An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2019-0118
Sector:	Insurance
Product / Service:	Payment Protection
Conduct(s) complained of:	Rejection of claim - fit to return to work
Outcome:	Upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The Complainant's former Employer is the policyholder of a Group Income Protection Policy with the Company. The Complainant had commenced contract work with the Employer on 12 March 2012 and was an insured person under this policy. She was later medically certified as unfit for work from 17 February 2014 and submitted an Income Protection Employee Claim Form in April 2014, advising that she was absent from work due to *"breast cancer, require surgery, chemotherapy and radiation"*. As there was a 26 week deferred period under the policy, Company liability was with effect from 18 August 2014 and following its assessment of this claim, the Company commenced payment of income protection benefits to the Employer on that date. The Complainant's contract with her Employer ended on 18 February 2015 and the Company then paid the benefit directly to the Complainant, in accordance with the policy terms and conditions. Following a later review of her claim, the Company advised the Complainant in its correspondence dated 6 March 2017 that it had concluded that she was at that time fit to return to work and it ceased payment of her claim on 5 April 2017, a decision it upheld upon review.

The Complainant's Case

The Complainant commenced contract with her former Employer on 12 March 2012. She was later diagnosed with breast cancer and was certified as unfit for work from 17 February 2014. The Complainant submitted an Income Protection Employee Claim Form in April 2014,

which the Company admitted into payment on the completion of the 26 week deferred period, on 18 August 2014.

The Complainant notes that her diagnosis of right breast cancer has since been complicated by right arm lymphedema. Her contract with her Employer ended on 18 February 2015. Following a later review of her claim, the Company advised the Complainant by way of correspondence dated 6 March 2017 that it had concluded that she was fit to return to work and it ceased payment of her claim on 5 April 2017, a decision it upheld upon review.

In this regard, the Complainant had attended for assessment with Dr A, Specialist in Occupation Medicine on 12 December 2016 and her ensuing Report dated 21 December 2016 advised that *"the option of returning to work has not arisen…as* [the Complainant's] *contract with* [her Employer] *was completed. However in my considered view* [she] *could certainly resume working on a part time basis initially and if this did not unduly aggravate symptoms then there would be no reason why she could not phase up a return to work full time"*. The Complainant notes however that when the Company later wrote to her on 6 March 2017 to inform her that it was ceasing payment of her claim, it did not advise that the medical evidence it was relying upon indicated that she was at that time only fit to return to work part-time. The Complainant thus considers that she *"would be entitled to a proportionate benefit"*, as provided for in the terms and conditions of the Group Income Protection Policy.

The Complainant appealed the Company decision to cease payment of her claim and attended for assessment with Dr B, Specialist in Occupational Health on 1 August 2017 and his ensuing Report dated 17 August 2017 advised that the Complainant *"is fit for her normal duties…perhaps working half the normal hours over four to six weeks before commencing full normal duties"*. Having considered this Report, the Complainant submits in her email to this Office dated 16 August 2018, as follows:

> *"There are a number of factual errors in this report. My father did not die at 44 and I do not have a sister who died of ovarian cancer. In addition all medical reports pertaining to me were listed including the reports on my cancer. The relevant reports are the ones relating to my lymphoedema. There is no mention of my invalidity pension. This is of relevance when making an informed decision on my condition. This should be referred to in the report if it was considered as part of the decision making process. In this report it was found that I didn't meet the definition of disability as required under the policy. The rationale for this statement has not been clearly explained. I was independently assessed by the Department of Social Welfare and no mention was made of this at all.*

The Complainant does not accept the Company decision to cease payment of her income protection claim. The Complainant's GP, Dr A. B. advises in correspondence dated 5 April 2017 that *"I believe the lymphoedema in* [the Complainant's] *right upper limb is a significant issue and in my opinion makes her unfit to work"*. The Complainant also considers that her receipt of an Invalidity Pension since January 2016 from the now Department of Employment Affairs and Social Protection confirms her ongoing inability to return to work.

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The Complainant submits in her email to this Office dated 16 August 2018 that *"the Company have not been transparent in their dealings with me and the policy was not applied in its totality. My medical evidence confirms my inability to work"*.

The Complainant notes that *"my contract with* [my Employer] *was not renewed during my illness so going back to* [my Employer] *is not available to me"* and now seeks for the Company to reinstate payment of her claim as she considers that *"income protection should cover this situation where my ability to find work while medically unfit is impossible"*.

The Complainant's complaint is that the Company wrongly or unfairly ceased payment of her income protection claim.

The Provider's Case

Company records indicate that the Complainant completed an Employee Claim Form on 28 April 2014 detailing that she was certified as unfit for work from 17 February 2014 due to *"breast cancer, require surgery, chemotherapy and radiation"*. The Complainant's GP, Dr A. B. completed the Practitioner Report on 9 July 2014, confirming the nature and cause of the Complainant's disability as *"breast cancer … ongoing treatment – chemotherapy – radiotherapy"*. Following a review of the claim evidence received from her GP, the Company concluded that the Complainant satisfied the Group Income Protection Policy definition of disability, as follows:

> *"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".*

The Group Income Protection Policy provides a benefit once the Company is satisfied that the policy definition of disability is met, payable after the completion of the 26 week deferred period. As a result, the Company commenced payment of benefits to the Employer with effect from 18 August 2014.

The Company received notice on 19 January 2015 from the Employer advising that the Complainant's contract was due to expire on 18 February 2015.

Income protection claims are subject to ongoing review and as part of its review the Company wrote to the Complainant's GP, Dr A. B. on 19 January 2015 requesting the completion of a Practitioner Report to confirm the then current medical status of the Complainant. The GP completed this Practitioner Report on 5 February 2015, indicating that he expected the Complainant to be fit to resume work within *"6 - 12 months … Currently she is medically unfit to return to work. This decision will be reviewed in 3 months"*.

