An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

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| **Decision Ref:** | 2018-0006 |
| **Sector:** | Insurance |
| **Product / Service:** | Income Protection and Permanent Health |
| **Conduct(s) complained of:** | Rejection of claim - did not meet policy definition of disability<br>Complaint handling (Consumer Protection Code)<br>Dissatisfaction with customer service |
| **Outcome:** | Partially upheld |

## LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

### Background

This complaint concerns a group Income Protection Scheme policy held with the Provider, of which the Complainant is a member. The Complainant's employer is the policyholder.

The first complaint is that the Provider unreasonably refused to admit the Complainant's claim under the policy. The second complaint is that the Provider dealt with the Complainant's complaint in an unacceptable manner.

### The Complainant's Case

The Complainant's representative submits that the Complainant initially went sick from her job with her employer in November 2015. The Complainant's representative submits that the Complainant's employer has an insurance policy with the Provider for long term sickness for wage protection as the Complainant's employer only covers one year's salary. The Complainant's representative submits that from the Complainant's consultations with her General Practitioner she knew that she would not be returning to work for some time so the Complainant approached the Provider in May 2016 to get the processes started to ensure that there was no delay.

The Complainant's representative submits that the Provider unreasonably declined the Complainant's claim. The Complainant's representative submits that up to this point the Complainant's General Practitioner, her counsellor and her employer's Occupational Health

Doctor found her unfit for work. The Complainant's representative submits that the Complainant appealed the Provider's decision. This appeal was also declined.

The Complainant's representative states that "*[The Complainant] is suffering from depression and this whole process with [the Provider] has massively added unnecessary stress and strain on an already very fragile person. It has set back her recovery and caused untold amount of tears and mental break downs, let alone the financial pressure*". The Complainant's representative submits that the Complainant is still on sick leave and has not received any wages since November 2016 despite her doctor, counsellor, employer's Occupational Health Doctor and Consultant Psychiatrist still finding her unfit for work.

The Complainant's representative submits that the Complainant left her employment in mid March 2017 based on medical advice. The Complainant's representative submits that the Complainant's cognitive behavioural therapist recommended that because of her situation, leaving her employment could assist in her recovery process. The Complainant's representative states that "*Personally I feel [the Provider is] partially responsible for [the Complainant] leaving... If [the Provider had] covered [the Complainant's] claim from the outset, and not put her through all the added mental torture, I think she may have been back to work by now*".

**The Provider's Case**

The Provider submits that the Complainant is a member of the Income Protection Policy, which is insured with it. The Provider submits that in order for an Income Protection claim to be payable, a claimant must satisfy the definition of disablement. The Provider submits that the purpose of the Income Protection policy is to support employees who demonstrate work disability supported by objective medical evidence. The Provider states that "*It is generally accepted that, a disabling psychiatric complaint not just impedes an individual from working but also adversely impacts an individual's ability to perform normal every-day tasks and activities. Clearly, this is not the case with [the Complainant] and the level of activity she has demonstrated over a long period is not commensurate with a disabling psychiatric illness that would prevent her from working*".

The Provider states that it "*must be guided by the weight of objective medical evidence and both Consultant Psychiatrists… indicated you were fit for work. We acknowledge that you may have some ongoing residual symptoms, however any residual symptoms are not disabling in nature*". The Provider submits that the additional objective evidence gathered from Desktop Research corroborates the independent examiners opinion that the Complainant is not medically disabled from working as it shows her to be very active.

The Provider submits that it is aware of the Complainant's concerns in relation to delays that she feels she experienced during the appeal process. The Provider states that "*It was not our intention to cause any distress and we sincerely apologise if we have done so. However, the appeal process can take a number of months to reach conclusion*".

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**Decision**

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on 10 January 2018, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

Following the consideration of additional submissions from the parties, the final determination of this office is set out below.

Before turning to the issue at hand, I must point out the following:

The Complainant's representative, in a submission dated 14 July 2017, states:

> *"… I would like to point out [the Provider has] made an unbelievably massive and severe Data Protection breach by sending all of [the Complainant's] medical information and history to [another address]…*
>
> *[The Complainant] is now physically sickened to her stomach that some unknown person has all of this extremely sensitive and personal information. This is incredible."*

Any complaint regarding breaches of Data Protection legislation is a matter for the Data Protection Commissioner.

**(1) The first issue to be determined is whether the Provider unreasonably refused to admit the Complainant's claim under the policy.**

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The Complainant's representative submits that the Complainant approached the Provider in May 2016. The Complainant's representative submits that the Provider sent the Complainant for an independent assessment with a Psychiatrist on 8 June 2016 which lasted 40 minutes. The Complainant's representative submits that from this appointment the Consultant Psychiatrist advised the Provider that he found from his 40 minute assessment of the Complainant that there was nothing wrong with her and that she was fit for work. The Complainant's representative submits that up to this point the Complainant's General Practitioner, counsellor and employer's Occupational Health Doctor found the Complainant unfit for work.

