Decision Ref:	2018-0201
Sector:	Insurance
Product / Service:	Critical & Serious Illness
Conduct(s) complained of:	Rejection of claim - fit to return to work
Outcome:	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The Complainant's claim on her salary protection scheme was declined by the Insurer on the grounds that the Complainant did not meet the definition of "*totally disabled*" within the terms of the scheme.

The Complainant's Case

The Complainant maintains that she has "*been refused salary protection as* [she] *had continuously been refused retirement on ill health grounds repeatedly over two years*". The Complainant maintains that she is entitled to benefit under the salary protection scheme and she has provided extensive medical reports and correspondence in support of her position.

The complaint is that the Insurer has failed to continue making payments (certain payments were made initially) on foot of the salary protection scheme. The Complainant seeks 75% of her salary (i.e. the full benefit available under the scheme) from 1/8/2014 (the date on which the initial payments ceased) to 15/12/2015 (the date deemed to be the Complainant's retirement date on foot of her successful application for early retirement on ill-health grounds). Thereafter, the Complainant seeks 25% of her salary from 16/12/2015 until the date of her 60th birthday (which would have represented retirement age had the Complainant remained healthy) on 15/10/2019. It would seem that 25% is sought for this period as that amount, combined with the ill-health retirement pension benefit, would equate to roughly 75% of her salary which would be commensurate with the full benefit available under the scheme.

The Provider's Case

The Insurer relies on the terms of the scheme which require that, in order to qualify for the benefit under the scheme, a member must demonstrate that she is totally disabled within the terms of the scheme. On the basis of a number of "*independent*" expert reports commissioned by the Insurer, it states that it is satisfied that it was entitled to decline to pay out the benefit.

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 19 November 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.

In the absence of additional submissions from the parties, I set out below my final determination.

Before embarking on my analysis, I will set out the relevant terms from the policy.

Policy Terms and Conditions

The policy document provides as follows:

> *Total disablement shall be deemed to exist where (a) the Insured Person is unable to carry out the duties pertaining to her normal occupation by reason of disablement arising from bodily injury sustained or sickness or illness contracted and (b) the Insured Person is not engaging on a full-time or part-time basis in any*

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other occupation (whether or not for profit or reward or remuneration, including benefit in kind)

Analysis

I will also set out certain parts of the history of this matter:

The Complainant joined the Insurer's income protection scheme in 1986, towards the beginning of her teaching career.

This scheme provided for the payment of a benefit (75% of salary) in the event of 'total disablement'. In 2009, the Complainant took up a position as a principle of a school. The Complainant ceased working at this location in February 2013 as a result, she maintains, of work-related stress and bullying arising from the conduct of a co-employee and from the conduct of the chairman of the school's Board of Management. The Complainant submits that this conduct had been ongoing for two years by the time of her stress-enforced absence in February 2013. Thereafter, the Complainant was in receipt of sick leave pay until the end of 2013.

In December 2013, the Complainant, who remained out of work, submitted a claim on the scheme arising from her absence from work as a result of "*work-related stress and depression*" and as a result of "*post-traumatic stress disorder due to prolonged bullying in the workplace and depression*". The Insurer arranged for the Complainant's attendance with a Consultant Psychiatrist in April 2014. On the basis of the report, the Insurer wrote in June 2014 indicating its view that the Complainant did not meet the definition of "*totally disabled*" within the terms of the scheme. Nonetheless, the Insurer stated that, in order to facilitate the Complainant's return to work, it was "*happy to admit and pay this claim from the expiry of the deferred period to 1 August 2014*", a date which would correspond with the Complainant's return to full-time work if she pursued the phased return to work recommended by the Consultant Psychiatrist. The Insurer made a payment to the Complainant of €24,823.32 on foot of the foregoing.

The Complainant appealed the decision of June 2014 deeming her to have failed to meet the definition of "*totally disabled*". In support of her appeal, the Complainant provided the Insurer with medical reports/letters from five different doctors (including from two Consultant Psychiatrists and a Psychologist). In the course of addressing this appeal, the Insurer arranged for the Complainant's attendance with a new Consultant Psychiatrist (the second arranged by the Insurer) in October 2014. In December 2014, the Insurer concluded, on the basis of the opinion of the second Consultant Psychiatrist, that the Complainant still did not meet the threshold of totally disabled and it confirmed to Complainant that her appeal had been unsuccessful. The Complainant was advised at this point of her entitlement to make a complaint to this office.

The Complainant has provided this office with a letter of the 1st July 2015 to the Complainant from her professional advisers wherein the following is stated:

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> *We have confirmed with* [the Insurer] *that you have not appealed their decision to the Financial Services Ombudsman.*

In August 2015. the Complainant issued High Court plenary proceedings against her employer. The Complainant has provided certain of the correspondence passing between her and the solicitor acting for her in the litigation. The proceedings appear to have been discontinued in April 2016.

