



<u>Decision Ref:</u>	2019-0338
<u>Sector:</u>	Insurance
<u>Product / Service:</u>	Income Protection and Permanent Health
<u>Conduct(s) complained of:</u>	Rejection of claim - did not meet policy definition of disability
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The Complainant became a member of a Group Income Protection Scheme via her Employer on 17 June 2001. Her Employer is the policyholder of this Scheme and the Complainant, during her time as an employee, was an insured person under this policy. The Provider is the insurer of the Scheme since 1 July 2002, responsible for the underwriting of applications for cover and assessing claims. The Complainant resigned in and around December 2017.

The Complainant's Case

The Complainant has been certified as unfit for work as a factory packaging operative from 27 March 2014. She later completed an income protection claim form on 25 May 2015, wherein she listed her disability as "*Repetitive Strain, Right Shoulder/Neck (Cervical Spondylosis)*".

Following its assessment, the Provider declined the Complainant's income protection claim on 30 October 2015, a decision it subsequently upheld upon review on 5 April 2016.

The Complainant submits, "*I have an injury that occurred in the work place ... I have been assessed by 4 separate medical professionals and three of these have gone on record as saying I am unfit to return to work and have stated this injury is a long term disability*". In

this regard, the Complainant questions “*why the word of three medical professionals who all said I have a disability and unfit for work, has been overruled by the word of one professional who claims I do not?*”

For example, the Complainant attended Dr J. A. N. M., GP, who in correspondence dated 25 May 2016 submits, among other things, as follows:

“I hope you are feeling a little better after the manipulation which I administered. Please note that this is only a transient treatment and that your right arm, shoulder and neck and back pains will persist as considerable damage was done in the aforementioned areas at your place of employ ...

*Before examining your good self thoroughly, and arriving at the conclusion that you are totally incapacitated as a result of the injuries sustained by you at [your place of employment] and the ongoing **Physical and Psychological Debilities** resulting from same:*

*I can confirm that you are **not fit** to engage in any form of manual labour requiring manual dexterity, ever again ...*

It is my belief that your injuries are work related and as such they comply with the requirements as designated by [the Provider] ... You satisfy all criteria and pre-requisites to pursue a very rigorous course of Legal Redress against [the Provider] who are Providers of Indemnity Cover to staff at [your Employer]”.

In her correspondence dated 20 February 2017, the Complainant sets out her complaint, as follows:

“... for approx. the past 2 and half years I have been unable to attend work...at the behest of [my Employer’s] doctor, my own GP and also an independent medical expert due to the physical and psychological debilities resulting from an injury sustained in the workplace of [my] Employer that they took full responsibility for.

Throughout this time I have been totally incapacitated by these injury’s which have affected my right arm, shoulder, neck and back. To this day I do not and have not received payment from or on behalf of [my Employer] and have relied solely on Social Welfare payment of €188 per week.

The whole issue from the injury and debility down to the financial burden this has placed on me has now also led to my mental health and wellbeing suffering immeasurably. Throughout my life I have always been a strong independent and financially savvy woman, however I now find that coupled with verdict of the experts I have spoken with and been examined by telling me I am unfit to work and the financial deficit this has created, I am also now of real danger of losing my home that myself and my [elderly – age redacted] mother share.

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My mortgage payments have been covering interest only at €750 per month, which is my whole monthly income and now the bank are pressuring me to return to the full payment in the next month, which is completely out of my financial capability and leaves myself and my mother in danger of becoming homeless.

From the very moment I began the process of securing the group income protection [claim] with [the Provider] I felt that my claim was not to be taken as seriously as it should have been. Through my dealings with both [the Provider] and [my Employer] I have found there to be many discrepancies in communications issued and not issued. There has also been a lack of information and duty of care from both parties which has also increased the stress and anxiety I have felt at my end.

I have been made aware that two of my colleagues in a similar situation in terms of injury to myself have been treated completely differently to me.

As I was aware after six months of forced absence from employment due to injury, the forms from the group scheme should have been available to me by [my Employer]. This was not the case for me but was for my two colleagues. When I raised the issue with my employer I was told that this was inaccurate and that [the Provider] themselves issued the above mentioned paperwork, which has been denied by both parties now ...