The Complainant's representative submits that the Complainant appealed the Provider's decision to decline the claim on 4 August 2016. The Complainant's representative submits that, as per the Provider's appeals process, the Complainant arranged her own independent opinion and scheduled an appointment with a Psychiatrist on 24 August 2016. The Complainant's representative submits that in this initial consultation, which lasted 90 minutes, the Consultant Psychiatrist completely disagreed with the decision of the Consultant Psychiatrist arranged by the Provider, and found the Complainant to be clinically depressed and in no shape or form fit for work.

The Complainant's representative submits that on 22 September 2016, on behalf of the Complainant, he submitted the Consultant Psychiatrist's and the Complainant's General Practitioner's reports to the Provider for review. The Complainant's representative submits that on 13 October 2016 he received an email from the Provider sending the Complainant for another independent review on 19 October 2016. The Complainant's representative states that "*Due to the mental trauma [of the first appointment] I reluctantly took [the Complainant] to this appointment*". The Complainant's representative submits that this Consultant Psychiatrist, in his report furnished to the Provider on 15 November 2015, found in favour of the Provider and set out that he was of the view that going back to work would assist the Complainant in her healing process and the claim was yet again declined.

The Provider submits that the Complainant completed an Income Protection claim form on 27 April 2016 detailing her illness as "*diagnosed with mild form of depression and anxiety*". The Provider submits that it also received a General Practitioner's report dated 26 January 2016 from the Complainant's GP on 9 February 2016, who advised the nature and cause of disability was "*severe depression*".

The Provider has submitted a copy of the Complainant's claim form. I note that this states, among other things, the following:-

*"Outline your Medical Condition and Absence(s):*

*First date of absence 01 12 15*

/Cont'd…

| | |
|---|---|
| *Describe in detail your Illness/condition* | *Diagnosed with mild form depression and anxiety. Following initial assessment with psychotherapist, it was determined that my levels of stress, anxiety & depression were extremely high for a person of my age* |

…

| | |
|---|---|
| *How does your condition Prevent you from working* | *Due to the condition, there are times when I find it extremely difficult to leave the house & when I do, I sometimes endure anxiety & panic attacks.* |

…

| | |
|---|---|
| *Please provide details* | *As my medication can take some time to work, it is now at a point where I feel to be on a more even keel. While I am not deteriorating, it may be a little while longer before there is any vast improvement.* |

*Are your symptoms* ☐ *Constant* ☑ *Intermittent*

| | |
|---|---|
| *Please provide details* | *Each day is different and while there may be times where there is a slight improvement, the following 2/3/4 days could be the complete opposite & I feel bad again. Given the illness, it is near impossible to predict how each day will be.* |

…

| | |
|---|---|
| *Additional Information Please provide any additional information that you feel would help us assess this claim* | *Due to the nature of the illness and the unpredictability/uncertainty of it, it feels as though life is somewhat on hold & find it difficult to plan anything such as social life and/or return to work. Also find it difficult to complete some tasks, such as completing this form – it has taken me over a week to so.*<br><br>*To date, we have spent approx. €1K on medical expenses… which is not fully covered by our medical insurance.* |

The Provider has also submitted a copy of the "*Practitioner Report*" completed by the Complainant's General Practitioner on 26 January 2016. I note that this states, among other things, the following:

/Cont'd…

**Information on Disability**

First date of absence 20 12 1 2 1 5

What is the exact nature and cause of disability?

depression - severe

Describe the symptoms which prevent the claimant from working.

low mood
↓ motivation
↓ concentration
insomnia.

/Cont'd…

Does the claimant's mental impairments ever cause intermittent symptoms or exacerbations severe enough that they would cause him/her to need to take unscheduled work breaks during a day if he/she was undertaking a full-time job?

(Yes) No

If your answer is Yes, then please state on average how often such breaks would be needed.

[ ] times every [ ] minutes or [ ] hours unsure - ↓ concentration.

and please state how long each such break would typically be

[ ] hours [ ] minutes

Does the claimant's mental impairments ever cause intermittent symptoms or exacerbations severe enough that they would cause him or her to take unscheduled days off work if they were undertaking a full-time job?

(Yes) (No)

If Yes, then how many days per month would the patient be absent from work on average?

less than 1 day | 1 day | 2 days | 3 days | More than 3 days

**Treatment**

Please provide details of current treatment plan including name and dosage for any medication.

Sertraline SSRI 150g.
- lit. O
- C.B.T.

Please provide details of types and effect of previous treatment plans

Improving slowly ↑ SSRI and C.B.T.
SSRI increased recently to 150g.

/Cont'd…

Are there any side effects as a result of the medication that may interfere with the claimant's ability to work?

No.

Is the claimant's condition:

| | Yes | No |
|---|---|---|
| 1. Improving | ✓ | |
| 2. Deteriorating | | |
| 3. Static | | |

If the condition is not improving, please confirm why this is.

What is your prognosis for the claimant?

patient should improve over next few weeks / months.

## Extent of Disability

Is the claimant in your opinion currently able to carry out **all of** the duties of their normal occupation?

Yes (No)

If Yes confirm the date the claimant was fit to do so

If No, how long is the expected duration of absence as a result of this disability?

0-3 months | 3-6 months | 6-12 months | 1-3 years | 3+ years

If No, please confirm the normal duties of the claimant's occupation that they are currently **unable** to perform.

patients concentration / motivation affected & difficulty working.