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As her contract of employment had ceased, the Company then wrote to the Complainant on 6 March 2015, as follows:

> *"As your contract of employment has ceased* [with your Employer] *since 18/02/2015,* [the Company] *will continue to pay a benefit directly to you Net of Tax and USC subject to the following conditions:*
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> - *the definition of disability will change to suited occupation.*
> - *we will cease payment of any supplementary benefits..*
> - *payments to you will cease upon reaching age 65 once you continue to meet the definition of disability as outlined below in the interim.*
> - *payment to you may be reduced and/or cease if you are in receipt of other regular income as a result of the illness or injury or have recommenced paid work activities.*
> - *medical evidence agrees the claim would continue to be valid had the member's employment continued.*
> - *you remain resident in Ireland for tax purposes – tax, PRSI, the universal social charge and any other applicable fiscal charges will be deducted from the benefit prior to payment.*
> - *as long as you continue to meet the definition of disablement under the policy.*
>
>   *The member's inability to perform the material and substantial duties of their normal insured occupation or suited 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 …*
>
> *Based on the most recent medical evidence obtained on your claim, benefit payments will continue. Please note your claim is subject to ongoing review and you must continue to satisfy the definition of disablement as outlined above"*.

In this regard, the Group Income Protection Policy defines *"suited occupation"* as follows:

> *"Where the member is unable to perform the material and substantial duties of their normal occupation as a result of their illness or injury, a suited occupation is one for which they are suited by reason of education, training or experience"*.

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As part of a claim review, the Company wrote to the Complainant's GP, Dr A. B. on 27 August 2015 requesting once again the completion of a Practitioner Report to confirm the then current medical status of the Complainant. The GP completed this Practitioner Report on 14 September 2015, indicating that the expected duration of the Complainant's absence was now *"Unknown … All duties currently unable to perform. Significant Lymphoedema – R Upper Limb – painful – chest pain – sleep disturbance"*.

To consider the review further, the Company arranged for the Complainant to attend for a medical examination with Dr B, Occupational Health Physician and it forwarded a copy of the medical records received from the Complainant's GP and Specialist to assist in his assessment. The Complainant attended for assessment on 5 January 2016 and in his ensuing Medical Report dated 26 January 2016, Dr B advised, among other things, as follows:

> *"The history and examination as well as medical reports indicate this lady had breast cancer which has been adequately treated and is under observation. This lady has developed right arm lymphoedema and it appears that her lymphoedema is responding well to the physiotherapy intervention …*
>
> *The measurement of the left upper limb: upper arm 35.5cm and forearm 25cm. Examination of the right upper limb was non-tender, some decrease in sensation in the posterior upper arm region. Normal range of movements in the shoulder, elbow and wrist levels with normal power and no pain. No evidence of neurovascular injuries otherwise. Grip strength was 5/5, opposition strength was 5/5 and no function deficits …*
>
> *It is my expectation that she will respond positively to the physiotherapy intervention and that she will be in a position to return to work in approximately three months' time. I would suggest this lady undergoes a phased return to work, working half her normal hours for the first two weeks, to help her reintegrate into the workplace"*.

The Complainant's GP, Dr A. B. next completed a Practitioner Report on 11 August 2016 indicating that the expected duration of the Complainant's absence was now *"Indefinitely … I do not believe the claimant will return to full time or part time work … because she is unable to return to work due to ongoing symptoms"*.

As part of its claim review, the Company arranged for the Complainant to attend for a medical examination with Dr A, Specialist in Occupational Medicine. The Complainant attended for assessment on 12 December 2016 and in her ensuing Medical Report dated 21 December 2016, Dr B advised, among other things, as follows:

> "[The Complainant] *developed lymphoedema towards the end of treatment moderate in severity affecting her upper and lower arm but not her hand …*

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This lady developed breast cancer in 2014. She has completed all appropriate treatment and she has done well without any evidence of recurrence. The only residual problem is residual moderate severity lymphoedema. This is not restricting her activities of daily living. She is swimming, playing bridge and walking. She has regular massage with lymphatic drainage done approximately every 3 months which is helping to control things …

However in my considered view she could certainly resume working on a part time basis initially and if this did not unduly aggravate symptoms then there would be no reason why she could not phase up a return to work full time. There is no evidence that it is involving her hand in any way. Predominantly most of the work she was doing was PC related work and I see no reason why this should be aggravated by a resumption of work".

As a result, the Company was of the opinion that the Complainant was fit to return to a suited occupation as she no longer satisfied the policy definition of disability In addition, it also considered that the Complainant was in a position to seek fulltime employment. In this regard, the Company wrote to the Complainant on 6 March 2017 to advise, as follows:

"Based in the findings of the Independent Medical Examination and a review of all medical records on file, it is our opinion that you no longer meet the definition of disability as set out in the policy for a "suited occupation".

"Where the member is unable to perform the material and substantial duties of their normal occupation as a result of their illness or injury, a suited occupation is one for which they are suited by reason of education, training or experience".

With due consideration to the recommendations of the Independent Medical Evaluation…you have been deemed fit to return to work to full-time duties. In arriving at our decision, we must be guided by the weight of the objective evidence obtained which, in our opinion, clearly indicates that you no longer meet the definition of disablement under the policy.

The treating specialist that conducted the assessment states:

"The only residual problem is residual moderate severity lymphoedema. This is not restricting her activities of daily living"

"However in my considered view she could certainly resume working …"

"Predominantly most of the work she was doing was PC related work and I see no reason why this would be aggravated by a resumption of work".

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The final payment of €1,628.57 will be issued on the 25/03/2017 in respect of the period 01/03/2017 – 05/04/2017".

The Company ceased payment of the Complainant's income protection claim on 5 April 2017, having paid a total benefit amount of €43,518.98.

