Decision Ref: 2019-0240

Sector: Insurance

Product / Service: Payment Protection

Conduct(s) complained of: Disagreement regarding Medical evidence submitted
Rejection of claim - fit to return to work

Outcome: Upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The Complainant became a member of a Group Income Protection Scheme in **1999**. The policyholder is a named Trade Union and its individual members can opt to join the Scheme through the policyholder's broker, which administers the policy. The Provider was the insurer of this Scheme from December 2012 to May 2017, responsible for the underwriting of applications for cover and assessing of claims.

The Complainant's Case

The Complainant completed an income protection claim form on **25 June 2014** wherein she listed her disability as *"breast cancer"* and her last day at work as *"10 June 2014"*. Following its assessment, the Provider was satisfied that the medical evidence supported a valid claim and it commenced income protection payments after the deferred period, with effect from **11 December 2014**.

The Complainant retired from her employment on grounds of ill health on **30 August 2015**.

Following a review of her income protection claim in 2016, the Provider concluded that the Complainant no longer satisfied the policy terms and conditions for a valid claim and it ceased payment of her claim on **25 January 2017**. The Complainant appealed this decision

but the Provider has repeatedly upheld its decision to cease payment of her income protection claim.

In this regard, the Complainant sets out her complaint, as follows:

> *"I have undergone treatment for breast cancer since June 2014. Before I became ill I held…a senior management position within the* [employer] *structure, reporting directly to the Chief Executive Officer …*
>
> *Before my diagnosis I managed this role effectively and I could sustain the long hours and the burden of responsibility.*
>
> *… The job required one hundred percent of my commitment and time so I could carry out the role effectively. It required energy and enthusiasm and an ability to react and respond to various situations and sustain long hours.*
>
> *Following my diagnosis and treatment I have lost the confidence and the physical strength to return to this post of responsibility. I am vulnerable emotionally and whilst I function well on a day to day basis I do not have anything like the stress or pressure that I would have if I returned to work. I did not have the option to return for a shorter working week, as the job demanded the long hours …*
>
> *In August 2015 I retired on the grounds of ill health…I was sent for an independent medical and the medical officer appointed by* [my Employer] *certified me as unfit to work.*
>
> *I have an income protection policy underwritten by* [the Provider]. [The Provider] *upheld my application under the scheme and I have been in receipt of benefit since December 2014 when my salary was reduced whilst on sick leave.*
>
> *I informed* [the policyholder's broker] *of my decision to retire on the grounds of ill health and my employer informed them in writing on the 31st August 2015. I followed this up with a phone call to* [the policyholder's broker] *and they confirmed that they had notified* [the Provider] *and all was in order. My date of retirement was the 30th August 2015.* [The Provider] *did not contact me at that time and* [it] *continued to pay my benefit.*
>
> *In October 2016* [the Provider] *requested that I attend for an independent medical and based on this medical they deemed I was fit to return to work…I appealed this decision with supporting documentation from my Oncologist and my GP, both of whom confirmed that I was unfit to return to my job as* [title] *…*
>
> [The Provider] *then referred me to* [Dr P.] *Consultant Psychiatrist.* [Dr P.] *reported that "from the perspective of psychiatric illness" I am fit to carry out my job. I never claimed to have a psychiatric illness. The basis of my appeal was my inability to carry out the role of* [title] *as I am no longer able for the stress and pressure of this job as a result of my cancer treatment.*

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> *I am unable to carry out my job as* [title] *due to my cancer diagnosis and treatment, a recognised illness under the terms of the policy. I am not involved in carrying out any other occupation for profit, reward or remuneration of any kind whatsoever.*
>
> *I have paid into this income continuance scheme since 1999, when the scheme was first promoted through* [my trade union]*. I am fully satisfied that I am not fit to return to the post of* [title] *and all the stress attached to the job and the independent medical assessor* [appointed by my Employer] *concurred with this, and my employer approved my retirement on the grounds if ill health. My GP and Oncologist also agree with this.*
>
> *I could not physically or emotionally take on this role again following my illness and treatment as my energy and emotional well-being are compromised. I believe having paid insurance against such an eventuality my claim should be upheld as I am not medically fit to return to my normal occupation and I am not following any other occupation"*.

In this regard, in her correspondence dated 9 November 2016, the Complainant's GP, Dr C. advises, as follows:

> *"As you are aware* [the Complainant] *was diagnosed with breast cancer in 2014. She had surgery, chemotherapy and radiotherapy. She is on tamoxifen. She had lymphoedema and has to attend physiotherapy. She had a very stressful job and neither physically nor mentally in my opinion would she be able to return to this work. She has had anxiety over the prospect of having to return to work and I feel this would be detrimental to her health. She would love to have been in a position to return to work but after her diagnosis this is not possible. Due to her breast cancer diagnosis and subsequent treatment she would not be able to manage the demands that would be placed on her due to work. I would be concerned that the stress may cause her to become unwell again"*.

In addition, in his correspondence dated 21 December 2016, the Complainant's Consultant Medical Oncologist, Prof M. advises, as follows:

> "[The Complainant] *has found her cancer journey extremely difficult and, at this point, believes it would be impossible for her to return to the stressful situation she has at work …*
>
> *As such, I support her endeavour to retire medically from her job"*.