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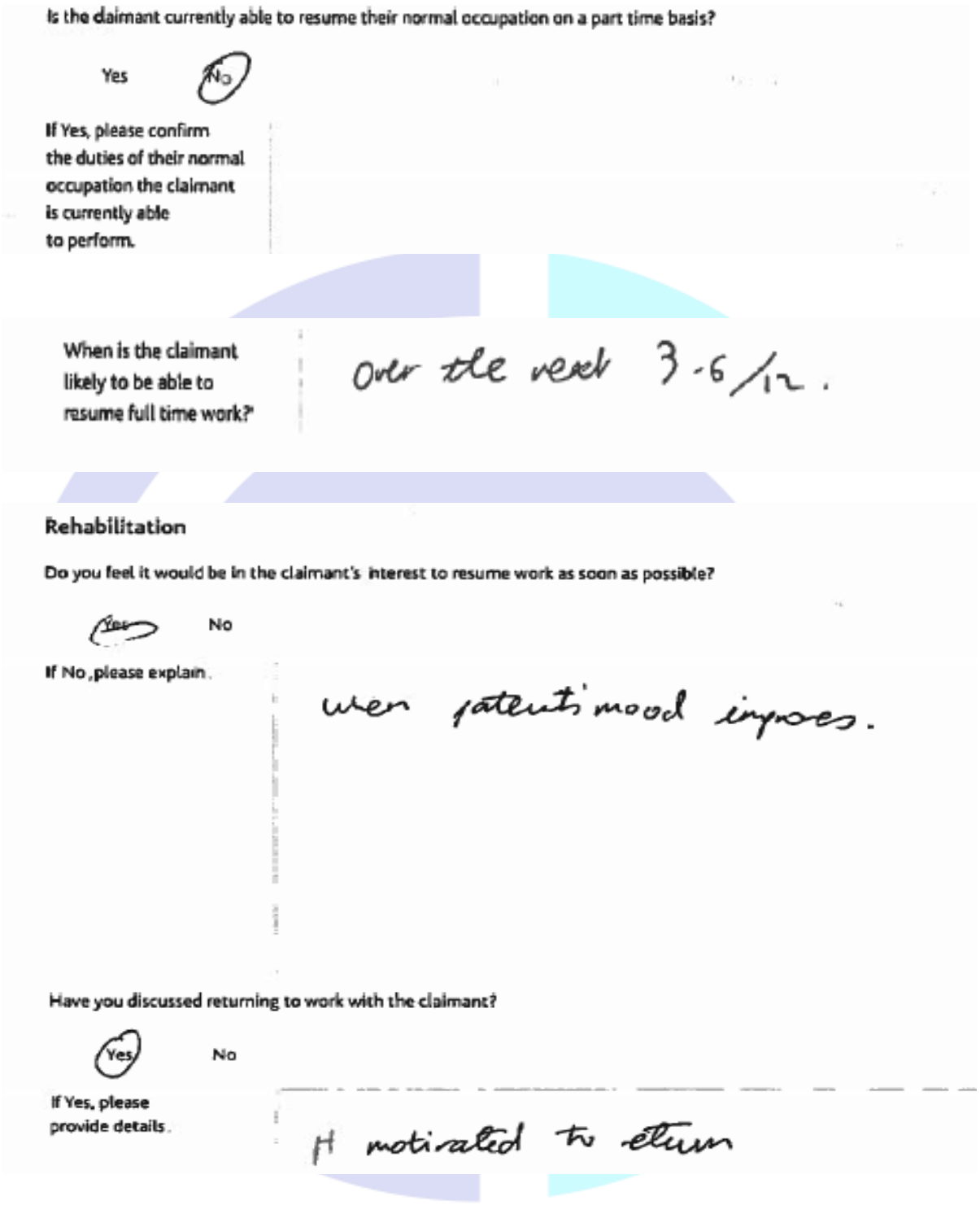

Is the claimant currently able to resume their normal occupation on a part time basis?

Yes (No)

If Yes, please confirm the duties of their normal occupation the claimant is currently able to perform.

When is the claimant likely to be able to resume full time work?

over the next 3-6/12.

**Rehabilitation**

Do you feel it would be in the claimant's interest to resume work as soon as possible?

(Yes) No

If No, please explain.

when patient's mood improves.

Have you discussed returning to work with the claimant?

(Yes) No

If Yes, please provide details.

H motivated to return

The Provider has also submitted a copy of the Complainant's "*Occupational Health Assessment*" dated 16 August 2016, which states the following:

> *"Unfortunately [the Complainant's] condition has deteriorated since her last assessment. Her symptoms have become more severe. She has continued to receive appropriate treatment. Her treating Doctor altered her treatment in July and she continues to engage with all recommendations. She has been referred for specialist assessment in light of the severity of her symptoms. She is unfit for work at present.*

/Cont'd…

*Given the duration of her absence and the limited improvement in her symptoms it is difficult for me to predict a return to work date at present. I suggest a further review in 3 months…"*

The Provider submits that in order to assess the Complainant's claim it arranged for an independent medical examination (IME) with a Consultant Psychiatrist on 8 June 2016. The Provider submits that it received the Consultant Psychiatrist's report on 13 June 2016, and during the course of the report, it states:

*"[The Complainant] did not appear depressed, but did appear mildly anxious, more so at first.*
*…*
*[The Complainant] was well oriented. Her concentration and memory appeared normal and she was judged to be of average intelligence.*
*…*
*7. [The Complainant's] symptoms do not disable her from carrying out satisfactorily a wide range of day-to-day functioning. She is able to shop, drive, use the internet, socialise with friends and look after her household.*

*8. [The Complainant] is not unable to perform the material and substantial duties of her normal insured occupation as a result of psychiatric illness or injury.*

*9. Return to work would be positively beneficial for [the Complainant] in terms of giving her the satisfaction of overcoming her anxiety and improving her confidence and sense of purpose".*

The Provider submits that it was of the opinion that the Complainant was fit to return to her normal occupation as she did not satisfy the definition of disablement and it was, therefore, unable to accept the claim. The Provider submits that it communicated its decision to the Complainant's employer on 1 July 2016 and outlined the appeals process.

The Complainant's representative submits that the appointment with the Consultant Psychiatrist on 8 June 2016 only lasted 40 minutes. The Complainant's representative states that "*After this appointment, [the Complainant] was very confused as [the Consultant Psychiatrist] was only interest in knowing if she had a bad childhood or was abused as a child and never queried her symptoms at the time. She was also a little taken aback that, despite expressing some suicidal thoughts, he dismissed them and only appeared interested in whether or not she had actually attempted to carry out any of these thoughts. For a supposed mental health 'expert', this is completely unacceptable*".

The Provider states that "*We acknowledge you had issues with [the Consultant Psychiatrist's] report which you outlined in your email of the 4 August 2016*". The Provider submits that the Consultant Psychiatrist is tasked specifically to conduct a medical assessment and provide an opinion on fitness for work or otherwise. The Provider submits that the Consultant Psychiatrist is a very experienced mental health professional and we have no concerns in relation to his ability to form an opinion on the Complainants fitness for work.

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The Provider submits that the Consultant Psychiatrist the Complainant met with on 8 June 2016 responded in relation to the Complainant's representatives concerns and a response was issued to him on 18 November 2016 as part of the appeal decline letter. The Provider submits that during the course of this report, he stated:

> *"I analysed all the data and arrived at the conclusion that her symptoms were all the while mild in nature, she had received satisfactory treatment and had achieved improvement.*
> *…*
> *Her day-to-day activities were satisfactory.*
> *…*
> *I commented that the best method of dealing with anticipatory X is to confront the fear.*
> *…*
> *It was my opinion following a detailed analysis of all of the information that [the Complainant] was not unable to perform the material and substantial duties of her normal insured occupation as a result of X illness or injury."*

The Provider submits that, as part of the Complainant's appeal which it received on 4 August 2016, it was outlined by the Complainant's representative that he would forward an additional medical report after the Complainant's attendance at an appointment with a Consultant Psychiatrist. The Provider submits that the letter submitted from the Consultant Psychiatrist on 22 September 2016 makes reference to a referral on the 24 August 2016 which appears to be the Complainant's first attendance at this clinic.

I note that the Consultant Psychiatrist that the Complainant attended on 24 August 2016 states, among other things, the following:

> *"**Mental State Examination***
>
> *[The Complainant] presented as a pleasant young adult female. She was obviously anxious and initially ill at ease. She appeared to settle as the interview progressed…. She was for the most part composed during the interview. At times she became quite tearful. She was however able to recompose herself and continue with the interview. I noted she also had a habit of apparently unconsciously running and digging her fingers into her forearms with obvious impact on her forearms. Her speech was coherent and rational with a normal rate and normal volume. Her mood state at this interview was subjectively low, dysphoric and anxious. She did not describe any current suicidal ideation. She did not endorse a passive death wish. She described a degree of rumination on her symptom profile and its reality. She did not describe any obsessional ideas. She described some compulsive behaviours. She described feelings of derealisation in that while she thought she was the same as normal that her surroundings were not. She did not describe any feelings of depersonalisation. She was not overtly psychotic. She did describe ideas of reference. She did not describe any delusions. She did not describe any hallucinations. She was alert. She was orientated. She was grossly cognitively intact. In terms of her self appraisal she was agreeable to the referral to*

/Cont'd…

*Psychological Medicine and agreeable to ongoing professional review and further medication assisted interventions.*

***Overall Impression***

*[The Complainant] therefore presents as a 34 year old apparently previously well functioning and socially integrated adult female whose mental state had gradually deteriorated to the extent that she went off work in November 2015.*
*She has engaged with both pharmacotherapy and CBT to date with some improvement in her symptom profile but without return to her previous level of functioning.*
*…*
*She reports a positive family history of mood disorder. She does not report any positive family history of completed suicide.*

*She does not report any current or historic difficulties with alcohol or other substances.*

***Recommendations for Further Management***

1. *I have attempted some brief psychoeducation and explained that most mood and anxiety disorders are treatable in either primary or secondary care with a combination of behavioural, psychological and medication interventions.*

2. *I have indicated it sensible as always to document that the standard baseline investigations are reported within normal limits and I have given her a lab form for these…*

3. *As a [Complainant's age] previously well adult female whose mental state has significantly deteriorated and who reports only a partial response to optimised antidepressant therapy I think an MRI Brain would be sensible at this point.*