The Complainant notified the Company on 19 April 2017 that she was appealing its decision to cease payment of her claim.

In order to consider her appeal, the Company arranged for the Complainant to attend for a further medical examination with Dr B, Occupational Health Physician on 1 August 2017 and his ensuing Report dated 17 August 2017 advised, among other things, as follows:

> *"This lady will wake around 9am, have a shower and breakfast, walks every morning for 30 to 44 minutes. At the weekend she will go for an extended walk with her husband for over 10km. She goes swimming with hydrotherapy on a weekly basis. She last went for holidays in Wexford in July. She manages only light house chores but is unable to do the ironing or the cooking, the hoovering or lifting heavy pots…*
>
> [Ms F. C.]*, MLD Therapist…30th of March 2017 indicated this lady was first reviewed in May 2016 with lymphoedema of the right arm secondary to surgery and axillary clearance, commenced on intensive treatment consisting of manual lymphoedema draining, compression bandaging and exercise. The volume difference between her arms was improved from 31 to 23%, measure again on 22nd of March 2017 this time volume difference was 21% (reduction from .773 initially to .524L)*
>
> *I note that in the previous report compression bandaging at night was to be started, currently this lady no longer needs compression bandaging at night…*
>
> *In my considered opinion, this lady is fit for her normal duties. I acknowledge that the contract is no longer available. In my opinion, the presence of lymphoedema and the other symptoms would not render someone in this lady's position from performing their full normal duties …*
>
> *In my considered opinion, this lady no longer fulfils the definition of disability as required under the policy. Regrettably, I am unable to support further insurance benefit".*

The Company is satisfied that it carried out a thorough review of the Complainant's claim but it remained satisfied that the Complainant was fit to return to a full time role as she did not satisfy the applicable policy definition of disability. As a result, the Company wrote to the Complainant on 18 September 2017 to advise, as follows:

> *"Under the terms of the policy, the definition of disability in relation to a suited occupation states:*

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> ***"Where the member is unable to perform the material and substantial duties of their normal occupation as a result of their illness or injury, a suited occupation is one for which they are suited by reason of education, training or experience".***
>
> *Based on the claim appeal evidence received and the recent IME carried out I regret to advise we are unable to consider this claim appeal. The treating specialist that conducted the assessment states:*
>
> *"In my considered opinion, this lady is fit for her normal duties. I acknowledge that the contract is no longer available. In my opinion, the presence of lymphoedema and the other symptoms would not render someone in this lady's position from performing their full normal duties"."*

The purpose of the Group Income Protection Policy is to support employees who demonstrate work disability supported by objective medical evidence. In this regard, the Company notes that both Dr A, Specialist in Occupational Medicine and Dr B, Occupational Health Physician advised that the Complainant's symptoms were mild in nature and both clearly indicated that the Complainant did not at that time have a disabling illness and was fit for work. The Company acknowledges that the Complainant has a chronic condition and receives ongoing treatment for residual symptoms, however any residual symptoms do not appear to be disabling in nature. In this regard, the Company submits that it is generally accepted that a disabling medical complaint not just impedes an individual from working but also adversely impacts an individual's ability to perform normal everyday tasks and activities. In this case, however, the Company considers that the level of activity the Complainant has demonstrated in terms of swimming, playing bridge and walking are not commensurate with a disabling medical illness.

The Company notes that the Complainant has not attempted a return to work and whilst this may be a lifestyle choice, there is no clear evidence that she could not continue to work whilst undergoing treatment for lymphedema. Furthermore, the presence of this condition does not automatically equate to work disability.

The Company notes that the Complainant has raised the possibility that she would have been entitled to a proportionate benefit. In this regard, a reduced benefit is payable to claimants only in circumstances where the individual is considered disabled from performing their normal occupation and is undertaking reduced work activities. In this situation, however, the Company deemed the Complainant fit to return fulltime to a suited occupation as she no longer satisfied the policy definition of disability. In this regard, the Company notes that having assessed the Complainant on 1 August 2017, Dr B, Specialist in Occupational Health advised in his Report dated 17 August 2017 that the Complainant *"is fit for her normal duties…perhaps working half the normal hours over four to six weeks before commencing full normal duties"*.

In addition, the Company notes that the Complainant advised that *"there are a number of factual errors"* relating to her family history in the Report from Dr B, Occupational Health Physician dated 22 August 2017. The Company asked Dr B to comment on these errors and

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he responded in writing on 22 May 2018 that *"I note* [the Complainant's] *comments, and apologise for any factual issues…My professional opinion and recommendation remain unaltered"*.

Furthermore, the Company notes that the Complainant considers that her receipt of an Invalidity Pension from the Department of Employment Affairs and Social Protection confirms her ongoing inability to return to work. In this regard, the Company submits that the decision of the Department of Employment Affairs and Social Protection to award the Complainant an invalidity pension is not relevant, since the definition of disability used by that Department is very different to the definition of disability contained in the Group Income Protection policy. In any event, the Company, as an insurer, is entitled to make its own decisions on fitness for work or otherwise.

The Company states that it ceased payment of the Complainant's income protection claim on 5 April 2017 as it determined from the objective medical evidence before it that the Complainant no longer satisfied the policy definition of disability, as set out in the applicable terms and conditions of the Group Income Protection Policy.

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 21 February 2019, 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.

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The complaint at hand is that the Company wrongly or unfairly ceased payment of the Complainant's income protection claim.

The Complainant commenced a two year contract with her Employer on 12 March 2012. She was later diagnosed with breast cancer and was certified as unfit for work from 17 February 2014. The Complainant submitted an Income Protection Employee Claim Form in April 2014, which the Company admitted into payment on the completion of the 26 week deferred period, on 18 August 2014. Her diagnosis of right breast cancer has been complicated by right arm lymphedema. The Complainant's contract with her Employer ended on 18 February 2015. Following a later review of her claim, the Company advised the Complainant in its correspondence dated 6 March 2017 that it had concluded that she was at that time fit to return to work and it ceased payment of her income protection claim on 5 April 2017, a decision it upheld upon review.