In her correspondence to this Office dated 13 June 2018, the Complainant submits, *inter alia*, as follows:

> *"I did not make the decision to retire on ill health easily. I would love to be able to continue to work at the level of* [title] *as I got great job satisfaction from my role.*

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> *However I believe that the decision to retire was correct as I do not have the stamina to carry out the role any longer. I get upset easily and I know I could not operate at the drive and level expected of a Director … Following my diagnosis and treatment my confidence has significantly decreased and I do not have the same attitude or self-belief that is required to carry out the role of* [title].
>
> *My GP,* [Dr C.] *and the Independent Medical Doctor for* [my Employer] *agree that I am not fit to carry out my role as* [title]. [Prof M.] *Consultant Oncologist supports this. I have spoken to* [Dr J.] *Consultant Radio Therapist* [who] *supports this decision also. The Independent Medical Assessors on behalf of* [the Provider] *do not agree.*
>
> *I believe if I had held a lower grade* [with my Employer] *such as a Staff Officer or lower, where I could opt for shorter working week I could have returned to work. As a* [title] *I could not reduce my working week and I had to be on "top of my game" at all times"*.

In addition, in her email to this Office dated 21 July 2018, the Complainant also submits, as follows:

> *"I am still satisfied that* [the Provider] *are omitting to consider the nature of the job I held as* [title] *and the need to be fully engaged, energetic and enthusiastic to carry out this role and deal with the long hours of work. My daily activities prior to my cancer diagnosis bear no resemblance to my current work load and I know I would be unable to carry out the job of* [title]*. Each day I have to rest in the middle of the day and I would not have the energy or stamina to maintain my previous role. Whilst my oncologist initially said I should return to work he did not appreciate the type of work I did or the responsibility of the role"*.

As a result, the Complainant seeks for the Provider to reinstate her income protection claim from 25 January 2017.

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

<u>The Provider's Case</u>

Provider records indicate that the Complainant completed an income protection claim form on 25 June 2014 wherein she listed her disability as *"breast cancer"* and her last day at work as *"10 June 2014"*. In addition, her GP, Dr C. completed the GP claim form on 27 June 2014, advising that the Complainant had been diagnosed with breast cancer on 29 May 2014 and was certified as unfit for work from 11 June 2014.

A member of the Group Income Protection Scheme can claim income protection benefit during a period of disability, which is defined in the policy conditions as *"a period throughout which a Member is totally unable to carry out his/her Normal Occupation due to a recognised*

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illness or accident". Following its assessment, the Provider was satisfied that the medical evidence supported a valid claim for the Complainant.

As the deferred period under the policy is *"an aggregate of 26 weeks in any consecutive 4 year period or less"*, the Provider commenced income protection payments with effect from 11 December 2014.

The Provider notes that it is no longer the underwriter of the Group Income Protection Scheme in question, however it does retain responsibility for the Complainant's claim as she made this claim whilst it was the underwriter. In addition, whilst the Complainant retired from her employment on grounds of ill health on 30 August 2015, the Provider notes that this has no relevance to her income protection claim or the requirement for her to satisfy the policy conditions in order for her claim to remain in payment.

In this regard, income protection claims are always subject to ongoing review. As part of such a review, the Provider obtained a medical report dated 12 September 2016 from the Complainant's Consultant Medical Oncologist, Prof M., wherein he indicated that her treatment was completed, her cancer diagnosis was in remission and that the prognosis for a return to work was excellent. In addition, the Provider arranged for the Complainant to attend for an independent medical examination with Dr D., Specialist in Occupational Health on 4 October 2016. In her ensuing report dated 12 October 2016, Dr D. advised, *inter alia*, that the Complainant *"is in remission from right sided breast cancer"* and that *"I can see no medical reason why* [she] *cannot return to work … in my opinion,* [the Complainant] *does not meet the definition of disability as defined"*.

As a result, the Provider concluded that the Complainant no longer satisfied the policy terms and conditions for a valid income protection claim and it advised her by way of correspondence dated 3 November 2016 that it was ceasing payment of her claim on 25 January 2017, which it then did.

Notwithstanding that the medical evidence from her Consultant Medical Oncologist, Prof M. dated 12 September 2016, and from her independent medical examination with Dr D., Specialist in Occupational Health dated 12 October 2016, both confirmed that her cancer diagnosis was in remission, the Complainant appealed the Provider's decision to cease payment of her income protection claim. In this regard, in correspondence dated 9 November 2016, the Complainant's GP, Dr C. advised that the Complainant *"had a very stressful job and neither physically nor mentally in my opinion would she be able to return to work. She has had anxiety over the prospect of having to return to work and I feel this would be detrimental to her health"*.

In this regard, the Provider arranged for the Complainant to attend for an independent medical examination with Dr P., Consultant Psychiatrist on 10 April 2017. In his ensuing report dated 10 April 2017, Dr P. advised, *inter alia*, that *"any symptoms of psychiatric illness present were mild in severity … Mood symptoms present are reactive to her breast cancer diagnosis and treatment, and are proportionate within normal mood parameters … There are no significant restrictions on normal daily activities caused by symptoms of psychiatric*

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illness … There is no objective evidence of pathological depression or anxiety … [she is] *currently fit to carry out normal occupation"*.

The Provider notes that the Complainant states she *"never claimed to have a psychiatric illness"*, however it is satisfied that it was appropriate and correct, given the contents of the correspondence it received from her GP, Dr C. dated 9 November 2016, for it to arrange for the Complainant to attend for an independent medical examination with a Consultant Psychiatrist in order for it to also assess her claim from a mental viewpoint to ensure that she received a thorough and fair claim assessment.

The Provider submits that the Complainant's own view of her inability to carry out her previous normal occupation, due to the stress and pressure of that job is not supported by the medical evidence on file. In this regard, the Complainant may well have some symptoms, but the Provider is satisfied that these do not render her *"totally unable to carry out…her Normal Occupation"*, as required by the policy terms and conditions, for there to be a valid income protection claim.