This whole affair has dragged my mental health completely through the mire and I have now been left with no alternative but to seek legal advice due to the lack of duty of care to me from my employer”.

The Complainant later wrote to this Office in December 2017 to advise that *“trying to make myself well to return to work was very stressful, I really tried to get back to work but was and still am in pain. So I had to come to a very sad decision to leave my job after 16 years”.*

The Complainant’s complaint is that the Provider wrongly or unfairly declined her income protection claim and that it provided her with poor customer service. The Complainant seeks for the Provider to admit her income protection claim.

The Provider’s Case

Provider records indicate that the Complainant completed an income protection claim form on 25 May 2015, wherein she listed her disability as *“Repetitive Strain, Right Shoulder/Neck (Cervical Spondylosis)”* and the date she ceased working as *“23/03/14”*. The Employer has since advised that the Complainant last attended work on 27 March 2014. The Provider notes that this was a late notification, as the terms and conditions of the Group Income Protection Policy require that the Provider is notified of any claim *“no later than 6 weeks before the expiry of the Deferred Period”*, which is 26 weeks after the claimant has ceased work due to an illness or accident.

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An income protection claim is paid where the policyholder meets the Group Income Protection Policy definition of period of disability, as follows:

“A period throughout which a Member is totally unable to carry out his 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 Normal Occupation”.

The Provider notes that the main dispute in this matter is in respect of conflicting medical evidence. It is the Provider’s view that the medical file does not support a claim for the Complainant being *“totally unable”* to work as a factory packaging operative. It is evident from the file that the work causing the Complainant’s main medical problem, that is the manual act of ‘capping’, was since semi-automated and that there was a position available with her Employer on restricted duties for her to return to. The Provider states it is unclear why the Complainant did not return to work even on a restricted basis. The Provider also notes that the Complainant has alluded to the possibility of a legal case for compensation against her Employer and this appears to have impinged upon the claim and a return to work.

In any event, the Provider states that it can only pay an income protection claim where the policy definition of disability is met. As part of its assessment of her claim and in order to determine whether or not she met the policy definition of disability, the Provider arranged for the Complainant to attend a Centre for Rehabilitation & Ergonomics (the Rehabilitation Centre) for a two day Functional Capacity Evaluation on 13 and 14 July 2015 and it advised in its ensuing report dated 14 July 2015, among other things, as follows:

“[The Complainant] is fit to return to lines 1, 2, 7 & 8 in the Packaging Hall currently. If a weighed restriction of 10g were applied to line 5 then [the Complainant] would be able to resume her regular duties in the Packaging Hall at this time”.

I note that as part of its Functional Capacity Evaluation, the Rehabilitation Centre had access to a Functional Job Analysis previously conducted by another Occupational Rehabilitation Centre, where it had carried out an onsite ergonomic assessment at the inception of the Group Income Protection Scheme that detailed the critical job demands for the Employer’s packaging hall where the Complainant had worked.

In addition, the Provider also arranged for the Complainant to attend for an independent medical examination with Dr H. M., Specialist in Occupational Health on 8 September 2015, who then advised in his ensuing report dated 22 September 2015, among other things, as follows:

“In my considered opinion, [the Complainant] is fit to return to work as a factory operative.

Although certain symptoms remain, I believe that it would be safe for her to return to nearly all duties as described in her job description, taking into account the FCE (functional capacity evaluation) recommendations of not lifting goods greater than or equal to 10kg”.

The Provider was satisfied that it was clear from the results of the Functional Capacity Evaluation carried out on 13 and 14 July 2015 and from the independent medical examination on 8 September 2015 that the Complainant did not meet the policy definition of disability and that she was medically fit to resume her normal occupation. As a result, the Provider advised the Complainant’s Employer, the policyholder, by way of correspondence dated 30 October 2015 that it had declined her income protection claim as it was *“unable to consider that the claimant is totally unable by reason of sickness or accident from following the occupation of Assistant Packaging Supervisor as required by the scheme conditions”*.