The Group Income Protection Policy of which the Complainant was a member of, like all insurance policies, does not provide cover for every eventuality; rather the cover will be subject to the terms, conditions, endorsements and exclusions set out in the policy documentation.

Section IV, 'Claims', of the applicable Income Protection Policy Conditions booklet provides, among other things, at pg. 12, as follows:

> *"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"*

In this regard, the 'Interpretation' section of this Policy Conditions booklet provides at pg. 4:

> ***"Disability***
>
> *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".*

Following its assessment of the claim evidence received, the Company concluded that the Complainant satisfied this policy definition of disability and commenced payment of benefit to her Employer after the completion of the deferred period on 18 August 2014.

I note from the documentary evidence before me that the Complainant's Employer advised the Company on 19 January 2015 that the Complainant's contract was due to expire on 18 February 2015.

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In this regard, Section IV, 'Claims', of the Policy Conditions booklet provides at pg. 14:

> *"**EMPLOYMENT CEASES***
>
> *Should a member's employment cease because you the employer have ceased trading or a fixed term employee contract expires while a benefit is in payment we will continue to pay benefit to the member directly subject to the following conditions:*
>
> - *the definition of disability will change to suited occupation*
> - *we will cease payment of any supplementary benefits..*
> - *payments to the member will cease when their entitlement to benefit ends (for fixed term employees this will be the ceasing age under the policy)*
> - *payment to the claiming member may be reduced and/or cease if he is receiving other regular income as a result of the illness or injury or has recommenced paid work activities.*
> - *medical evidence agrees the claim would continue to be valid had the member's employment continued.*
> - *the member is resident in Ireland for tax purposes – tax, PRSI, the universal social charge and any other applicable fiscal charges will be deducted from the benefit prior to payment."*

In addition, the 'Interpretation' section of the Policy Conditions booklet provides at pg. 6:

> "***Suited Occupation***
>
> *Where the member is unable to perform the material and substantial duties of their normal occupation as a result of their illness or injury, a suited occupation is one for which they are suited by reason of education, training or experience"*.

As her contract of employment had ceased on 18 February 2015, I note that the Company wrote to the Complainant on 6 March 2015, as follows:

> *"As your contract of employment has ceased* [with your Employer] *since 18/02/2015,* [the Company] *will continue to pay a benefit directly to you Net of Tax and USC subject to the following conditions:*
>
> - *the definition of disability will change to suited occupation.*

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- *we will cease payment of any supplementary benefits..*

- *payments to you will cease upon reaching age 65 once you continue to meet the definition of disability as outlined below in the interim.*

- *payment to you may be reduced and/or cease if you are in receipt of other regular income as a result of the illness or injury or have recommenced paid work activities.*

- *medical evidence agrees the claim would continue to be valid had the member's employment continued.*

- *you remain resident in Ireland for tax purposes – tax, PRSI, the universal social charge and any other applicable fiscal charges will be deducted from the benefit prior to payment.*

- *as long as you continue to meet the definition of disablement under the policy.*

  The member's inability to perform the material and substantial duties of their normal insured occupation or suited 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 …

Based on the most recent medical evidence obtained on your claim, benefit payments will continue. Please note your claim is subject to ongoing review and you must continue to satisfy the definition of disablement as outlined above".

It is an industry standard that income protection claims are subject to ongoing review. In this regard, Section IV, 'Claims', of the Policy Conditions booklet provides, *inter alia*, at pg. 13:

"CLAIM REVIEW

Payment of benefit is conditional on the claiming member continuing to satisfy the definition of disability and we will conduct a periodic assessment of the member's ability to carry out the material and substantial duties of their normal occupation, the frequency of these reviews will be determined by the medical evidence received …

As part of the process we will request updated medical evidence from the claiming member's treating physician. We may also request a medical examination by a specialist chosen by us, or other types of medical evidence as necessary".

As part of a claim review, I note that the Company arranged for the Complainant to attend for a medical examination with Dr B, Occupational Health Physician and forwarded a copy

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of the medical records received from the Complainant's GP and Specialist to assist Dr B in his assessment.

The Complainant attended for assessment on 5 January 2016 and Dr B advised in his ensuing Medical Report dated 26 January 2016, among other things, as follows:

*"**2. HISTORY OF PRESENTATION:***

[The Complainant] *indicated that she underwent the Breast Check Programme in February 2014. Mammogram discovered calcification of the right breast. She proceeded to have a needle biopsy which confirmed the diagnosis. She then underwent a full mastectomy and axillary clearance at [Hospital]. Following this, this lady underwent chemotherapy in April 2014 followed by radiotherapy until October of that year. She indicated having lethargy throughout her treatment.*

This lady also mentioned undergoing genetic testing in February 2014, which was clear. Furthermore a DEXA scan in May 2015 outruled bony deposits, and a CT scan discovered a pulmonary nodule which is being observed. A repeat scan is planned for the 20/01/2016 …

4. CURRENT SYMPTOMS:

4.1 Of note this lady is right handed. She indicated that she developed right sided lymphoedema around March 2015. She complained of right arm heaviness and numbness of the whole arm, which could be painful at times, though she does not require pain medication at present. She mentioned she in unable to use her right arm to do any major activities.

This condition is being managed with regular physiotherapy using compression sleeves and bandaging. The sleeves are removed at night. Of note another form of compression is being discussed with the physiotherapist which could be put on at night and may provide her with better symptom control the following day.