4. *I have reinforced the value of the standard behavioural interventions.*

5. *I have reinforced the value of her continuing with CBT.*

6. *In respect of her pharmacotherapy she has a preference to continue with the Sertraline 200mg daily.*

7. *I think augmentation of the Sertraline is appropriate at this time and have suggested to her that if there is no improvement in her symptom profile within 7 days of our review that we should augment with Olanzapine initially 2.5mg nocte.*

8. *We have agreed early review on 14/09/2016…"*

/Cont'd…

I note that the Complainant's General Practitioner's letter to the Provider dated 20 September 2016 states:

> *"This is to confirm that [the Complainant] attended [the Consultant Psychiatrist] on the 24th August 2016 in [named location].*
>
> *Based on a thorough history and assessment his assessment was of moderate to severe depression.*
>
> *He has increased her Sertraline to 200mg and suggested Olanzapine 2.5mg if this is not working. He is going to see her back for review in a few weeks.*
>
> *[The Complainant] therefore remains medically unfit for work."*

The Provider submits that it forwarded a copy of this report to the Consultant Psychiatrist the Complainant attended on 8 June 2016 for further consideration, however he did not change his opinion or feel that the Complainant was disabled from working. The Provider states that he stated the following:

> *"1. [The Complainant's Consultant Psychiatrist's] account of the history and background is largely similar to the findings in my report.*
>
> *2. Overall, [The Complainant's Consultant Psychiatrist's] report did not describe an individual with a disabling psychiatric illness.*
>
> *3. Of note, [The Complainant's Consultant Psychiatrist's] did not go into great detail of [the Complainant's] activities of daily living or daily routine.*
>
> *4. Neither did he address the specific issue of her ability to work.*
>
> *5. Neither did he conduct any tests assessing the credibility of her symptom reports."*

The Provider submits that, to further consider the matter, it arranged an independent medical examination with another Consultant Psychiatrist on 19 October 2016, and it received his report on 15 November 2016. The Provider submits that during the course of this report the Consultant Psychiatrist stated:

> *"16.1 [The Complainant] was appropriately dressed and there was no evidence of self-neglect. She was well groomed.*
> *16.2 She engaged well in the interview and good rapport was established. Her behaviour was within normal parameters during the assessment.*
> *16.3 Mood was subjectively depressed. Objectively there was mild depression. Affective was reactive.*
> *16.4 There was no abnormality of the form or stream of thoughts. There was no evidence of psychosis.*

/Cont'd…

*16.5 There was no evidence of memory or concentration difficulties in the assessment.*

*…*

*17.9 Degree of disability/fitness for work:*

*In my opinion [The Complainant] is currently fit to carry out her normal occupation. There is no objective evidence of disabling psychiatric illness that is preventing her from performing the material and substantial duties of her normal occupation. Any current symptoms are not disabling in nature.*

*It is reasonable to return to work when there are residual symptoms of psychiatric illness because work and achievement of occupational functioning have therapeutic benefits. Occupational functioning is recognised to be an integral and essential part of recovery from psychiatric illness."*

The Provider submits that it noted from the report that the Complainant indicated that she used to have a wide range of hobbies and activities, however, it noted from her account provided to the Consultant Psychiatrists that she exercises regularly, attends the gym, meets friends, socialises and uses social media. The Provider submits that the Complainant's illness does not therefore seem to have any significant impact on her ability to carry out non-work activities. The Provider states that "*Furthermore, we note that on both SIMS questionnaires administered by [both Consultant Psychiatrists], the results were significantly elevated. The results indicate a high frequency of symptoms that are highly uncommon in patients with genuine psychiatric or cognitive disorders*". The Provider submits that further tests of cognitive or executive functioning did not show any abnormality.

The Provider submits that it carried out a thorough review of the claim but it remained its opinion that the Complainant did not satisfy the definition of disability. The Provider submits that it wrote to the Complainant's employer on 18 November 2016 to advise that it was standing over its decision on the Complainant's claim.

The Complainant's representative submits that on 19 November 2016 he found out that the report from the Consultant Psychiatrists the Complainant attended on 8 June 2016 and 24 August 2016 were sent to the Consultant Psychiatrist the Complainant attended on 19 October 2016 prior to the meeting. The Complainant's representative states that "*This outraged me. How can [the Consultant Psychiatrist] in the words of [the Provider] be an "Independent" examiner? Surely, he has already been influenced by reading about a patient before meeting them*".

The Provider submits that in relation to the point raised around submission of the medical reports to the Consultant Psychiatrist the Complainant met with on 19 October 2016 consent is sought from the Employee at the outset of the claims process. The Provider submits that this consent allows it access and sharing of medical evidence required to assess the claim. The Provider submits that it does not accept the Complainant's representative's assertion that the assessment was not independent. The Provider states that "*As the Insurer of the policy, we are entitled to form our own opinion on fitness or otherwise for work. We take all opinions into account and it is appropriate for an examiner to have access to all*

/Cont'd…

*relevant medical records*". The Provider goes on to state that "*We encourage the doctors concerned to be totally objective and ask them to form their own opinions based on the actual examination and the medical evidence provided*".