The Provider received correspondence from the Complainant on 31 December 2015 appealing this decision. Enclosed was an occupational health assessment report dated 24 November 2015 from Dr T. M., Occupational Health Physician for the Complainant’s Employer, wherein he advised, *“I would request that consideration be given to having a further discussion with [the Complainant] to review any other employment options at the plant which would not involve repetitive pressure type arm activity as she is keen to engage in a return to work trial with the company”*. The Provider furnished Dr T. M. with both the results of the Complainant’s Functional Capacity Evaluation carried out on 13 and 14 July 2015 and of her independent medical examination on 8 September 2015, and having considered these, he “Dr T. M.” advised by letter dated 14 March 2016 that *“I have no additional information or opinion to provide”*.

As a result, the Provider wrote to the Complainant on 5 April 2016 to advise, among other things, as follows:

“As part of the appeal process a medical report was obtained from [Dr T. M.], Occupational Physician who reviewed you on behalf of your employer on 23/11/2015. In line with our appeals procedure, our Claims Manager has now carried out a full review of your claim. Following this review, they have confirmed, based on the medical evidence available, that they are unable to consider that you are continuing to suffer a Period of Disability, which requires you to be totally unable to follow your normal occupation of Packaging Operative”.

In addition, in its later correspondence to the Complainant dated 18 May 2016, the Provider advised, among other things, as follows:

“All the medical information and reports were reviewed by our Health Claims team in conjunction with our Chief Medical Officer (CMO) at the various stages of this claim assessment.

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It is our understanding that a large part of the work previously undertaken involving 'capping' has now been automated which involved 'repetitive pressure type arm activity'. Our CMO's view of this claim on 16th February 2016 was that there was no basis to admit and that you are fit for the vast majority of your job.

It is our view that you do not meet the claim criteria for a valid claim under this group income protection scheme. It is also our view with reasonable accommodation from your employer that you are medically capable of returning to work".

The Provider notes from a subsequent report dated 22 February 2017 that Dr T. M., the Occupational Health Physician for the Complainant's Employer had "advised [the Complainant] to seek a consultation with a neurosurgeon or an orthopaedic surgeon through her GP". In this regard, the Provider would normally have expected such specialist referrals and reports in support of a valid claim to have been obtained at an earlier stage, given that the Complainant has been absent from work since March 2014.

In addition, the Complainant attended Ms F. C., Clinical Specialist Physiotherapist on 21 April 2017 and in this regard, the Provider's Chief Medical Officer, Dr P. H., Specialist in Occupational Medicine reviewed the report from Ms F. C. to the Complainant's GP, Dr J. McG. dated 25 April 2017 and advised the Provider by email on 22 May 2019, as follows:

"I have review[ed] additional information provided by her physiotherapist, working with her rheumatologist. The examination findings are largely normal – with normal joint and rotator cuff examination. Full range cervical spine movement, no impingement signs, non-tender ACJ and biceps on examination.

A phased graded return to work was recommended in tandem with a strengthening programme.

My view remains that [the Complainant] is not totally disabled and that she is fit for work. I do not believe this report alters this view".

Furthermore, the Provider notes that a more recent letter from the Complainant's GP, Dr J. McG. dated 6 December 2017 does not provide any supporting or specialist reports that would provide evidence that the conditions complained of by the Complainant render her totally unable to undertake her normal work duties.

The Provider typically communicates with individual members of the Group Income Protection Scheme via the Employer, the policyholder, and its appointed broker and that it is they that then manage the communications with the employees as members of the scheme, which would include informing members about the scheme and the Provider of any pending claims. The Complainant has raised complaints on these two points and the Provider has directed her to her Employer in that regard.

In addition, her complaint that two other colleagues were treated differently is also a matter for the Complainant to pursue with her Employer. The Provider notes that it can only deal with a claim when it has been notified of such a claim.

In this instance, the first (and late) notification to the Provider of the Complainant's claim was on 27 May 2015. In addition, the Provider notes that the Employer as the policyholder has not made any representations to the Provider to pay this claim.

