

## Ombudsman's Determination

Applicant	Mr S
Scheme	BASF UK Group Pension Scheme ( <b>the Scheme</b> )
Respondent	BASF PLC ( <b>BASF</b> )

## Outcome

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

## Complaint summary

3. Mr S has complained that BASF has refused to grant him a Severe Incapacity pension.

## Background information, including submissions from the parties

4. The Deputy Ombudsman has previously issued a Determination on this matter. To avoid duplicating the background information, I will summarise this complaint from the previous Determination onwards.
5. On 26 July 2017, the Deputy Ombudsman issued a Determination regarding Mr S' claim for a Severe Incapacity pension. BASF was instructed to make, "...the discretionary decision afresh, without taking into account Mr S' pre-employment medical or the questionnaire."
6. On 7 August 2017, Simmons & Simmons LLP (**Simmons & Simmons**), who are BASF's solicitors, sent BASF a letter outlining some considerations for BASF to discuss. The letter confirmed that BASF has discretion over the awarding of a Severe Incapacity pension. The guidance also instructed BASF to ensure that the pre-placement medical questionnaire and the original dispute were not considered when making any decisions. Simmons & Simmons advised other relevant considerations included: -
  - (A) Dr Staines' medical report and the seriousness of Mr S' condition;
  - (B) Mr S' personal statement relating to health problems;

(C) His reasonable expectations;

(D) His employment history;

(E) That the incapacity pension was introduced after he had gone on long-term sick leave; and

(F) The cost of the benefit.

7. On 9 August 2017, BASF, acting through the Pension Management Group (**PMG**), met to consider Mr S' application for a Severe Incapacity Pension. The Minutes from the meeting show the PMG were instructed not to consider Mr S' pre-employment medical or questionnaire. The PMG confirmed it was satisfied that Mr S was under a Severe Incapacity. However, the PMG exercised its discretion in deciding not to award a Severe Incapacity pension. In notifying Mr S of the decision, BASF said that the PMG had carefully considered a number of factors, including: Mr S' employment history with BASF, the fact that the Severe Incapacity Pension was introduced after Mr S had gone on long term sick leave, the estimated cost of providing Mr S with a Severe Incapacity Pension and the Scheme's finding position. BASF confirmed this decision to Mr S on 22 August 2017.
8. On 11 September 2017, Mr S brought his complaint back to The Pensions Ombudsman.
9. Mr S' position is shown below: -
  - BASF has not provided any specific reasons why it has declined his application.
  - The reasons provided by BASF are based on manipulated information.
  - The new factors considered as relevant by BASF were available during the first application. Mr S believes they weren't seen as relevant then, so they should be viewed irrelevant now.
  - Because BASF has been instructed to ignore Mr S' pre-employment medical and questionnaire, BASF decided to treat all medical information as irrelevant.
  - Mr S feels that the criteria for being qualified as under Severe Incapacity is stringent. By qualifying as under Severe Incapacity, he had an expectation that he would be paid a Severe Incapacity pension.
10. BASF's position is shown below: -
  - BASF accept that Mr S is under a Severe Incapacity.
  - BASF did alter its discretionary decision criteria. However, the determinant factor in the original decision concerned the pre-employment medical, so it was inevitable that other factors would come to the forefront when BASF reconsidered the decision.

- BASF truly believes that its decision not to exercise its discretion in favour of Mr S and grant him a Severe Incapacity pension was one which it was entitled to make and one which any reasonable employer might have made in the circumstances.

## **Adjudicator's Opinion**

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

- There is no dispute as to whether Mr S is incapacitated; both parties agree that he is. It falls to BASF to decide whether to grant a Severe Incapacity Pension.
- The Scheme rules make it clear that the decision to grant a Severe Incapacity pension is at the discretion of BASF. Because BASF's power is discretionary, it is allowed to act in its own commercial best interests. The only requirement is that BASF must not make a perverse decision; that is to say, a decision which no reasonable decision maker, properly directing itself, could arrive at in these circumstances.
- Whilst the Adjudicator noted that BASF has not gone into detail about its decision regarding each factor considered, the Adjudicator believed that BASF has made it clear overall why it has reached the decision it has.
- The Adjudicator did not believe that BASF manipulated facts. Instead, he considered that BASF acted properly in considering all facts, including facts that weren't considered during the original application.
- The Scheme's funding deficit was correctly considered during the decision making process. The discretionary nature of Rule 8.1 means BASF are free to act in its own best interests so long as it doesn't come to a perverse decision. A reasonable decision maker would have considered the funding deficit when assessing Mr S' application for a Severe Incapacity Pension.
- The Adjudicator did not agree that BASF were, "changing tactics in order to reject the application". When the Deputy Ombudsman issued a Determination on the original complaint, she instructed BASF to take its discretionary decision afresh. The Adjudicator believed BASF reviewed the decision in line with the Deputy Ombudsman's instructions, and came to a reasonable decision.

12. Mr S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr S provided his further comments, saying that: -

- BASF has continually manipulated the facts of the case.