4.2 This lady complained of right central chest pains at night especially on lying down. This was described as a tightening sensation and sharp in nature. There was no fixed pattern to this. This lady indicated this could be due to the lymphoedema. She indicated that she was not overly concerned by this symptom, and it will be further evaluated at her follow-up CT scan.

4.4 Fatigue: [The Complainant] *mentioned whether this could be due to her poor sleeping pattern whereby she finds it hard to get to sleep and she would wake several times during the night. She also indicated that this could be due to her hormonal medications. She indicated that she is not worried about this symptom.*

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4.5 *Previous left hip pain: fortunately the DEXA scan ruled out any bony deposits …*

Physical examination:

The measurement of the left upper limb: upper arm 35.5cm and forearm 25cm. Examination of the right upper limb was non-tender, some decrease in sensation in the posterior upper arm region. Normal range of movements in the shoulder, elbow and wrist levels with normal power and no plain. No evidence of neurovascular injuries otherwise. Grip strength was 5/5, opposition strength was 5/5 and no function deficits …

11. COMMENT ON MEDICAL REPORTS:

The medical reports confirm the history of breast cancer specifically invasive ductal carcinoma, minor mucinous component, Grade 2, 2.7cm with DCIS, lymphovascular invasion positive, 6 of the 8 lymph nodes positive, ER positive, HER2 negative. No distant metastasis were diagnosed on CT but a 2x3mm pulmonary nodule was discovered, bone scan was negative.

The physiotherapy report indicated that in October 2015 her limb volume was 36.4% weaker than that of the left arm and she will continue to have monitoring and treatment over the next coming months.

It appears from the reports that fortunately from a cancer point of view [the Complainant] *has been adequately treated and the main medical objective now is for observation and treatment of complications such as the lymphoedema.*

This lady indicated that from an occupational point of view that she has no real plans to return to work. Her physiotherapist was not able to give any specific advice regarding this but she mentioned she has not ruled out returning to work in the future, maybe returning on a part-time basis.

12. CONCLUSIONS AND RECOMMENDATIONS:

12.1 Diagnosis:

The history and examination as well as medical reports indicate this lady had breast cancer which has been adequately treated and is under observation. This lady has developed right arm lymphoedema and it appears that her lymphoedema is responding well to the physiotherapy intervention. The plan now as I understand is to have compression bandaging at night which hopefully will provide her with more positive results during the day.

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12.2 Fitness for work:

In my considered opinion at the present time this lady is unfit for work.

On saying this it is my expectation that she will respond positively to the physiotherapy intervention and that she will be in a position to return to work in approximately three months' time. I would suggest this lady undergoes a phased return to work, working half her normal hours for the first two weeks, to help her reintegrate into the workplace.

12.3 Suitability for Insurance benefit:

In summary this lady currently fulfils the definition of disability as required by your policy. I support her claim for insurance benefit for the next three months after which I will expect that this lady will be in a position to resume work".

Having considered this Report, the Company concluded that the Complainant continued to satisfy the policy definition of disability and her income protection claim remained in payment.

I note that the Complainant's GP, Dr A. B. completed a Practitioner Report on 11 August 2016, indicating that the expected duration of the Complainant's absence was now *"Indefinitely … I do not believe the claimant will return to full time or part time work … because she is unable to return to work due to ongoing symptoms"*.

In order to consider the claim further, the Company arranged for the Complainant to attend for a medical examination with Dr A, Specialist in Occupational Medicine on 12 December 2016 and her ensuing Report dated 21 December 2016 advised, among other things, as follows:

*"**OCCUPATIONAL HISTORY:*** [The Complainant] *tells me she was employed by* [her Employer] *on a 2 year contract from 2012 to 2014. During the time of her illness the contract was completed and was not renewed and during that time she was diagnosed with breast cancer. She worked in the [unit]…It was a full time job desk and PC based… She enjoyed the job and described no work related difficulties …*

PRESENTING COMPLAINT: *Breast cancer was diagnosed at a routine screening mammogram in early 2014. She was recalled almost immediately for an ultrasound and biopsy…She had multiple calcifications around the breast as well as the breast lump and the recommendation was to proceed with a mastectomy. She tells me that 6 out of 35 lymph nodes were positive and she had an axillary clearance with total mastectomy in March 2014. She had chemotherapy from April through to August 2014 every 2 weeks followed by radiotherapy daily for 6 weeks. All treatment was completed in October 2014.*

She made a full recovery from all the chemotherapy side effects. She developed lymphoedema towards the end of treatment moderate in severity affecting her upper

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and lower arm but not her hand. She did go for a massage and lymphatic drainage and bandaging for a 3 week period…which temporarily improved symptoms but it has been persistent since.

She attends physiotherapy…about every 3 months for lymphatic drainage massage. She wears a sleeve by day but not at night. She complains of low grade discomfort upper and lower arm which is present particularly at night and the arm feels heavy at times. Notwithstanding this she is unrestricted in her activities of daily living.

She tells me she is exercising by walking every second day and she goes swimming twice a week, doing 20 lengths in hydrotherapy. She doesn't do any hoovering or heavy lifting, but is otherwise unrestricted. She is playing bridge twice a week and is enjoying this.