The Provider notes that its Chief Medical Officer had sight of the full medical file when assessing the Complainant's income protection claim for cancer and from resulting stress and pressure impacting upon her to a level that she is totally unable to perform her previous normal occupation. It concluded that from January 2017 onwards the medical file no longer supported a claim for the Complainant being totally unable to work as a [title] with a [employer]. In addition, the Provider is also satisfied that the job requirements of the Complainant's previous position of employment were fully considered throughout the claim assessment. In this regard, in its correspondence to this Office dated 20 June 2018, the Provider stated, as follows:

> *"We assess our income Protection claims based upon the medical file as it relates to the policy conditions for a valid claim, namely a 'Period of Disability'. It is therefore important that upon review of a medical file that it is not alone the medical condition that is considered but also its impact upon being totally unable to perform the previous 'normal occupation'. It is agreed that there are conflicting medical reports but the balance and speciality of report in respect of assessment to a 'Period of Disability' is in the view of our claims team, in conjunction with our* [Chief Medical Officer]*, that there is not a valid claim from January 2017. This claim was assessed based upon the duties of the previous 'normal occupation' as demonstrated by the medical reports and assessments"*.

In conclusion, the Provider considers that the complaint at hand is essentially about the medical evidence produced in support of the Complainant's income protection appeal and that obtained by independent medical examinations. The Provider is satisfied that when the full medical file is reviewed and on the balance of the medical evidence received, the continuance of the income protection claim for the Complainant is not medically supported from January 2017 onwards. As a result, the Provider is satisfied that as the Complainant no longer met the policy terms and conditions for a valid claim at that time, that it correctly ceased payment of her income protection claim on 25 January 2017.

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The Complaint for Adjudication

The complaint is that the Provider wrongly or unfairly ceased payment of benefits for her income protection claim.

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 13 June 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.

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

The complaint at hand is that the Provider wrongly or unfairly ceased payment of the Complainant's income protection claim. In this regard, the Complainant was a member of a Group Income Protection Scheme and the Provider was at that time, the underwriter of this Scheme. The Complainant was diagnosed with breast cancer on 29 May 2014 and certified as unfit for work from 11 June 2014. She submitted an income protection claim and following its assessment, the Provider was satisfied that the medical evidence supported a valid claim and it commenced income protection payments with effect from 11 December 2014.

In this regard, Section 4.1, 'Disability Benefit', of the applicable Group Contributory Income Protection Plan Policy Conditions provides, *inter alia*, at pg. 11, as follows:

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"Disability Benefit will be payable from the end of the Deferred Period if, in Our opinion, having regard to all of the information available to it, the Member is suffering a Period of Disability, as defined in these Conditions".

Section 1, 'Contracts and Definitions', of these Policy Conditions provides the following definitions at pg. 4:

*"**Period of Disability***

A period throughout which a Member is totally unable to carry out his/her Normal Occupation due to a recognised illness or accident and during which the Member is not involved in carrying out any other occupation for profit, reward or remuneration of any kind whatsoever whether sedentary or otherwise and whether or not entirely different from his/her Normal Occupation ….

Normal Occupation

The Member's normal principal occupation during the year immediately prior to a Period of Disability".

I note that the Complainant retired from her employment on grounds of ill health on 30 August 2015. In this regard, an ill health retirement application is determined according to the specific criteria of the Employer's pension/ill health retirement scheme, whilst income protection is assessed according to the specific policy definition of disability. There is often a difference between the criteria for each of these, and a person may be eligible and accepted for ill heath retirement but not income protection, and indeed vice versa.

The occupational health provider assessing ill health retirement may take into account the employee's attendance record, motivation and subjective symptoms, in addition to the nature of the illness and the specific work place and role. Income protection insurance decisions are based on objective medical evidence and the job demands of the occupation, to ascertain whether the claimant meets the policy definitions for a valid claim. As a result, the fact that the Complainant has retired on ill-health grounds does not directly impact on an income protection assessment or review and she must continue to satisfy the policy terms and conditions in order to have a valid claim.

It is an industry standard that income protection claims are subject to ongoing review. In this regard, section 4.5, '**Other Evidence and Enquiries'**, of the Policy Conditions provides, *inter alia*, at pg. 13, as follows:

"The payment of benefit is not guaranteed and will at all times be subject to regular review. The claim will at all times be assessed on the Member's ability to carry out his/her Normal Occupation. If the Member's Normal Occupation is no longer available for the Member to return to, it will have no impact on the continued payment of the claim".

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Following one such review of her claim in late 2016, the Provider concluded from the medical evidence before it, that the Complainant no longer satisfied the policy terms and conditions for a valid income protection claim and it therefore ceased payment of her claim on 25 January 2017. The Complainant appealed this decision but the Provider has repeatedly upheld its decision to cease payment of her income protection claim.

I note that as part of its review of the Complainant's income protection claim, the Provider obtained a medical report from her Consultant Medical Oncologist, Prof M. dated 12 September 2016, wherein he advised, as follows:

> "[The Complainant]*…has completed treatment for her breast cancer except for her adjuvant endocrine therapy which she commenced in November 2014 and she will be on same for 5 years.*
>
> *To briefly summarise,* [the Complainant] *originally presented back on 29/05/2014 with a mass in the breast and had confirmed T3 N0 cancer. Her first consultation prior to this was in March 2014. She was unable to work throughout all of her treatment but this is now completed. She has had no previous similar history.*
>
> *Her current treatment is with Tamoxifen 20mg p.o daily which will be ongoing for 5 years.*
>
> *My treatment advice is to return to normal living and she will be reviewed in my Outpatient Clinic every 6 months, with her next appointment in November 2016. She will be discharged to her GP after 5 years. She requires no further referrals.*
>
> [The Complainant's] *prognosis for return to work is excellent"*.