- BASF has changed its view on previously considered factors. It has made a decision to reject Mr S' application and it will continue to change the factors every time it is asked to revisit the decision.
  - The Adjudicator has not questioned why BASF was allowed to use cost as a factor, when it was BASF who set the payable level as 50% of pensionable salary.
  - BASF has used the deficit to decline the claim. BASF has said that it is taking steps to resolve the deficit so it cannot rely on this to decline the application.
13. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mr S for completeness.

### **Ombudsman's decision**

14. The Scheme rules make it clear that the decision to grant a Severe Incapacity pension is at the discretion of BASF. My role in this matter is not to decide whether Mr S should be awarded a Severe Incapacity pension – that is for BASF to decide.
15. My role is to consider whether the decision was made in a proper manner. When doing so, I have to consider whether BASF took into account all relevant considerations and disregarded all irrelevant ones, and whether they made a perverse decision; that is to say, a decision which no reasonable decision maker, properly directing itself, could arrive at in these circumstances.
16. If I am not satisfied that the decision has been taken properly I can ask the decision maker to look at the matter again. However, I will not usually replace the decision maker's decision with a decision of my own, nor will I tell them what their subsequent decision should be.
17. BASF made a fresh decision, following the previous Determination. Some of the factors that BASF has relied on were available to it at the time the original decision was made. Mr S believes that BASF cannot be allowed to consider previously available factors as new considerations. I do not agree; BASF was instructed to make its decision afresh, and was bound to consider all of the material relevant to the exercise of its discretion. It was previously directed not to consider Mr S' pre-employment medical or the pre-employment Questionnaire and it has not done so. I am satisfied that the material which it did consider was relevant.
18. Mr S has complained that BASF has a history of manipulating his circumstances. Mr S said that he told a doctor he was unable to drive due to his medical condition. He said that BASF added the words "at present" in an attempt to show that his condition was not permanent. BASF now accept that Mr S has a permanent incapacity, so whilst I can see that this provides context to the complaint I cannot uphold the complaint on this point.

19. Mr S has provided a more recent example from the facts presented at the meeting of 9 August 2017, where BASF amended the section 'last day at work' to 'last day actively at work'. I believe that Mr S' last day in active employment was a relevant consideration for the case, so I cannot instruct BASF to look at the application again without considering it. Whilst BASF did alter the heading of the section, it only served to provide them with more information to aid its decision making. I cannot hold that against BASF.
20. If awarded a Severe Incapacity pension, Mr S would be entitled to benefits equivalent to 50% of his pensionable pay. Mr S has argued that BASF should not be able to use cost as a factor in its decision making. He contends that BASF introduced the award of 50% of pensionable pay in 2014, so it should have known that this was going to be an expensive provision. I disagree. The Scheme rules afford BASF complete discretion as to whether it awards a Severe Incapacity pension. An employer with this power is entitled to take its own financial interests into consideration, so long as it properly considers exercise of the power in a particular case and does not fetter its discretion.
21. Mr S believes that, as BASF has already agreed to eliminate the deficit, it should not be allowed to cite the pension deficit as reason to decline his application. I do not agree. BASF may well be taking steps to tackle the deficit, but that is a call on its existing resources and does not detract from the point that the employer is entitled to take its own financial interests into consideration when reaching a decision of this kind.
22. I understand my Determination will be of disappointment to Mr S. I acknowledge that Mr S has said his incapacity is outside of his control. However, I believe BASF has considered all relevant factors and abided by the Scheme Rules. I do not find that its decision was perverse, so I have no reason to remit Mr S' case back to BASF for re-consideration.
23. Therefore, I do not uphold Mr S' complaint.

**Karen Johnston**

Deputy Pensions Ombudsman  
10 September 2018

## **Appendix**

### **Rule 8 – Severe Incapacity Pension**

#### **8.1 Grant of Severe Incapacity pension**

When a DC Member (other than a DB Active Member) is in Active Membership and is, in the opinion of the Trustees, suffering from a Severe Incapacity and retires from Service with the consent of the Principal Company before Normal Pension Age (or State Pension Age, if later) but on or after 1 April 2014, the Principal Company may (but is not bound to) direct the Trustees that this paragraph 8 shall apply to the Member provided that:

8.1.1 the Member consents to the payment of a pension under this paragraph 8; or

8.1.2 in the Trustees' opinion (a) the Members earning capacity is destroyed or seriously impaired by physical or mental infirmity and (b) this Member is incapable of deciding whether it is in his interest to give his consent.

**1.2 Facts regarding the application**

Employee Name	Gerard Rodgers
Date of Birth	15/10/1964
Date joined Company	30/07/2012
Date joined BPP DC Section	01/09/2012
Site	Bradford
Last day actively at work	28/01/2013
Date BASF sick pay was exhausted	13/02/2013
Employment Notice Period (final pension contributions were made)	01/07/2016 to 30/09/2016
Date dismissed from BASF employment	30/09/2016
Pensionable Salary (at date last actively at work)	Basic salary £33,000 plus £15,180 shift allowance = £48,180 p.a
Full Severe Incapacity pension	£24,000 p.a
Member's Fund Value	£6,505 at 31/07/2017
Member's total contributions paid to the Scheme	£1,900.86
Estimated cost to provide the Full Severe Incapacity Pension from the BPP DB Section	Approximately £900,000