I note that the claim form completed by the Complainant provides as follows:

> *"Access to Medical Records*
>
> *We ask your permission to allow us to approach any doctor for medical information about anything which affects your physical or mental health.*
>
> *If you decide not to allow us to contact your doctor, it may mean we are unable to proceed with this claim application.*
>
> *I expressly consent to [the Provider] contacting my doctor and any associated consultants in relation to my claim and to the collection, use and disclosure of my personal data including medical and health information for the purposes and as described above."*

I note that the Provider submits that its claim appeal process is:

- *"In the event of an appeal the claim file together with any fresh medical evidence, if applicable, will be independently reviewed by [the Provider's] Claims Appeal Panel who were not part of the original claims assessment and decision making process.*
- *Where a new medical opinion provided by the employer contradicts or challenges the original medical evidence obtained by [the Provider], we reserve the right to have the opinion independently assessed.*
- *The final decision of the Appeals Panel will be sent in writing to the employer as policyholder."*

I can find no wrongdoing on the Provider's part in sharing the reports of both Consultant Psychiatrists that the Complainant attended with on 8 June 2016 and 24 August 2016 with the Consultant Psychiatrist, the Complainant attended with on 19 October 2016 prior to the meeting. I accept that it would be necessary for the Consultant Psychiatrist to get all information pertaining to the Complainant before coming to his/her own conclusion and providing an objective view.

I note that the Complainant's employer's "*Occupational Health Assessment*" dated 30 November 2016 states:

"…

| | |
|---|---|
| *Outlook* | *This individual has a significant medical complaint, is receiving appropriate care, and it is anticipated that they will require a period of prolonged absence.* |

/Cont'd…

*Assessment/Outcome/Recommendation*

| |
|---|
| *Condition has improved slightly but relapses are common. Has seen a new specialist in August and her medication has been reviewed and changed. Still attending counselling.*<br>*Making some progress but in stops and starts. Some symptoms are severe and prevent her from either going to work or being effective when she is there.*<br><br>*She has already been away from work for over 12 months, the prognosis is very guarded and I am unable to predict a return to work date.*<br><br>*She is unfit for work.* |

The Provider submits that in order to obtain an objective independent review of the Complainant's level of activity, it also arranged a Desktop Research Investigation which was carried out in March 2017. The Provider has submitted a copy of this report. The Provider submits that through the Complainant's social media profile it was clear that she was very active attending numerous social and outdoor activities between 2015 to 2016. The Provider states that "*We also established a Facebook profile called… which appears to have been created in January 2017 selling [products]. It appears [the Complainant] is involved in the business judging by the comments on the particular profile*". The Provider also states that "*Furthermore, there was evidence to show [the Complainant] was involved in creating [products] for order and sale*".

The Provider goes on to states that:

"*A number of activities were also tracked during this desk top research:*

- *[The Complainant] can be seen at an event, seemingly a [function] – dated… 2016.*
- *[The Complainant] posted a picture of herself at [a location] dated… 2016.*
- *A Photo of [the Complainant] with what appears to be her family at [a location] dated… 2016.*
- *[The Complainant] appears to have been on a day outing to [a location]… around the time of… 2016…"*

The Provider states that "*In conclusion the report and research shows that [the Complainant] generally appears to be an active person in relation to attending events, being outdoors and also seemingly involved in a business…*"

The Complainant's representative submits that with regard to any business involvement, the Complainant was assisting her mother-in-law and father-in-law. The Complainant's representative states that "*In the 16 months that [the Complainant] was out sick she attended her brother's wedding, Godchild's Christening, went for a number of walks, injured an ankle, shared posts for her mother-in-law and had one night out that ended with an panic attack*".

/Cont'd…

I note that Section IV of the policy terms and conditions sets out, among other things, the following:

> *"WHEN ARE THE BENEFITS PAYABLE?*
>
> *The benefit shall be payable to the policyholder at the end of the deferred period once we are satisfied that the member meets the definition of disability*"

Disability is defined on page 4 of the policy document as:

> *"The member's inability to perform the **material and substantial duties** of their normal insured occupation as a result of their illness or injury; upon occurrence of which the **benefit** under the **policy** becomes payable, after the **deferred period**.*
>
> *The member must not be engaged in any other occupation."*

It is not disputed that the Complainant does have a medical condition. That the Complainant suffers from Depression, is accepted by the examining practitioners, but opposing views are expressed on the question of the Complainant's ability to work with the medical condition that she has.

I have carefully considered all of the evidence before me. I have reviewed the submission of medical reports by both parties, and I have examined the terms of the insurance policy governing the Complainant's claim for disability benefit. Benefit payments only get paid where the severity of symptoms prevents a return to work and not all medical conditions require a prolonged absence from work or prevent a person from carrying out their occupational duties in a general sense. While it may be that a person has an underlying health condition it does not automatically mean that he or she is disabled from working.

I accept that based on the evidence before the Provider, it was reasonable for it to come to a decision that the Complainant's medical condition was not of a severity that prevented her from undertaking the duties of her normal occupation and that she therefore did not meet the definition of Disabled as required by the policy.

From the evidence submitted, I accept that the Provider did not act unreasonably in arriving at its conclusion that the Complainant did not satisfy the definition of disability under the policy and was medically fit to resume her normal occupation.