Mentally she tells me she coped very well with the diagnosis…She sees [Mr D. E.] *and* [Dr J. W.] *every 6 months alternatively and last had a mammogram in March 2016 and everything was fine in this regard.*

She tells me work-wise she has not really has a discussion about a return to work because the option of returning to work did not arise as her contract was completed with [the Bank] *in 2014 and her GP was reluctant to sign her off as fit to work. She tells me Social Welfare have granted her a disability allowance …*

SUMMARY: *This lady developed breast cancer in 2014. She has completed all appropriate treatment and she has done well without any evidence of recurrence. The only residual problem is residual moderate severity lymphoedema. This is not restricting her activities of daily living. She is swimming, playing bridge and walking. She has regular massage with lymphatic drainage done approximately every 3 months which is helping to control things.*

The option of returning to work has not arisen in her case as her contract with [her Employer] *was completed. However in my considered view she could certainly resume working on a part time basis initially and if this did not unduly aggravate symptoms then there would be no reason why she could not phase up a return to work full time. There is no evidence that it is involving her hand in any way. Predominantly most of the work she was doing was PC related work and I see no reason why this would be aggravated by a resumption of work".*

Having considered this Report, the Company concluded that the Complainant no longer satisfied the policy definition of disability and wrote to her on 6 March 2017, as follows:

"Based in the findings of the Independent Medical Examination and a review of all medical records on file, it is our opinion that you no longer meet the definition of disability as set out in the policy for a "suited occupation".

/Cont'd…

"Where the member is unable to perform the material and substantial duties of their normal occupation as a result of their illness or injury, a suited occupation is one for which they are suited by reason of education, training or experience".

With due consideration to the recommendations of the Independent Medical Evaluation carried out on the 11 February 2017, you have been deemed fit to return to work to full-time duties. In arriving at our decision, we must be guided by the weight of the objective evidence obtained which, in our opinion, clearly indicates that you no longer meet the definition of disablement under the policy.

The treating specialist that conducted the assessment states:

> *"The only residual problem is residual moderate severity lymphoedema. This is not restricting her activities of daily living"*
>
> *"However in my considered view she could certainly resume working …"*
>
> *"Predominantly most of the work she was doing was PC related work and I see no reason why this would be aggravated by a resumption of work"*.
>
> *The final payment of €1,628.57 will be issued on the 25/03/2017 in respect of the period 01/03/2017 – 05/04/2017"*.

As it had concluded that the Complainant no longer satisfied the policy definition of disability, the Company ceased payment of the income protection claim on 5 April 2017.

The Complainant appealed the Company decision to cease payment of her claim and as part of the appeal submitted correspondence from her GP, Dr A. B. dated 5 April 2017, which advised, as follows:

"This is to certify that I have examined [the Complainant] *today at the surgery.*

I believe the lymphoedema in her right upper limb is a significant issue and in my opinion makes her unfit to work".

In addition, as part of the Complainant's appeal, I note that in her correspondence dated 30 March 2017, Ms F. C., Manual Lymph Drainage Therapist advised, as follows:

"[The Complainant] *first came to me in May 2016 presenting with lymphedema of her right arm, secondary to surgery and axillary clearance two years previously. At the time, the volume difference between her arms was 31.37% or .773 litres.*

We commenced an intensive treatment, which consisted of MLD, compression bandaging and exercise. After this treatment, the volume difference between her arms was 23.05% or .568 litres.

/Cont'd…

[The Complainant] *was then fitted with a compression garment and given a series of exercises.*

I measured [the Complainant] *again on 22nd March 2017. At this time, the volume difference between her arms was 21.27% or .524 litres.*

This is a long-term chronic condition, which will require treatment continuously. [The Complainant] *has pain when performing everyday tasks – hovering, driving etc. Driving and using the computer in particular cause pooling of fluid around the elbow, which without treatment would develop into fibrosis of the tissue"*.

I note from the documentary evidence before me, an email from Dr C, Specialist in Occupational Health and the Chief Medical Officer for the Company at 21:15 on 3 July 2017, as follows:

"These breast cancer ones are always difficult.

The lady has positive lymph nodes and that is always a worry and the axillary clearance resulted in lymphoedema. Nevertheless she is doing quite well and her job is sedentary; she is fit at the very least to make an attempt at returning to work. We have supported her for a long period of time, but it is now reasonable to expect her to return to work.

The decision of the DSP to award invalidity pension is not relevant, since the definition of disability used by the DSP is very different to the one in this policy …

The letter from the GP is brief and doesn't [add] *anything new. There is no specialist report to support her ongoing absence"*.

To consider the appeal fully, the Company arranged for the Complainant to attend for a further medical examination with Dr B, Specialist in Occupational Health. The Complainant attended for assessment on 1 August 2017 and I note that in his ensuing Medical Report dated 17 August 2017, Dr B advises, among other things, as follows:

*"**4. CURRENT SYMPTOMS:***

Right arm feels heavy all the time with pain in the right elbow and across her chest on the right side, described as a crampy pain 5/10 in severity, intermittent last one to two minutes. Overall this lady indicated the pain is manageable, but requires to take Neurofen as required. The pain can be aggravated by heavy lifting or major movements. She had stopped driving because of her chest pains. Other activities like hoovering or ironing may also aggravate the pain. Sleeping patterns have been broken …

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12. CONCLUSIONS AND RECOMMENDATIONS:

12.1 Diagnosis:

The history, examination and medical reports indicate a history of breast cancer and right sided lymphoedema. It appears the lymphoedema is responding to physiotherapy but the physiotherapy intervention will likely be on a long term basis. I note that in the previous report compression bandaging at night was to be started, currently this lady no longer needs compression bandaging at night.

12.2 Fitness for work:

In my considered opinion, this lady is fit for her normal duties. I acknowledge that the contract is no longer available. In my opinion, the presence of lymphoedema and the other symptoms would not render someone in this lady's position from performing their full normal duties, although work rehabilitation is usually preferable, perhaps working half the normal hours over four to six weeks before commencing full normal duties.

12.2 Suitability for insurance benefit:

In my considered opinion, this lady no longer fulfils the definition of disability as required under your policy. Regrettably, I am unable to support further insurance benefits".

As a result, I note that the Company wrote to the Complainant on 18 September 2017 to advise that it was upholding its decision to cease payment of her income protection claim, as follows:

"Under the terms of the policy, the definition of disability in relation to a suited occupation states:

"Where the member is unable to perform the material and substantial duties of their normal occupation as a result of their illness or injury, a suited occupation is one for which they are suited by reason of education, training or experience".