In addition, I note that the Provider then arranged for the Complainant to attend for an independent medical examination with Dr D., Specialist in Occupational Health on 4 October 2016 and that in her ensuing report dated 12 October 2016 she advised, *inter alia*, as follows:

> *"In May 2014,* [the Complainant] *presented to her doctor with a lump in her right breast and fatigue. She was subsequently diagnosed with invasive ductal carcinoma Grade III of the right breast. She was treated with lumpectomy, chemotherapy and radiotherapy, followed by adjuvant endocrine therapy. She was part of a trial but this was discontinued due to side effects and she also received 12 months of Herceptin infusions.* [The Complainant] *finished the active part of her treatment in July 2015 and remains on Tamoxifen hormonal therapy.*
>
> [The Complainant] *says chemotherapy was very difficult and she still has post-chemotherapy fatigue.* [She] *says she had problems with lymphedema in her right arm and availed of physiotherapy which continues on a monthly basis.*
>
> [The Complainant] *attends oncologist and radiologist every 6-12 months. She saw a specialist three weeks ago and he is very pleased with her progress and she does not*

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require any medical follow-up for another 12 months. [She] *had a scan in May 2016 which was normal and will have a repeat scan in May 2017.*

[The Complainant] *availed of counselling at a post cancer care centre, she also availed of reflexology and yoga. She took antidepressants for a short period in 2015 but says mentally is a lot better now …*

CURRENT SYMPTOMS:

The Complainant says she is easily stressed. Her confidence is low, her energy levels are improving, her sleep is disturbed, she has hot flushes, night sweats, her right arm tires easily and she wears a lymphoedema sleeve at times….

ACTIVITIES OF DAILY LIVING:

[The Complainant] gets up at 7 am to help her children get ready for school. Sometimes she goes back to bed during the day for a nap. She is able to do the grocery shopping and prepare meals. She visits her mother. She walks most days and is able to walk for about 3 miles. She is able to drive. She enjoys going to the choir. She paces her activities to avoid fatigue and wears a lymphoedema sleeve when doing any physical tasks. [The Complainant] has a cleaner who comes once a month to help with heavy household chores. She and her family went to Italy in 2016. She is able to read, watch the television and use the computer. Kathleen drove herself from [home approximately 150 kms away] to today's appointment.

[The Complainant] *joined the* [employer] *at the age of 18 years and was promoted several times to a senior position. She was* [title] *with overall responsibility for several departments. There were 200 staff reporting to her and a very busy job and attended meetings in the evening, did a lot of public speaking. She travelled to* [a location 155km away] *at least once a week and also travelled to other parts of the country for meetings. She loved her job and she was planning to seek further promotion to become a* [role].

… *since her illness* [the Complainant] *has lost her "mojo", she thought a lot about returning to work and says even the thoughts of returning to work makes her feel very anxious. She has not attempted to return to work. She attended her employer's occupational health physician. She applied for ill-health retirement which was granted with effect from August 2015. She has no plans to return to the workforce …*

The Consultant Medical Oncologist confirms the diagnosis of invasive ductal carcinoma Grade III. She appears to have responded well to treatment and is in remission. The consultant advises her to return to normal living and states that her prognosis for return to work is excellent …

[The Complainant] *is in remission from right sided breast cancer. She is tolerating anti-hormonal therapy reasonably weak. She has a good prognosis for remaining in remission.*

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> *I can see no medical reason why* [the Complainant] *cannot return to work. There is no medical evidence to indicate that she lacks the physical or mental capacity to perform the role of senior manager reliably, safely or effectively. There is no medical evidence that returning to work will have an adverse effect on her health. In fact remaining on long term sick leave places* [her] *at risk of the adverse health effects of long term worklessness.*
>
> *In my view, it would be discriminatory to prevent* [the Complainant] *returning to work should she choose to do so. She functions normally in her daily life and there is no objective medical evidence to indicate that she cannot also function normally in her work-life.* [The Complainant] *appears to have made a firm decision to withdraw from the workplace. However, I believe she is medically fit to do so should she choose to.*
>
> *In my opinion,* [the Complainant] *does not meet the definition of disability as defined under this policy. I am unable to categorise* [her] *as totally unable by reason of sickness or accident to follow the occupation* [of] [title] [with her Employer]*"*.

I note from the documentary evidence before me that the Provider then referred the file to its Chief Medical Officer for consideration, who on 1 November 2016 recommended, as follows:

> *"Based on* [independent medical examination] *report and update from consultant I feel* [the Complainant] *is fit to* [return to work] *– medically there doesn't appear to be any reason for here continued absence form work. She has been out of work now since June 2014, therefore I am happy to support claim for a further 3 months to allow her to put in place a plan for* [return to work] *should she chose to do so"*.

Based upon the medical evidence including the evidence from her Consultant Medical Oncologist, Prof M., dated 12 September 2016 and from the independent medical examination with Dr D., Specialist in Occupational Health dated 12 October 2016, both of which confirmed that the Complainant's cancer diagnosis was in remission, the Provider concluded that the Complainant no longer satisfied the policy terms and conditions for a valid claim. As a result, the Provider then made the decision to cease payment of the Complainant's income protection claim with effect from 25 January 2017.

I note that the Complainant then wrote to the Provider on 22 December 2016 to appeal its decision, as follows:

> *"I enclose two letters in support of my appeal against the decision of* [the Provider] *to stop my income continuance payment. The letters are from my Consultant Oncologist and my General Practitioner. The letters support my decision to retire on the grounds of ill health as the nature of my job as* [title] *is highly stressful, and following my cancer diagnosis & treatment, I am no longer able to carry out my role"*.

Enclosed with this letter was correspondence from the Complainant's GP, Dr C. dated 9 November 2016, wherein she advised, as follows:

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> *"As you are aware* [the Complainant] *was diagnosed with breast cancer in 2014. She had surgery, chemotherapy and radiotherapy. She is on tamoxifen. She had lymphoedema and has to attend physiotherapy. She had a very stressful job and neither physically nor mentally in my opinion would she be able to return to this work. She has had anxiety over the prospect of having to return to work and I feel this would be detrimental to her health. She would love to have been in a position to return to work but after her diagnosis this is not possible. Due to her breast cancer diagnosis and subsequent treatment she would not be able to manage the demands that would be placed on her due to work. I would be concerned that the stress may cause her to become unwell again"*.