I cannot comment on the private consultation that occurs between the doctor and his patient. Doctor's opinions regarding fitness to work and suitability for benefit should be based on the applicant's clinical history, the clinical findings during examination, the results of investigations and collateral medical evidence and not just on presentation on the day of assessment. The role of the appointed doctor is to determine a person's medical ability or otherwise to perform the duties of their normal occupation and they should have no personal interest in the outcome of any claims.

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With regard to the professionalism of the doctors who assessed the Complainant and the manner in which they carried out their assessments, it would be expected that such trained professionals would carry out their work in an unbiased, diligent and professional manner.

I cannot comment on the ability or expertise of a medical practitioner acting in that capacity in particular in their examination of a patient/claimant and submission of medical opinion. If a patient or claimant has any issues with a doctor there is another body (Medical Council) who may investigate such matters. On the basis of the doctors taking comprehensive histories and providing their considered reports and in general acting in a professional manner, their objectivity has to be accepted.

Consequently, it is my Preliminary Decision that this aspect of the complaint is not upheld.

**(2) The second issue to be determined is whether the Provider dealt with the Complainant's complaint in an unacceptable manner.**

The Complainant's representative submits that the Provider has failed to adhere to the regulations and procedure involved in handling complaints and lacked professionalism in dealing with a delicate case. The Complainant states that "*I have e-mailed [the Provider] about 25 times since logging my complaint on the 04/08/2016. I have asked for updates on the complaint and I have never received anything. I spoke to a manager on 21/11/16 and still heard nothing*".

The Complainant's representative submits that on 4 August 2016 he emailed the Provider appealing its decision and formally requesting a complaint to be opened about the whole process. The Complainant's representative submits that, as per the Provider's appeals process, the Complainant arranged her own independent opinion and scheduled an appointment with a Psychiatrist on 24 August 2016. The Complainant's representative submits that once the Complainant had all medical reports on 22 September 2016 he submitted the Consultant Psychiatrist's and the Complainant's General Practitioner's reports to the Provider for review. The Complainant's representative submits that he did not receive confirmation of receipt of the reports from the Provider until 7 October 2016. The Complainant's representative submits that during the period 22 September 2016 and 7 October 2016 he e-mailed the Provider a number of times looking for updates and an acknowledgment of the complaint submitted on 4 August 2016.

The Complainant's representative submits that on 13 October 2016 he received an email from the Provider sending the Complainant for another independent review on 19 October 2016. The Complainant's representative also submits that in this email, 50 working days after he logged complaint on 4 August 2015, the Provider acknowledged receipt of the complaint.

The Complainant's representative submits that on 18 November 2016 he emailed the Provider expressing disappointment and again sought an update on the complaint. The Complainant's representative submits that he spoke with the Provider's complaints manager on 21 November 2015, and he advised that he would have someone look into the complaint.

/Cont'd…

The Provider submits that on 5 September 2016 it spoke to the Complainant's representative on the phone and agreed that it would wait for the additional evidence to come in from him in relation to the Complainants attendance with her Consultant Psychiatrist. The Provider submits that on receipt of the complete file on 22 September 2016 it proceeded with its review which included the referral back to the Consultant Psychiatrist the Complainant met with on 8 June 2016 along with arranging a further Independent Medical Examination as part of the appeal process. The Provider submits that once it was in receipt of the IME results it was then in a position to respond to the Complainant fully on the appeal outcome inclusive of the Consultant Psychiatrist the Complainant met with on 8 June 2016 findings. The Provider submits that this process was outlined in an email to the Complainant's representative on the 13 October 2016.

The Provider submits that on 7 October 2016 it also responded to the Complainant's representative in relation to the Consultant Psychiatrist the Complainant met with on 8 June 2016 stating that "*we have no concerns in relation to his ability to form an opinion on [the Complainant's] fitness for work*". The Provider submits that on 13 October 2016 it advised the Complainant's representative by email that it acknowledged receipt of the complaint.

Provision 10.9 of the Consumer Protection Code 2012 provides the following:

> *"10.9 A regulated entity must have in place a written procedure for the proper handling of complaints. This procedure need not apply where the complaint has been resolved to the complainant's satisfaction within five business days, provided however that a record of this fact is maintained. At a minimum this procedure must provide that:*
> *a) the regulated entity must acknowledge each complaint on paper or on another durable medium within five business days of the complaint being received;*
> *b) the regulated entity must provide the complainant with the name of one or more individuals appointed by the regulated entity to be the complainant's point of contact in relation to the complaint until the complaint is resolved or cannot be progressed any further;*
> *c) the regulated entity must provide the complainant with a regular update, on paper or on another durable medium, on the progress of the investigation of the complaint at intervals of not greater than 20 business days, starting from the date on which the complaint was made;*
> *d) the regulated entity must attempt to investigate and resolve a complaint within 40 business days of having received the complaint; where the 40 business days have elapsed and the complaint is not resolved, the regulated entity must inform the complainant of the anticipated timeframe within which the regulated entity hopes to resolve the complaint and must inform the consumer that they can refer the matter to the relevant Ombudsman, and must provide the consumer with the contact details of such Ombudsman; and*
> *e) within five business days of the completion of the investigation, the regulated entity must advise the consumer on paper or on another durable medium of:*
> *i) the outcome of the investigation;*
> *ii) where applicable, the terms of any offer or settlement being made;*
> *iii) that the consumer can refer the matter to the relevant Ombudsman, and*