Based on the claim appeal evidence received and the recent IME carried out I regret to advise we are unable to consider this claim appeal. The treating specialist that conducted the assessment states:

"In my considered opinion, this lady is fit for her normal duties. I acknowledge that the contract is no longer available. In my opinion, the presence of lymphoedema and the other symptoms would not render someone in this lady's position from performing their ***full normal duties****"."*

/Cont'd…

I note that with regard to the Report dated 17 August 2017, of Dr B the Specialist in Occupational Health that the Complainant attended on 1 August 2017 for assessment, the Complainant states in her email to this Office dated 16 August 2018, as follows:

> *"There are a number of factual errors in this report. My father did not die at 44 and I do not have a sister who died of ovarian cancer. In addition all medical reports pertaining to me were listed including the reports on my cancer. The relevant reports are the ones relating to my lymphoedema. There is no mention of my invalidity pension.*
>
> *This is of relevance when making an informed decision on my condition. This should be referred to in the report if it was considered as part of the decision making process. In this report it was found that I didn't meet the definition of disability as required under the policy. The rationale for this statement has not been clearly explained. I was independently assessed by the Department of Social Welfare and no mention was made of this at all"*

I note from the documentary evidence before me that the Company asked Dr B to comment and he responded in writing, dated 22 May 2018, as follows:

> *"I note* [the Complainant's] *comments, and apologise for any factual issues …*
>
> *As you are aware, I reviewed this lady on two occasions, 5th January 2016 and 1st August 2017.*
>
> *With regards to this lady's arm measurements. The left unaffected upper limb was already measured on the first assessment and did not require repeated …*
>
> *All medical evidence are routinely reviewed as part of independent medical assessments, though not necessarily commented on in the final report …*
>
> *My professional opinion and recommendation remain unaltered"*

The errors contained in this Report in relation to the Complainant's family history are careless and regrettable, and I can understand how they would undermine the Complainant's confidence in the opinion.

The Complainant considers that her receipt of an Invalidity Pension from the Department of Employment Affairs and Social Protection confirms her ongoing inability to return to work and that this ought to have been included in the Report from Dr B. I accept, however, the Company position that the decision of the Department of Employment Affairs and Social Protection to award the Complainant an invalidity pension is not relevant, since the definition of disability used by that Department is different to the definition of disability contained in the Group Income Protection policy. In this regard, I accept that the

/Cont'd…

Complainant's income protection claim was governed by the terms and conditions of the Group Income Protection policy, which forms the basis of the contract of insurance.

In addition, in her email to this Office dated 22 October 2018, the Complainant submits, as follows:

> *"The policy states that a proportionate benefit is payable if there is a reduction of earnings due to a disability following the normal occupation or any other occupation. The company found that the part time finding didn't meet the disability requirement of the policy. Is the company correct in its interpretation? Does the company contend that a part time finding fails to meet the proportionate benefit criteria in all circumstances. If so why is this clause in the policy.*
>
> *Part time work would involve a reduction in earnings. Can the company explain how Lymphodema satisfied their disability criteria when income protection was paid to me yet doesn't when the condition was deemed to necessitate part time work"*.

In this regard, Section IV, 'Claims', of the applicable Income Protection Policy Conditions booklet provides, among other things, at pg. 13, as follows:

> ***"PROPORTIONATE BENEFIT***
>
> *We will pay a proportionate benefit if prior to disability the member was following the material and substantial duties of their normal occupation and as a result of their disability they have a reduction in earnings because they are either:*
>
> - *following their normal occupation on a part-time basis*
>
>   *or*
>
> - *following any other occupation"*

In its letter to this Office dated 19 November 2018, the Company advises, among other things, as follows:

> *"A reduced benefit is payable to claimants but only in circumstances where the individual is considered disabled from performing their normal occupation and is undertaking reduced working activities. In this situation,* [the Company] *deemed* [the Complainant] *fit to return to a suited occupation and at the time that the assessment was carried out* [the Complainant] *was not undertaking reduced work activities therefore there was no entitlement to a reduced benefit.* [The Company] *were of the opinion that* [the Complainant] *was fit to return to a suited occupation as she did not satisfy the definition of disablement"*.

Finally, I note that the Complainant refers specifically to an email on the Company file from Dr C, Specialist in Occupational Health at 21:15 on 3 July 2017, which provides, as follows:

/Cont'd…

"These breast cancer ones are always difficult.

The lady has positive lymph nodes and that is always a worry and the axillary clearance resulted in lymphoedema. Nevertheless she is doing quite well and her job is sedentary; she is fit at the very least to make an attempt at returning to work.

We have supported her for a long period of time, but it is now reasonable to expect her to return to work.

The decision of the DSP to award invalidity pension is not relevant, since the definition of disability used by the DSP is very different to the one in this policy …

The letter from the GP is brief and doesn't [add] *anything new. There is no specialist report to support her ongoing absence.*

Can you send me the password for [Dr A]*'s report? I am sure she wrote a detailed report and outlines the reason why she believes this lady is fit for work …*

I think we will have to send her for another medical opinion. [*Dr S. O'B.*] *in* [*organisation*] *is good and I expect that she will agree with* [Dr A]. *If I saw her I would probably advise to support partial benefit for 2-3 months and then discontinue"*.

In this regard, in her email to this Office dated 22 October 2018, the Complainant submitted, as follows:

"I also note that the Insurer has included in their letter dated 4th October under all medical reports an email address to the Chief Medical Officer [Dr C] *who acts for the Insurer dated 3rd July 2017 notifying her of my appeal.* [Dr C] *is also the medical director of* [M.] *the independent medical assessor. In this email,* [Dr C] *advises the company to send me for an assessment with* [organisation]. *In this email* [Dr C] *comments that she would expect the independent medical assessment to agree with the findings of* [Dr A], *however she acknowledges she hasn't seen the report. She also says what she would expect to find in relation to part payment without her actually assessing me. The independent assessment in appeal was conducted by* [M.]*"*.