Also enclosed was correspondence from the Complainant's Consultant Medical Oncologist, Prof M. dated 21 December 2016, wherein he advised, as follows:

> *"*[The Complainant] *is a patient of mine who underwent treatment for a breast cancer…At this point, she has no evident disease and is in follow up on Tamoxifen therapy.*
>
> *She has found her cancer journey extremely difficult and, at this point, believes it would be impossible for her to return to the stressful situation she has at work …*
>
> *As such, I support her endeavour to retire medically from her job"*.

I note that the Complainant's GP, Dr C. advised, *inter alia*, in her correspondence dated 9 November 2016 that the Complainant *"had a very stressful job and neither physically nor mentally in my opinion would she be able to return to this work. She has had anxiety over the prospect of having to return to work and I feel this would be detrimental to her health"*.

I am thus satisfied with the Provider's position that it was correct for it to then also assess the claim from a mental viewpoint to ensure that the Complainant received a thorough and fair claim assessment. In this regard, I note that the Provider arranged for the Complainant to attend for an independent medical examination with Dr P., Consultant in General Adult Psychiatry on 10 April 2017 and that in his ensuing report dated 10 April 2017, he advised, *inter alia*, as follows:

> *"*[The Complainant] *last worked in her profession as* [title] [with her Employer] *in June 2014. She told me that she had worked for* [her Employer] *for 32 years. She had more than 200 people working in the areas…which reported to her …*
>
> [The Complainant] *told me that she had retired on medical grounds after giving long thought to this matter. She said she could not go back to the nature of the job. She said that the job would not allow shorter hours or a job-share situation.*
>
> *She said, "I could not see myself functioning again in that environment". She said she used to be in the public eye, dealing with media, community groups and business groups, constantly making presentations. She said she had to deal with difficult human resources issues, including a major restructuring which had just got underway*

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> *when she became unwell with breast cancer. She said, "You live and breathe the* [job]*".*
>
> *She said she would not be able to return to that work because she does not have enough stamina or energy for it. She has also lost confidence She said about retirement, "I didn't make the decision lightly".*
>
> *She said that in her work she had to delegate but she knew everything that was going on. She said, '"At the end of the day the buck stopped with you" …*
>
> *Any symptoms of psychiatric illness present are mild in severity. Mood symptoms present are reactive to her breast cancer diagnosis and treatment, and are proportionate within normal mood parameters …*
>
> *There are no significant restrictions on normal daily activities caused by symptoms of psychiatric illness …*
>
> *There is no objective evidence of pathological depression or anxiety …*
>
> *There is no objective evidence of disabling psychiatric illness that would prevent her from performing the material and substantial duties of her normal occupation.*
>
> [The Complainant] *reported symptoms which may be related to her treatment for cancer"*.

In addition, I note that in and around this time the Complainant's Consultant Medical Oncologist, Prof M. advised the Provider in his correspondence dated 13 March 2017, as follows:

> *"I write this in reply to your letter regarding* [the Complainant]*. Specifically, with respect to your question regarding new symptoms,* [the Complainant] *developed new arthralgia which may be related to her Tamoxifen therapy. Her breast cancer remains in remission. It was on the basis of this that I supported her endeavour to retire medically from her job.*
>
> *From a breast cancer standpoint, her prognosis, as per my previous correspondence, remains good"*.

I note that the Complainant's GP, Dr C. later wrote to the Provider on 30 August 2017, as follows:

> *"In my opinion medically* [the Complainant] *is unable to return to work post her diagnosis and treatment of breast cancer. She has changed from her pre diagnosis state and is prone to anxiety, fatigue and stress. This change (since her diagnosis) is so significant in my opinion that she cannot return to work as this would have a huge physical and emotional impact on her health. I acknowledge the reports from other doctors but I genuinely feel that if you knew* [the Complainant] *prior to her diagnosis*

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of breast cancer (as I do as her GP) you would realise that change in [her] *and that she cannot return to work. She has to rest every day in the afternoon and continues to suffer from lymphoedema of her arm. While she may be able to "get through the day" this is in my opinion very different from being medically fit to return to work and maintain emotional and physical well being while doing so.*

I firmly believe that [the Complainant's] *inability to return to work is completely as a result of her diagnosis of breast cancer and that had she not been diagnosed with breast cancer she would still be working today. I always found her prior to her breast cancer to be very motivated and committed to work, but she is not now fit for work and therefore should be deemed unfit to return to work"*.

In addition, Dr C. wrote again to the Provider on 26 October 2017, as follows:

"Please note my medical report from 30/8/17. We wish to appeal the decision regarding [the Complainant's] *claim.*

A report from 13.3.17 from [Prof M.] *mentioned arthralgia that* [the Complainant] *had developed from her tamoxifen therapy.* [Prof M.] *supported her endeavour to retire on medical grounds.*

She was also assessed by a doctor for [her Employer] *who deemed her retirement on medical grounds appropriate.*

In [the terms of] *her policy with you it mentions that the period of disability is when a member is "totally unable to carry out his/her normal occupation due to a recognised illness". There is no doubt in my mind that as a direct result of* [the Complainant's] *diagnosis with breast cancer she has suffered psychological impact and she is unable to return to her role…This job involved up to 60 hours per week including public appearances which she is unable to perform specifically to the job that she has left. As a result of her breast cancer diagnosis and treatment she has suffered a lot of stress and feels that she has changed and is unable to return to her previous role. She has also recently been commenced on blood pressure medication.*