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*iv) the contact details of such Ombudsman."*

I note that the Complainant's representative's email to the Provider dated 4 August 2016 states:

*"… I would like to appeal the declined claim for my wife [the Complainant].*

*My wife is in no shape or form fit to return to work and I am outraged at the conduct and unprofessional consultation my wife received with your assigned psychiatrist…*

*I would also like to put a formal complaint in against the consultant who reviewed my wife…*

*My wife's doctor, [her employer's] occupational health company… have all signed her unfit for work and [the Consultant Psychiatrist] deems [the Complainant] fit for work after a 40 minute consultation where he did not once ask a question about her current symptoms or state of mind.*

*He has grossly failed as a medical professional, I have also contacted [the Consultant Psychiatrist] by e-mail and advised him that we will be contesting his report, expressed my dissatisfaction and I will be holding him responsible for my wife's mental state, and God forbid if my wife was to do anything to herself.*

*I will also be forwarding any medical expenses on to [the Consultant Psychiatrist] and [the Complainant's] counsellor once the appeal is over turned.*

*Apologies… I told you [the Complainant's] appointment with the psychiatrist… for a 2nd opinion was the 19th, its actually the 29th.*

*Once we receive her medical report I will forward this to you along with a report from [the Complainant's] GP, [the Complainant's employer's occupational health doctor]"*

I note that the Complainant's representative, in an email dated 23 September 2016 to the Provider, states:

*"Can you please confirm that you received the below email and attachments."*

The Provider responded on 26 September 2016 stating:

*"Yes I can confirm receipt and they are due to be reviewed in the coming days."*

I note that the Complainant's representative, in an email to the Provider dated 3 October 2016, states the following:

/Cont'd…

*"Thanks for getting back to me. I also request[ed] a complaint to be opened in relation to the review by [the Consultant Psychiatrist the Complainant attended on 8 June 2016]. That was back in August.*

*I have had no follow up or acknowledgement about this complaint to date.*

*What is your complaint procedure and is it normal to be waiting over 2 months for an update"*

The Provider's representative responded on 5 October 2016 stating:

*"Thanks for your email. I apologise for the lack of communication in respect of your complaint.*

*I will look into this for you and I will come back to you before the end of the week."*

I note that the Complainant's representative, in his email to the Provider dated 8 October 2016 states, among other things, the following:

*"To date I have still had no feedback on my complaint logged in the 04/08. No complaint number, no acknowledgment letter, no resolution letter, nothing."*

I note that the Complainant's representative emailed the Provider on 13 October 2016 stating:

*"Is there any update on my below e-mail"*

I note that the Provider's email to the Complainant's representative dated 13 October 2016 states, among other things, the following:

*"Thank you for your recent mail I wish to acknowledge receipt of your complaint.*

*When the original complaint was received we spoke on the phone and we agreed that we would wait for the additional evidence to come in from [the Complainant] in relation to her attendance with Dr… On receipt of the complete file on the 22/09 we then proceeded with our review which included the referral back to Dr…*

*I have now also arranged a further Independent Medical Examination as part of the appeal process with Dr… Please find attached the appointment details in relation to same.*

*Once we are in receipt of the IME results following [the Complainant's] attendance with Dr… I will then be in a position to respond to you fully on the appeal outcome inclusive of Dr… findings"*

I note that the Provider submits that on 5 September 2016 it spoke to the Complainant's representative on the phone and agreed that it would wait for the additional evidence to

/Cont'd…

come in from him in relation to the Complainants attendance with her Consultant Psychiatrist. Whilst the Provider has not submitted a recording of this conversation, I note that the Provider confirmed this in an email to the Complainant's representative dated 13 October 2016. That said, I note that there was a gap between 4 August 2016 and 5 September 2016 where the Provider did not comply with Provision 10.9 at this time. To mark the Provider's failure in this regard, I direct the Provider to make a compensatory payment of €250.00 to an account of the Complainant's choosing within 35 days.

Consequently, it is my Decision that this aspect of the complaint is partly upheld.

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**Conclusion**

- My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is partially upheld, on the grounds prescribed in ***Section 60(2)(g).***

- Pursuant to ***Section 60(4)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** I direct that the Respondent Provider pay an amount of compensation to the complainant for any loss, expense or inconvenience sustained by the complainant as a result of the conduct complained of.

- Pursuant to ***Section 60(6)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** I direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in ***Section 22*** of the ***Courts Act 1981***, where the amount is not paid by 26 March 2018.

- Pursuant to ***Section 60(8)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** the Respondent Provider is now required, not later than 14 days after 26 March 2018 to notify this office in writing of the action taken or proposed to be taken in consequence of the said direction/s outlined above.

**The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.**

**GER DEERING**
**FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

20 February 2018

**Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—**

**(a) ensures that—**

**(i) a complainant shall not be identified by name, address or otherwise,**

**(ii) a provider shall not be identified by name or address,**

**and**

**(b) in accordance with the Data Protection Acts 1988 and 2003.**