ms S’ case to Duradiamond Healthcare. Dr Aitken, Consultant Occupational Physician for Duradiamond Healthcare completed a form to ‘Agree’ with the BAHS decision. Dr Aitken said that as Ms S has refused to take up the further tests which Professor Cullinan has recommended in his letter dated 3 March 2015, which could have a reasonable chance of therapeutic success, he does not believe that Ms S meets the criteria for IHER.
17. On 5 November 2015, Ms S appealed this decision. She enclosed reports from Dr Abou-Donia, Dr Mulder, Dr Botma and Dr Goodman, who said that in their opinion Ms S is not fit to work at all and there is no safe, proven treatment for her condition, which was ‘aerotoxic syndrome’.
18. On 20 January 2016, BAHS wrote to Professor Cullinan following his letter dated 3 March 2015 asking that he clarify what he meant by ‘possible ways forward’, and in particular whether he was considering further diagnostic test or therapeutic

procedures. BAHS asked Professor Cullinan if it was therapeutic procedures, could he confirm the likely chance of success to the extent that she would be able to return to flying.

19. On 23 February 2016, Professor Cullinan responded to Dr Popplestone at BAHS saying that he did not consider himself an expert on 'aerotoxic syndrome' although he was aware of the issue and has seen a number of patients with that label. He confirmed that a potential management plan has been discussed with Ms S which has around 80% chance of success based on use with a group of 50 patients but would depend on the patients' willingness to engage with the process. He explained that his department had been carrying out such or similar inhalation challenges for about 50 years, that 'in our hands the technique is very safe. I do not recognise any of the adverse responses claimed by your other correspondents.'
20. On 14 March 2016, Dr Popplewell for BAHS considered all the medical evidence provided by Ms S and that which had been obtained by BAHS, including the qualifications and registration status of the practitioners who had provided it. He considered the relevant rule and the guidelines which BAHS use to interpret the rule including that no 'recognised reasonable investigation, treatment or other intervention likely to lead to improvement should be planned or available'. He concluded that as there was reasonable investigation and treatment available for her condition (as outlined by Professor Cullinan), she did not meet the criteria for IHER. Dr Popplewell said 'whilst I can understand Ms S would be concerned about what Dr Mulder says, I am aware of no evidence to support his assertion'. BAHS included Professor Cullinan's letter of 23 February 2016, which confirmed that the treatment is safe.

Adjudicator's Opinion

21. Ms S' complaint was considered by one of our Adjudicators who concluded that no further action was required by BAHS. The Adjudicator's findings are summarised briefly below:-
 - The Ombudsman's role is not to decide whether Ms S is eligible for IHER; that is a matter for BAHS to decide after receiving the requisite medical advice.
 - The Ombudsman's role is to decide whether BAHS had abided by the Scheme rules, asked relevant questions, considered all relevant evidence and explained the reason(s) for its decision in a transparent way. The Ombudsman can request that BAHS look at Ms S' case again should he find flaws in the decision making process. The medical evidence is reviewed in order to determine whether it is appropriate and supports the decision made. However, it is up to BAHS to decide how much weight it attaches to any particular evidence. BAHS can prefer the advice of its own medical advisers unless there is a cogent reason why it should not.

- The Adjudicator was satisfied that Professor Cullinan had considered all the relevant medical evidence, so in adopting his reasoning there had been no error or omission of fact by BAHS. As such, BAHS was able to consider all the relevant facts and the Adjudicator found no reason to remit the matter back for further consideration.
 - Ms S says that BAHS has ignored Dr Goodman's opinion and Professor Abou-Donia's findings. However, it is for BAHS to attach weight (if any) to the relevant medical evidence. BAHS made its final decision based on Professor Cullinan's report, which made reference to all the available medical reports including those set out above and findings. As such, the Adjudicator was satisfied that BAHS had considered all the relevant information.
 - Ms S asserts that BAHS has only focused on her respiratory illness. The Adjudicator on reviewing all the evidence available to her, was of the opinion that looking at all the evidence provided the focus had been largely respiratory in nature and as such BAHS had clearly seen the relevant medical documents and reviewed them before issuing its decision.
 - Ms S disagreed with Dr Popplestone's and Professor Cullinan's assessment and reiterated that her medical reports support her application. However, the Adjudicator was of the view that this is not sufficient for the Ombudsman to say that BAHS' preference for Professor Cullinan's opinion was flawed.
22. Ms S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Ms S provided her 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 Ms S for completeness.

Ombudsman's decision

23. I find that Professor Cullinan's report was sufficient and provided BAHS with a comprehensive opinion in order for it to reach a decision. I have not seen any evidence to show that BAHS did not review any aspect of Ms S' concerns or condition. Professor Cullinan's opinion referred to further treatment which could significantly improve Ms S' condition, which she has refused to undertake. The question is whether it is reasonable to expect her to undertake it.
24. I appreciate that Ms S disagrees with the conclusions reached, and presented her counter arguments, but while I recognise that Ms S disagrees with Professor Cullinan's report, specifically with his opinion that the treatment which he is recommending is safe, I conclude that Dr Cullinan and in their turn BAHS reached a conclusion that it was reasonable to expect her to try the recommended treatment on the basis of a proper weighing of conflicting opinions. Ms S's disagreement with that conclusion is therefore not a sufficient reason for me to remit the matter back to BAHS for the application to be reconsidered.

PO-14075

25. Ms S questions how a decision can be made that she would be unfit to return to flying, unfit to return to normal duties and then unfit to work at all but is still not eligible for IHER. The reason for that was explained by Dr Popplewell and I am satisfied that his reasoning was consistent with the approach required by Rule 14. As explained by the Adjudicator in the Opinion my role is not to review the medical evidence and come to a decision of my own but to consider the decision making process. I find that, based on the evidence that has been presented to BAHS, it has considered the relevant factors in arriving at its decision not to grant Ms S IHER. There are no justifiable grounds for me to find that BAHS' decision was perverse or that the process it undertook in reaching its decision was flawed.
26. Therefore, I do not uphold Ms S' complaint.

Karen Johnston

Deputy Pensions Ombudsman
7 February 2018