In your letter from October 2017 you mention that [Dr P.] *noted mild psychiatric symptoms relating to* [the Complainant's] *breast cancer diagnosis. Surely with this recognition of even mild anxiety symptoms it is possible for her to continue normal daily activities but that this is very different to being psychologically fit to return to her job which was demanding prior to her diagnosis. The fact that she even has mid symptoms of anxiety I feel preclude her from being able to return to her highly stressful job.*

In conclusion, there was no other option for [the Complainant] *other than to return to the role that she was in prior to her breast cancer, and due to her anxiety, arthralgia from her tamoxifen therapy and the fact that she is on blood pressure medication leave her unable to return to this role. The stress of appealing the decision regarding her policy claim had caused her significant anxiety and this may have had*

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an impact on her having to start hypertensive medication which is a new illness. [The Complainant] *in my opinion cannot return to the role that she was in which is what her policy that she paid in to for twenty years was meant to compensate her for".*

I note from the documentary evidence before me that Dr P., Specialist in Occupational Medicine, who is the Chief Medical Officer with the Provider, then examined the Complainant's medical file once again and furnished the Provider with the following report on 11 April 2018:

"I wish to confirm that every report was considered at initial assessment stage and at appeal stage including all letters from [the Complainant's] *GP and treating specialist and independent assessments by* [Dr D.] *Occupational Physician and* [Dr P.] *Psychiatrist.*

It is now over 3 years since [the Complainant] *completed treatment for breast cancer. She remains on tamoxifen as maintenance treatment and she remains in remission from her breast cancer. Her claim was initially admitted but terminated following reports received from her oncologist and a specialist occupational physician IME.*

The initial report from her treating oncologist 12.9.2016 advised that [the Complainant] *should "return to normal living" and further advised that her prognosis for a return to work was excellent.*

At an initial [occupational health] *assessment* [Dr D.] *12.10.2016, she was found to have mild symptoms and was recorded as having unrestricted activities of daily living. She was felt to be fit to resume work and* [Dr D.] *considered her job demands in reaching this conclusion.* [Dr D.] *advised that she found no objective evidence that* [the Complainant] *lacked the physical or mental capacity to resume work and to perform her previous role effectively.* [Dr D.] *was also of the view that she had made a decision to withdraw from the workplace.* [Dr D.] *advised that she was fit to resume work if she chose to do so.*

[The Complainant's] *GP subsequently appealed this decision on the grounds predominantly that she had a stressful job and was not physically or mentally capable of resuming work. She alluded to anticipatory anxiety about the prospects of resuming work. Her oncologist supported the appeal on the grounds of her "stressful situation" at work…but did not elaborate with any detail in this regard. He also advised she had developed some arthralgia (painful joints) on tamoxifen.*

On the basis of the appeal which was predominately on the grounds of stress, we arranged a psychiatric IME to explore the concerns raised at appeal concerning stress and [the Complainant's] *mental health.*

The psychiatrist [Dr P.] *assessed her on 10.04.2017. He confirmed unrestricted activities of daily living and advised that any symptoms of psychiatric illness were mild. He described her mood symptoms as reactive and proportionate to her diagnosis and with normal mood parameters. He found no objective evidence of*

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pathological depression or anxiety. He found no objective evidence of a disabling psychiatric illness that would prevent her from performing the material and substantial duties of her previous occupation. As the basis of her appeal was predominately on the grounds that it was impossible to resume work in her stressful position with [her Employer] *– we made a decision to uphold our decision not to reinstate her claim. I also considered her subsequent GP letter appealing our decision 26.10.2017.*

I would add my considered view to the medical file that in occupational medicine we regard no particular job as inherently stressful but we recognise that every job will have challenging and stressful components. If activities of daily living are unrestricted we assume a capacity for work. No evidence has been presented to suggest that the symptoms of arthralgia/lymphoedema are sufficiently disabling to prevent her working nor are they interfering with her normal and unrestricted activities of daily living. Hypertension would not impact on ability to work.

I remain of the view that [the Complainant] *is not totally disabled and that she is fit to resume work".*

In her more recent email to this Office dated 3 September 2018, I note that the Complainant advised, as follows:

"[My Employer's] *Independent Medical Examiner certified me as unfit for work, my GP and Consultant Oncologist agreed with this decision. The decision was made base on the complexity and stressful nature of the job of* [title] *and the long hours I was required to work. I am awaiting a further letter from my Consultant Radiologist. I expect to have this letter in the next two weeks"*.

In this regard, the Complainant then submitted to this Office on 20 September 2018 the following correspondence from her Consultant Radiation Oncologist, Dr J. dated 12 September 2018, wherein he advised, as follows:

"I met [the Complainant] *on the 12/09/18.*

As you know, she was treated for high grade invasive breast cancer some time ago. As a result of her diagnosis and her journey, she was unable to continue with her post [with her employer]*, and after expert independent medical opinion* [with her Employer's doctor] *this was confirmed.* [Her Employer] *therefore agreed that she was not able to continue this work based on said opinion.*

I understand that [the Provider] *takes a different and contradictory view of this. As a consultant who has treated several thousand patients with breast cancer, the one thing I can say is that every patient is different and that a small but definite minority will in fact be unable to return to the same work in the future. I would hope that no inference has been made that every single cancer survivor is under some obligation to return to work, particularly when it contradicts an independent medical opinion"*.