In January 2016, the Department of Education approved the Complainant's application for early retirement on ill-health grounds and approved the payment of ill-health retirement pension benefit effective from the 16th of December 2015. This was an application that the Complainant had advanced unsuccessfully on a number of prior occasions.

In May 2017, the Complainant re-engaged in her dispute with the Insurer and forwarded a complaint to this office. At this point in time, the Insurer arranged for the Complainant's attendance with a third Consultant Psychiatrist. This doctor also concluded that the Complainant was "*not disabled*".

The position is thus that the Complainant's complaint relates to the Insurer's initial decision of June 2014 to refuse to pay out the benefit on the basis that the Complainant did not qualify as "*totally disabled*". The complaint also relates to the subsequent rejection of the Complainant's appeal and indeed this is really the substance of the complaint.

The first matter that I propose to address is the fact that the Complainant has, in her complaint form to this office, linked the Insurer's refusal to grant the benefit to the fact that she had "*continuously been refused retirement on ill health grounds"* by the Department of Education. I am satisfied that this is demonstrably not the case. On the occasion of her initial claim and on the occasion of her appeal, the Insurer sought the expert view of a Consultant Psychiatrist on the specific question as to whether the Complainant qualified as totally disabled. The Insurer asked the first Consultant Psychiatrist to address the following question:

> *In your opinion is* [the Complainant] *currently fit to carry out her normal occupation?*

The second Consultant Psychiatrist also addressed this question and concurred with the First Consultant Psychiatrist that the Complainant was "*not disabled*". I can find no evidence that the Insurer's decisions were in any way linked to the decisions of the Department of Education regarding early retirement on ill-health grounds. Accordingly, I do not propose to uphold this aspect of the complaint.

As such, what remains for me to consider, and that which is really the substance of the Complainant's complaint, is whether she should have been deemed to be 'totally disabled' and afforded the benefit available under the scheme. I will reproduce the relevant parts of the various reports:

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The report on foot of which the Insurer declined the initial claim was a report of a Consultant Psychiatrist of the 11th April 2014. This doctor made the following observations:

> "*On the issue of returning to work*, [the Complainant] *states that she doesn't want to return to work in the same school but would if it were a different school.*
>
> [The Complainant] *does not currently meet criteria for any severe mental illness.*
>
> [The Complainant] *does not currently present with symptomatology that meets criteria for diagnosis of a disabling mental illness.*

The Consultant Psychiatrist concluded that the Complainant was fit to carry out her normal occupation albeit that a phased return was recommended.

This was the sole report on the basis of which the Insurer came to its initial decision in June 2014 to decline the Complainant's claim. Therefore, it does not appear unreasonable for the Provider to have arisen at the decision it did.

Thereafter, matters become somewhat more complicated insofar as the Complainant submitted reports/letters from five doctors (including from two Consultant Psychiatrists and a Psychologist) in support of her appeal. Four reports/letters from the Complainant's General Practitioner were submitted spanning May 2013 to September 2014. These reports document a diagnosis of post-traumatic stress. The reports cite the author's view that "*it would be impossible for* [the Complainant] *to return to that environment without serious health consequences*". The GP sets out her opinion that the Complainant is "*unfit to return to work*".

Given the overall content of the GP's reports, it is impossible not to conclude that the GP was of the view that the Complainant was only unfit to return to her previous place of work specifically. The reports describe a fear of meeting anyone connected with the school for example. This is not the same as the Complainant being unable to carry out the duties pertaining to her normal occupation. The Complainant was not unable to carry out these duties. Rather the Complainant's GP was of the opinion that she was unfit to return to the place of work where the she had experienced the allegedly objectionable conduct. (It forms no part of my function to express a view as to whether any such objectionable conduct did or did not occur.) In any event, the Complainant's GP expresses no view as to whether the Complainant was total disabled or unable to carry out the duties pertaining to her normal occupation.

The Complainant also submitted a report and a letter from her Psychologist dated 15/09/2014 and 07/05/2013 respectively. This report describes the Complainant's practice of "*avoiding the location of the school or indeed anywhere within several miles of it*". The Psychologist concludes that the Complainant "*is not equipped to return to her position*". However, I am again compelled to conclude that this opinion is specific to the Complainant's actual workplace and does not correspond with an opinion that she was unable generally to carry out the duties pertaining to her normal occupation.

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The Complainant submitted a report from a second GP dated May 2014 which appears to have been initially commissioned for the purpose of supporting an application for early retirement on ill-health grounds albeit that the GP did not agree that the Complainant met the criteria for ill-health retirement. This report includes the following passages:

> *She outlines that she cannot contemplate returning to work alongside the individuals with whom she has grievance issues. She reports that even passing the school is associated with a direct increase in her anxiety and stress levels.*
>
> [The Complainant] *tells me that she looked at her options of work elsewhere or to transfer elsewhere to no avail.*
>
> [The Complainant] *tells me that she cannot face going back to work with her colleague again or having to work alongside the board of management chair. She believes her reputation is destroyed in the school. She indicates that she could return to work if both people were not there. She does not trust them and cannot face going back to the school. She reports that she enjoyed teaching and does not have any difficulty with teaching as a role per se and enjoys the work and the duties and the responsibilities.*
>
> [The Complainant] *has genuine medical difficulties that are currently preventing her from working in her occupation in her current school and she is not medically fit to work at this time in my view.*

This report compels me to a similar conclusion as that reached in respect of the reports already considered. The fact that the Complainant was prepared to contemplate, and indeed explored, the possibility of securing work at a different location is inconsistent with the proposition that she was unable to carry out the duties pertaining to her normal occupation. The Complainant's difficulties were specific to her former place of work and the people involved in that place of work and did not constitute a general inability to perform her duties (i.e. teaching).