The Provider is also not aware of any "*discrepancies in communications*" issued by the Provider, as alleged by the Complainant. However, whilst her job title was referenced differently within some of the reports provided externally - for example, assistant packaging supervisor, packaging operator or machine operator - the Provider is satisfied that the Complainant had the opportunity at each assessment to make clear the role of her job and that this were clearly consistent throughout the assessments, notwithstanding that different titles may have been used. In addition, a Functional Job Analysis was conducted by the Rehabilitation Centre to determine the exact job description for, and duties undertaken by a factory packaging operative in the Complainant's Employer's packaging hall and this analysis clearly detailed the duties undertaken by the Complainant.

The Provider notes that there was a high level of contact with its office from the Complainant and her Employer's broker seeking updates regarding the assessment of her income protection claim and subsequent appeal. The Provider note that whilst it provided a high level of update, some telephone calls were not returned and there were some minor delays in the appeal process. In this regard, most of these delays were due to awaiting outstanding medical reports and internal claim reviews. As a result, the Provider offers the Complainant a customer service award in the amount of €750 in an attempt to resolve this element of her complaint.

The Provider notes that this dispute is essentially about the medical evidence produced in support of the Complainant's claim and the medical evidence obtained by the Provider by way of independent medical examinations. It is the Provider's view that when the full medical file is reviewed, the income protection claim for the Complainant is not medically supported. In this regard, the Provider's Health Claims team in conjunction with its Chief Medical Officer has reviewed the medical evidence at each stage and were clearly of the view that the Functional Capacity Evaluation conducted by the Rehabilitation Centre on 13 and 14 July 2015, along with the independent medical examination carried out by Dr H. M., Specialist in Occupational Health on 8 September 2015 provided an objective assessment of capabilities that evidenced that the Complainant was capable of performing her work duties with the reasonable accommodation of restricting lifting up to 10kg.

Accordingly, the Provider states that it is satisfied that the Complainant did not meet the policy definition of disability and that it declined her income protection claim in accordance with the terms and conditions of the Group Income Protection Scheme, of which she was a member of.

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Decision

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

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

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

A Preliminary Decision was issued to the parties 11 September 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, within the period permitted, I set out below my final determination.

The complaint at hand is that the Provider wrongly or unfairly declined the Complainant's income protection claim and that it provided her with poor customer service. In this regard, the Complainant became a member of a Group Income Protection Scheme via her Employer on 17 June 2001. Her Employer is the policyholder of this Scheme and the Complainant, during her time as an employee, was an insured person under this policy. The Provider is the insurer of the Scheme since 1 July 2002, responsible for the underwriting of applications for cover and assessing claims. The Complainant resigned in and around December 2017.

The Complainant has been certified as unfit for work as a factory packaging operative from 27 March 2014. She completed an income protection claim form on 25 May 2015, wherein she listed her disability as "*Repetitive Strain, Right Shoulder/Neck (Cervical Spondylosis)*". Following its assessment, the Provider declined the Complainant's income protection claim on 30 October 2015, a decision it subsequently upheld upon review on 5 April 2016.

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In this regard, the Complainant submits, *"I have an injury that occurred in the work place ... I have been assessed by 4 separate medical professionals and three of these have gone on record as saying I am unfit to return to work and have stated this injury is a long term disability"*. The Complainant questions *"why the word of three medical professionals who all said I have a disability and unfit for work, has been overruled by the word of one professional who claims I do not?"*

Income protection policies, like all insurance policies, do 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.

In this regard, section 1.2, 'Definitions' of the applicable Group Income Protection Plan Policy Conditions provides, among other things, at pg. 3, as follows:

"Period of Disability

A period throughout which a Member is totally unable to carry out his 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 Normal Occupation".

As a result, in order for an income protection claim to be payable, the claimant must satisfy this policy definition of disability. In this instance, the Complainant must be totally unable to carry out her duties as a factory packaging operative due to a recognised illness or accident.

I note from the documentary evidence before me that the Complainant completed an income protection claim form on 25 May 2015, wherein she listed her disability as *"Repetitive Strain, Right Shoulder/Neck (Cervical Spondylosis)"* and that her Employer has advised that she last attended work on 27 March 2014.