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In reply, Dr P., Specialist in Occupational Medicine who is the Provider's Chief Medical Officer, advised in her correspondence dated 2 October 2018, as follows:

> *"I have reviewed the enclosed report from* [Dr. J.]*.*
>
> *No additional information concerning* [the Complainant's] *medical condition is alluded to in this report.*
>
> *I fully agree with* [Dr J.] *that in respect of breast cancer every patient is different and that indeed a small minority are unable to resume work.*
>
> *In* [the Provider]*, we similarly approach every case from this view point and indeed it is our experience that a small minority may remain disabled and unfit for work after completing treatment. It is also our experience that a small minority also make a conscious decision not to resume work despite the absence of any disabling medical sequelae from their illness …*
>
> *The medical evidence we have reviewed thus far does not in my considered view support her claim that she is medically disabled and in this context unfit for work as our policy terms & conditions require"*.

It is important to note that for benefits to continue to be paid, a claimant must continue to satisfy the policy conditions which are prescribed, and which govern the entitlement to benefit payments. In this regard, Section 1, 'Contracts and Definitions', of the applicable Group Contributory Income Protection Plan Policy Conditions provides the following definitions at pg. 4:

> ***"Period of Disability***
> *A period throughout which a Member is totally unable to carry out his/her Normal Occupation due to a recognised illness or accident …*
>
> ***Normal Occupation***
> *The Member's normal principal occupation during the year immediately prior to a Period of Disability"*.

It is important for the complainant to understand that simply because she met the criteria to be approved for retirement on the grounds of ill health, does not, in itself qualify her for the continuation of benefit payments under her income protection policy with the Provider. The Complainant must also understand the fact that her position is no longer available to her, has no bearing on whether or not she meets the criteria under the income protection policy, for payment of benefits. Neither will the Complainant be entitled to payment of income protection benefits simply because she paid into the scheme for a long number of years.

The policy prescribes that for benefit payments to be made, the claimant must be "*totally unable to carry out…normal occupation due to a recognised illness or accident".* In that context, I have considered the medical evidence at length and also the description of the

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Complainant's role within her employer, before she was diagnosed with breast cancer. I am conscious in this regard that the Complainant held a position within senior management requiring a high level of energy and what the Complainant has described as "*an ability to react and respond to various situations and sustain long hours*". In April 2017, in the course of undergoing the medical assessment arranged by the Provider, she described her role within her employer, as one in the public eye, dealing with media, community groups and business groups, constantly making presentations. She explained that "*you live and breath* [the employer]."

Having considered the documentary evidence before me and which I had cited from at length, I am not satisfied that in late 2016/early 2017, it was reasonable for the Provider to conclude from the medical evidence that the Complainant no longer satisfied the policy terms and conditions for a valid income protection claim. I do not accept, in that respect, that the medical evidence before it at that time, indicated that the Complainant was no longer *"totally unable to carry out…her Normal Occupation due to a recognised illness or accident"*. I am not satisfied that due regard was had to the demands of the Complainant's role in the context of her previous employment, during the claim assessment and review.

The Provider's stated position is that it regards *"no particular job, as inherently stressful but we recognise that every job will have challenging and stressful components.* The Provider also confirmed that *"If activities of daily living are unrestricted, we assume a capacity for work".* There are in fact a number of references in the evidence before me to the Complainant having "*unrestricted activities of daily living*".

In circumstances where neither the policy definition of "***Period of Disability***" nor of "***Normal Occupation***" as quoted above on pages 7-8 and again on page 17, contain any identifiable criterion regarding "*activities of daily life*", it is unclear to me precisely what such a phrase should be taken to signify. I am also unclear as to why the use of such a phrase should give rise to the Provider considering it appropriate to "*assume a capacity for work*", without firstly undertaking an accompanying analysis of the responsibilities and role of the "normal occupation" of the policyholder, and secondly, a more comprehensive understanding of the extent to which such activities of daily living are considered to be "*unrestricted*".

It is not in dispute that in late 2016 the Complainant's cancer was considered to be in remission and her own Consultant Medical Oncologist confirmed that there was no evident disease. It is clear however, that she had ongoing difficulties with post chemotherapy fatigue, and lymphoedema and was attending physiotherapy; it was noted that she had found the cancer journey extremely difficult.

I note that in April 2018, the Provider took the view that the Complainant's "*anticipatory anxiety*" regarding her employment, to which her GP had made reference, did not suggest that she was totally unable to carry out her normal occupation, although I see that Dr. P. who reported to the Provider, that same month, acknowledged that the Complainant had mild psychiatric symptoms, arising from her situation.

I also note that the Provider's Chief Medical Officer offered the opinion in April 2018, that Dr. D. had taken the Complainant's job demands into account, in coming to the conclusion

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in October 2016, that the Complainant was fit to resume work. I am not however convinced regarding the CMO's opinion in that regard. Dr. D.'s report noted that the Complainant had been in a role where 200 staff were reporting to her, and had "*a very busy job…attended meetings in the evening, did a lot of public speaking*". She travelled to [a location 150kms away] at least once a week and also travelled to other parts of the country for meetings.

I also note that Dr. D.'s report records that the Complainant was at that point, rising at 7 am in order to help her children get ready for school, and that "*sometimes she goes back to bed during the day for a nap. ….. She paces her activities to avoid fatigue and wears a lymphoedema sleeve when doing any physical tasks*". Dr. D. also noted the Complainant's current symptoms at that time were as follows:-

> "[The Complainant] *says she is easily stressed. Her confidence is low, her energy levels are improving, her sleep is disturbed, she has hot flushes, night sweats, her right arm tires easily and she wears a lymphoedema sleeve at times."*

It is unclear to me why, bearing in mind the Complainant's current symptoms as then recorded, Dr. D.'s report reached the conclusion that the Complainant was "functioning normally" in her daily life. The Complainant's symptoms at that time do not seem to me to have been indicative of the Complainant's normality. I find it difficult in those circumstances to accept the Provider's Chief Medical Officer's view that Dr. D., in late 2016, adequately took into account the Complainant's job demands in reaching the conclusion that the Complainant was fit to resume work.