In its letter to this Office dated 19 November 2018, the Company replied, as follows:

"[Dr B] *has been working with* [M.] *since 2014 as an Occupational Health Physician. While* [Dr B] *does work for* [M.] *it is an independent company and has no connection to* [the Company]. [Dr C]*'s role as our Chief Medical Officer is separate from* [M.] *and she does not carry out any independent medicals for our claimants.* [Dr B] *has carried out these medicals* [for the Company] *and other Insurers in the market and his independence in these assessments has never been called into question"*.

/Cont'd…

I am concerned about certain aspects of the assessment of this claim.

I am not a medical expert and my function is not to adjudicate on conflicts of medical opinion. My role is to assess whether or not the Provider acted reasonably, properly and lawfully in coming to its decision of ceasing payment to the Complainant.

Based on the evidence before me, I do not believe it was reasonable for the Provider to arrive at the decision it did.

While the conduct of medical professionals is not a matter for this Office and I make no comment on their independence or competence, I will consider the impact of these reports as they relate to, and influenced the decision of the Provider in rejecting the Complainant's claim.

In that regard, I am particularly concerned about the tone and content of an e-mail from Dr C, Specialist in Occupational Health who, I understand, also acts as Chief Medical Officer for the Company.

There are a number of statements in the e-mail sent by Dr C at 21:15 on 3 July 2017 which concern me and which, in my view, undermine the Provider's assessment process as it relates to the Complainant.

These are as follows:

> *"She is fit at the very least to make an attempt at returning to work".*

I do not find this to be a definitive assessment of the Complainant's ability to work

> *"We have supported her for a long period of time, but it is now reasonable to expect her to return to work*".

I do not believe the length of time the Complainant has been in receipt of benefit under the policy should have any impact on the decision in relation to her fitness to work and I fail to see its relevance of the length of time the Complainant has been in receipt of benefit in the context of an assessment of the Complainant's fitness to work.

> *"Can you send me the password for [Dr A's] report? I am sure she wrote a detailed report and outlines the reasons why she believes this lady is fit for work…"*

This comment would appear to indicate that as Chief Medical Officer, Dr C appears to have arrived at a view on the fitness of the Complainant to work without accessing all the reports already completed on the Complainant.

Finally and most worrying, I note the comment "*I think we will have to send her for another medical opinion. [Dr S. O'B.] in [organisation] is good and I expect that she will agree with [Dr A]. If I saw her I would probably advise her to support partial benefit for 2-3 months and then discontinue".*

/Cont'd…

I find this approach by the Provider to be most unreasonable. The idea that the Complainant would be referred for any medical assessment in circumstances where the Provider's Chief Medical Officer would "*advise*" on the possible outcome of such an assessment is, in my view, most unreasonable and unacceptable.

I am also concerned that none of the medical assessments carried out on behalf of the Provider appear to have addressed the issues set out in the correspondence from Ms F C, Manual Lymph Drainage Therapist who advised, among other things:

> *"Driving and using the computer in particular causes pooling of fluid around the elbow, which without treatment would develop into fibrosis of the tissue".*

This would appear to me to be an important matter deserving of consideration in any decision to require the Complainant to return to work, where working with a computer is a central part of her occupational role.

I am mindful that the Company did not as part of its assessment of her appeal send the Complainant to Dr S. O'B., who the Chief Medical Officer had advised *"is good and I expect that she will agree with* [Dr A]*"*. Instead, the Company arranged for the Complainant to be assessed by Dr B, Specialist in Occupational Health on 1 August 2017, whom I note had previously assessed the Complainant on 5 January 2016 and had found her at that time to be *"unfit for work"* and the Company had accepted that medical opinion and continued paying the Complainant her income protection claim. It was the medical opinion of Dr B on 1 August 2017 that the Complainant *"is fit for her normal duties"*.

That said, I have concerns that the Company, when ceasing benefit, ignored the medical opinions it had sought and received that indicated that: *work rehabilitation is usually preferable* and that reduced working hours was preferable for a time (*"she could certainly resume working on a part time basis initially and if this did not unduly aggravate symptoms then there would be no reason why she could not phase up a return to full time").*

I would have expected where such medical opinions were received, some continuation of payment of benefit from the Company was necessary for a time, after fulltime benefit was to cease, to allow a period of time for a sufficient improvement in health and to assist a claimant to adjust back into the workplace. There was no such payment considered or offered by the Company here when it decided to end the payment of benefit.

For the reasons I have set out above, I do not believe it was reasonable of the Provider to decide to discontinue paying benefit to the Complainant under the policy. Accordingly, I uphold this complaint and direct the Provider to reinstate the payments and pay a sum of €3,000 in compensation to the Complainant.

I would also point out that income protection claims are reviewable by the Company at its discretion, and should the Company wish to further review the claim, I consider that a Functional Capacity Evaluation should be arranged to examine the Complainant's work abilities, particularly in relation to using a computer, with her medical condition and I direct accordingly.

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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 upheld, on the grounds prescribed in ***Section 60(2) (b) and (g).***

Pursuant to ***Section 60(4) and Section 60 (6)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** I direct the Respondent Provider to rectify the conduct complained of by reinstating the payments and by making a compensatory payment to the Complainant in the sum of €3,000 to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant to the Provider.

I also 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***, if the amount is not paid to the said account, within that period.

The Provider is also required to comply with ***Section 60(8)(b)*** of the ***Financial Services and Pensions Ombudsman Act 2017.***

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

9 April 2019

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.**