I note that as part of its assessment of her claim, the Provider had access to a Functional Job Analysis conducted by the Occupational and Rehabilitation Centre, where it had carried out an onsite ergonomic assessment at the inception of the Group Income Protection Scheme that detailed the critical job demands for the Employer's packaging hall where the Complainant worked. In this regard, I note that the ensuing Functional Job Analysis Report set out the job description for the Employer's packaging hall, as follows:

"Critical Job Demands

4) Packaging Hall:

- Line 1: a) Sit constant
 b) Reach Constant

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- c) Hand Dexterity Constant
- d) Lift 8.5Kg from 15cm from floor to waist Occasional
- e) Carry 8.5Kg 4-5m Occasional

- Line 2:
- a) Sit Frequent
 - b) Stand Frequent
 - c) Lift 1Kg Frequent
 - d) Twist/Turn Back Frequent
 - e) Reach to 92cm from floor to pallet bend frequent

- Line 5:
- a) Sit Frequent
 - b) Stand Frequent
 - c) Hand Dexterity Constant
 - d) Lift 15Kg Occasional

- Line 7:
- a) Sit constant
 - b) Hand Dexterity Constant
 - c) Stand Occasional
 - d) Walk Occasional
 - e) Lift 9.3Kg from floor to waist occasional

- Line 8:
- a) Sit Constant
 - b) Reach Constant
 - c) Hand Dexterity Constant

The Job Analysis Report then goes into great detail in relation to what each line does. I have not included the work of department provided so as not to identify the Complainant or her workplace.

I note that the Provider arranged for the Complainant to attend the Rehabilitation Centre for a two day Functional Capacity Evaluation on 13 and 14 July 2015 and it advised in its ensuing report dated 14 July 2015, as follows:

“PAIN BEHAVIOUR: [The Complainant] *demonstrated appropriate pain behaviour in that she reported pain only when it increased significantly. Reports of increased pain were consistent with increased physiological responses of increased heart rate, increased respiration rate & recruitment of appropriate accessory muscles of movement. Reports of increased pain were limited to her right upper & mid trapezius throughout both days of testing & were consistent with underlying pathology ...*

QUALITY OF MOVEMENT: *Movement was smooth & controlled throughout both days of testing. At increased functional capacities [the Complainant] developed pain & fatigue in her right upper & mid trapezius throughout both days of testing.*

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SIGNIFICANT ABILITIES:

1. *Good ability to push & pull.*
2. *Good bilateral grip strength.*
3. *Good ability for sustained trunk flexion in sitting & standing.*
4. *Good ability for un-weighted rotation in sitting & standing.*
5. *Good ability to kneel, crouch & squat.*
6. *Good ability for sustained sitting & standing.*
7. *Good ability to walk.*
8. *Good ability to climb stairs & ladders.*
9. *Good ability to balance on a balance beam.*
10. *Above average bilateral upper extremity hand dexterity.*

SIGNIFICANT DEFICITS:

1. *Decreased ability for weighted capacities in excess of 7.5Kg.*
2. *Decreased ability for sustained overhead activity.*
3. *Decreased ability to [illegible] secondary to decreased ability to weight bear through rigger upper extremity.*

JOB DESCRIPTION EXPLORED: [The Complainant] works as a Factory Worker...She has not worked since March 2014. The following is a Job Description Explored for a Factory Worker in the Packaging Hall as outlined by the Rehabilitation Centre in an on-site Functional Job Analysis.

Critical Job Demands

Packaging Hall:

Line 1:

- a) *Sit constant – [The Complainant] is fit for this task*
- b) *Reach Frequent – [The Complainant] is fit for this task*
- c) *Hand Dexterity Constant – [The Complainant] is fit for this task*
- d) *Lift 8.5Kg from 15cm from floor to waist Occasional – Lift 7.5Kg from floor to waist – [The Complainant] is fit for this task*
- e) *Carry 8.5Kg 4-5m Occasional – Carry 10Kg Occasional – [The Complainant] is fit for this task*

Line 2:

- a) *Sit Frequent – [The Complainant] is fit for this task*
- b) *Stand Frequent – [The Complainant] is fit for this task*
- c) *Lift 1Kg Frequent – [The Complainant] is fit for this task*
- d) *Twist/Turn Back Frequent – [The Complainant] is fit for this task*
- e) *Reach to 92cm from floor to pallet bend frequent – [The Complainant] is fit for this task*