Be that as it may, this adjudication requires no specific determination regarding the Provider's CMO's opinion in April 2018, 15 months after the Provider had already ceased benefit payments to the Complainant. Rather, the adjudication requires a determination as to whether or not the Provider acted correctly and reasonably, when it made the decision to cease those benefit payments, on the basis of the totality of the medical evidence available to it, at that earlier time.

In my opinion, it is clear from the Provider's own medical reports that in late 2016, the Complainant was still suffering from post-chemotherapy fatigue. In addition, her own Medical Oncologist, Professor M. indicated that his "*treatment advice is to return to normal living…"* There was no suggestion within this report dated September 2016, that the Complainant had already returned to any form of normal living. Indeed, the Provider's own independent report from Dr. P. dated April 2017, 3 months after payment benefits had ceased, and for the purpose of considering the Complainant's appeal, reported that at that juncture, the Complainant's ongoing symptoms required her to rest each afternoon, though she no longer found it necessary to nap. She described her sense of confidence as gone (what she herself described as her "*self-belief*") and she admitted that her ongoing situation had given rise to frustration and that it did not take a lot to upset her. She also described a difficulty with focus, reporting that "*I was never like that … I could multi-task … concentrate … when I am reading now I takes me forever to read a book"*.

Taking all of the medical evidence into account, I am of the opinion that in late 2016/early 2017, it was not reasonable for the Provider to form the opinion that the Complainant was

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at that point, no longer "*totally unable to carry out her normal occupation*", an occupation which I note involved the management of some 200 people over a period of (frequently) 55 – 60 hours per week, with significant travelling, frequent public presentations and interactions with media, community groups and business groups. I do not believe that the medical evidence available to the Provider at that time, supported this decision to cease benefit payments to the Complainant.

Since the Preliminary Decision was sent by this office to the parties, the Provider has sought to rely upon the High Court Decision of Binchy J. in ***Baskaran v Financial Services and Pensions Ombudsman [2019] IEHC 167***, where the learned Judge opined that:-

> *"It is also clear from the authorities to which I have referred above, that a conflict of medical opinion is not a conflict as to matters of fact, and the Respondent is not a medical expert whose function is to adjudicate on conflicts of medical opinion. The function of the Respondent in considering the Appellant's complaint was, in general terms, to assess whether or not Friends First acted reasonably, properly and lawfully in declining the claim of the Appellant."*

The FSPO is cognisant that it is not a medical expert and that it cannot adjudicate on conflicts of medical opinion. The FSPO is also cognisant of its obligations, in the adjudication of this complaint, to examine the conduct of the Provider in reaching its decision to cease benefit payments to the Complainant; the FSPO must determine, in that respect, whether the Provider acted correctly and reasonably in reaching the decision which it did, on the basis of the totality of the medical evidence available to it at that time.

For that reason, in the course of adjudicating this complaint, I have sought to examine the conduct of the Provider in late 2016 (November) when it originally made a decision that it was appropriate to cease benefit payments to the Complainant, with effect from January 2017, and again in early 2017, when it gave further consideration to the Complainant's entitlement (following the appeal of the Complainant) when it affirmed its decision in that regard.
The obligation of the FSPO in that regard is to determine whether the Provider's conduct was wrongful within the meaning of ***Section 60(2)(a)-(g)*** of the ***Financial Services and Pensions Ombudsman Act 2017***. In determining, in those circumstances, whether the complaint should be upheld, it has been necessary to examine the contents of all of the medical evidence which was before the Provider when it reached the decision in question, and to consider the totality of that medical evidence as a basis upon which the Provider reached its decision to cease benefit payments.

Since the Preliminary Decision was issued to the parties, the Provider has also offered the further comments of its Chief Medical Officer, to the effect that:-

> *"My view of April 2018 remains unchanged. I believe the demands of her occupation were considered in the context of all evaluations in relation to her claim. If activities of daily living are unrestricted, it is medically correct to assume a capacity to work. This is long validated and established in occupational medical practice."*

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I am conscious in that regard of the provisions of ***Section 60(2)(c)*** of the ***Financial Services and Pensions Ombudsman Act 2017*** which prescribes that:-

> *"A complaint may be found to be upheld, substantially upheld or partially upheld only on one or more of the following grounds:*
>
> *…*
>
> *(c) although the conduct complained of was in accordance with a law or an established practice or regulatory standard, the law, practice or standard is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant;*
>
> *…"*

In those circumstances, and for the reasons outlined in detail within this decision, I am satisfied that the Provider's decision to cease payment of the Complainant's income protection claim with effect from 25 January 2017 was not an appropriate or a reasonable decision, and on the evidence before me, I am satisfied that that this complaint should be upheld.

The Complainant should however understand that claims of this nature are subject to ongoing review. Given the significant period which has elapsed since the Provider last reviewed the payment of benefits, the Provider may consider it appropriate soon to undertake a fresh review of the Complainant's entitlement to ongoing payment of benefits.

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)(c) (e) and (g)***

- I direct the Respondent Provider to rectify the conduct complained of by immediately restoring benefit payments to the Complainant, with effect from 25 January 2017.

- I also direct the Respondent Provider to make such further payment as necessary to the Complainant, if any, in order to redress any loss that may have been caused to the Complainant, by the Provider not having paid those benefit payments at the time when they were payable to her, from January 2017 onwards, in order to take account of any changes in the taxation regime, which may now disadvantage the Complainant.

- I also direct the Respondent Provider to make a further compensatory payment to the Complainant in the sum of €2,000, to take account of the fact that the Complainant has been out of pocket since January 2017, when her benefit payments were incorrectly ceased by the Company.

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- 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.

MARYROSE MCGOVERN
DIRECTOR OF INVESTIGATION, ADJUDICATION AND LEGAL SERVICES

8 August 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.