Finally, the Complainant submitted reports from two separate Consultant Psychiatrists dated 23/07/2014 and 05/09/2014. The report from July 2014 concludes that the Complainant is "*clearly not fit to work at the moment*" but the author did "*not think it is possible to be definitive and say that she will never be fit to return to work*". It is clear in this report also that the problems that were identified were directly linked to the particular school at which the Complainant worked. The consultant did not express a view as to whether the Complainant was, generally speaking, unable to carry out the duties pertaining to her job and, in this regard, my view is that the threshold was not met.

The report of September 2014 includes the following passages:

> *I understand from the* [the Complainant] *that she has stated she would find it extremely difficult to return to the school due to the environment and the stress she experienced there. It is my understanding that she did state that she would be*

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prepared to work in a different school but is not sure whether this is available to her.

From my examination of [the Complainant], *I can see that it would be very difficult for her to return to the school environment of the* [named] *school which she appears to have experienced as particularly stressful and no doubt she suffered significant Post-Traumatic Stress as a result of her time there. It is my opinion that at the present time she would decompensate if she returned to that school environment. She may however be suitable to work in a different school if that is available and I would suggest that she would start on a graded programme of part-time hours initially until she regains some of her confidence.*

Finally it is my onion that the woman is not capable of returning to the school where she felt so stressed whilst the prevailing situation, staff and environment are in place.

Ultimately, this complaint turns on the correct interpretation of the terms of the scheme. The terms provide guidance as to what constitutes 'total disablement'. I accept that in order to establish that a person is 'unable to carry out the duties pertaining to her normal occupation', it is not sufficient to show that she is unable to return to a particular work place. In this case, the Complainant appears to have been capable of teaching (i.e. the primary duty of her occupation), however she was unable to do so at a particular school given the conflict with personnel she had experienced there. This is not commensurate with being unable to carry out the duties.

In response to the Complainant's submission of the foregoing reports, the Insurer arranged for the Complainant to attend with a further Consultant Psychiatrist. This expert sought to directly address "*whether or not* [the Complainant] *meets the definition of disablement*".

The report includes the following passages:

It is my opinion that [the Complainant] *is being deemed medically unfit for work when the issue is relationship conflict but* [the Complainant] *insisted that her GP said her problem was she was medically unfit and that she is medically unwell*.

[The Complainant] *confirms that she is able to teach but does not want to teach in that school again saying "it's because it is a toxic environment and I am constantly undermined by my colleague and the chairman of the Board of Management".*

[The Complainant] *confirmed that she is studying for a masters in communication with ….. Her work at the present time is by thesis now and she plans to do her thesis on* [redacted]. *She said she's currently looking for placement which is part of the requirement and if she were offered placement she believes that she would be able to work and fulfil the role.*

It is my opinion that [the Complainant] *is currently fit to be employed as a primary school principal, she concurred with this herself that if she were offered a position*

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either for her placement for her course or in any other school that she would be willing to take up such a position.

Ultimately this Consultant Psychiatrist concluded that the Complainant "*was not disabled by reason of mental illness*". On the basis of the material placed before me, I am compelled to agree. Accordingly, I accept that the Insurer was entitled to decline to the benefit.

It is important to differentiate between a person being disabled and unable to work and a person being unable to work because of relationships or other issues in the workplace. An insurer cannot be requested to admit a claim in relation to disablement when the absence and problem is caused by relationship issues.

A number of additional reports were furnished to this office from both parties however, insofar as reports post-date the date that the Insurer rejected the Complainant's appeal in December 2014, they are not relevant to this Preliminary Decision. The relevant material is that which was at the disposal of the Insurer at the time that the decisions complained about were made.

With regard to the date of the rejection of the appeal, this was the 2nd of December 2014 as confirmed by way of letter of that date from the Insurer. The Complainant refers to the date in her complaint form as being the 24th of April 2016, however this was merely the date of a letter to her from a broker which communicated to her information about complaining to this office, quite possibly in response to a query in relation to that matter.

In light of the entirety of the foregoing, and in the absence of evidence of wrongdoing by the Provider or conduct within the terms of Section 60(2) of the Financial Services and Pensions Ombudsman Act 2017 that could ground a finding in favour of the Complainant, I do not uphold this complaint.

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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 rejected.

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

11 December 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) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.