Line 5:
a) Sit Frequent – [The Complainant] is fit for this task
b) Stand Frequent – [The Complainant] is fit for this task
c) Hand Dexterity Constant – [The Complainant] is fit for this task
d) Lift 15Kg Occasional – [The Complainant] is not fit for this task, as she can only lift up to 10Kg

Line 7:
a) Sit constant – [The Complainant] is fit for this task
b) Hand Dexterity Constant – [The Complainant] is fit for this task
c) Stand Occasional – [The Complainant] is fit for this task
d) Walk Occasional – [The Complainant] is fit for this task
e) Lift 9.3Kg from floor to waist occasional – [The Complainant] is fit for this task

Line 8:
a) Sit Constant – [The Complainant] is fit for this task
b) Reach Constant – [The Complainant] is fit for this task
c) Hand Dexterity Constant – [The Complainant] is fit for this task

RECOMMENDATIONS:

1. [The Complainant] is fit to return to lines 1, 2, 7 & 8 in the Packaging Hall currently. If a weighted restriction of 10Kg were applied to line 5 then [the Complainant] would be able to resume her regular duties in the Packaging Hall at this time”.

In addition, I note that the Provider also arranged for the Complainant to attend for an independent medical examination with Dr H. M., Specialist in Occupational Health on 8 September 2015. In his ensuing report dated 22 September 2015, I note that Dr H. M. advises, among other things, as follows:

“1. PRESENTATION:

I reviewed [the Complainant], [age redacted] factory worker who has been complaining of approximately two years history of various musculoskeletal complaints, currently primarily affecting her right shoulder area.

2. HISTORY OF PRESENTING COMPLAINT:

[The Complainant] gave a history that after working as a factory worker on the line for the last number of years, she has gradually developed pain affecting her right upper limb area. She indicated that her symptoms started distally affecting her hands and wrists and then gradually spreading to affect her right shoulder, neck and right chest wall muscle. I note her GP had out ruled any breast pathology by examination.

[The Complainant] described the severity in her right shoulder as 10/10 or even greater. She described pain in the anterior chest wall in a wide distribution, approximately the area of her palm. There was no radiation, but she indicated intermittent pins and needles at the tips of her fingers secondary to the pain. She indicated it is aggravated by heavy lifting. She indicated that the symptoms affecting her wrist and hand areas have settled. She was unable to hold a heavy bag, push her mother's wheelchair or use a kettle, even though she is left-handed dominant. [The Complainant] saw a pain specialist [Dr V. P.] approximately in May, August and October whereby she had injections in the affected areas. I understand she was last reviewed in December with [Dr V. P.]. No other injections were recommended. She indicated that she saw a physiotherapist on four occasions in 2012 and five occasions in 2013. She indicated her symptoms were getting worse, and was advised to take some anti-inflammatory medications. She was on paracetamol, topical gel and Lyrica which was stopped.

3. CURRENT SYMPTOMS:

Right anterior chest wall pain mainly. Other symptoms include irritability, fatigue and feeling low ...

8. OCCUPATIONAL FACTORS:

[The Complainant] worked as a factory worker for the past 14 years, working full-time approximately 40 hours a week, alternative shifts from [time redacted] in the afternoon for one week and from [time redacted] in the second week, with no night duties.

She worked as part of a team: filler, capper and pallet packer ... all lines are automated except one which has only been automated in the past year. The filler job would be to place the jars onto the turntables. The capper would place the caps on...on the previous unautomated line.

[Identifying factors of the role redacted]. She indicated this was initially voluntarily but later on compulsory. She indicated there was no proper discussion with the staff. Overall she indicated liking her job. She indicated good wages and good relations with colleagues. She indicated that she was [other role redacted].

[The Complainant] indicated she found the hand capping difficult. She indicated the employer is quite supportive of staff ...

[The Complainant] has been out of work since March 2014. Commute to work was 15 minutes. She further indicated that 'light' duties were available, with auto machines or robots on the line which manufactures only some small samples and the employees were only required to fill up the card machine or blister packs. She stated feeling guilty returning to work as she may take these restricted duties away from other workers ...

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11. CLINICAL EXAMINATION: ...

Physical state:

Normal gait and postures. Respiratory and cardiovascular examination unremarkable.

Abdominal, neurological examination normal.

Straight leg raise tests normal bilaterally.

Cervical spine: non tender, full range of movement.

Shoulder examination: right and left non tender, full range of movements all planes, thumbs to mid-back. No step deformity in the right shoulder, no impingement signs.

Mild tenderness right trapezius area, described as discomfort.

No tenderness or discomfort in the upper scapular area which was identified as problematic area. No chest wall tenderness. Breast examination not done today.

Power 5/5 on abduction, adduction, flexion and extension bilaterally.

Full range of movements right and left elbows all planes, power 5/5.

Grip 5/5 right and left hands, full functionality, no deformities.

Full range of movements right and left wrists, no sensory deficits. Normal reflexes to upper limbs.

12. COMMENT ON MEDICAL REPORTS:

Reports indicate cervical spondylosis, myopathy and tendinopathy of the right neck shoulder and AC joint area. Overall the functional capacity evaluation indicated that this lady is fit to return to work, although pain was present. It was mentioned she was fit to do her duties if her lifting was limited to 10 kg and below.

13. CONCLUSIONS AND RECOMMENDATIONS:

13.1. Diagnosis:

The history, examination and reports were in keeping with degenerative changes of the right neck, shoulder and AC joint areas, in keeping with long term wear and tear changes. This is a chronic condition, generally managed with medications and exercises. There were no indications from the history regarding need for surgery.

13.2. Fitness for work

In my considered opinion, [the Complainant] is fit to return to work as a factory operative.

Although certain symptoms remain, I believe that it would be safe for her to return to nearly all duties as described in her job description, taking into account the FCE recommendations of not lifting goods greater than or equal to 10kg. There seems to be adequate rotation of jobs as well as adequate manual handling management, with minimal heavy lifting requirement.

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In summary regrettably I am unable to declare by reason of sickness or accident that [the Complainant] is unable to follow an occupation of factory operator. In my opinion, [the Complainant] does not fit the definition of disability as mentioned in your referral letter”.

I note from the documentation before me that the Provider then sent these three reports to its Chief Medical Officer for her consideration, and that her notes dated 13 October 2015 advise, as follows:

“FCE [functional capacity evaluation] & IME [independent medical examination] find fit to RTW [return to work] ...

Fit RTW”.

As a result, the Provider advised the Complainant’s Employer, the policyholder, by way of correspondence dated 30 October 2015 that it had declined the income protection claim as it was *“unable to consider that [the Complainant] is totally unable by reason of sickness or accident from following the occupation of Assistant Packaging Supervisor as required by the scheme conditions”.*

I note that the Complainant appealed this decision and as part of her appeal submitted an occupational health assessment dated 24 November 2015 from Dr T. M., the Occupational Health Physician for the Complainant’s Employer, whom she had attended on 23 November 2015, wherein he advised, among other things, as follows:

“I am of the opinion, based on her history and my examination, that [the Complainant] has low-grade chronic fibro-muscular tendonitis which is extensive throughout the right upper arm and shoulder area. It has been my experience that once this condition sets in, which it has in this case, it is very slow to resolve and frequently only incompletely settles down. The likelihood of a flare-up of her complaint if she returns to this type of work is very high. She herself feels there is little point in even trying to resume her previous work role because of this likelihood. On the other hand, she is very keen to resume work in a capacity that it at her comfort level.

FITNESS FOR WORK – WORK RESTRICTIONS/MODIFICATIONS ...

I would request that consideration be given to having a further discussion with [the Complainant] to review any other employment options at the plant which would not involve repetitive pressure type arm activity as she is keen to engage in a return to work trial with the company”.

I note from the documentation before me that the Provider sent this report to its Chief Medical Officer for her consideration, and that her notes dated 16 February 2016 advise, as follows:

"[Dr T. M.] has offered a dx of low-grade chronic fibro-muscular tendonitis, extensive throughout R arm & shoulder. No objective evidence to support this opinion ...

IME [independent medical examination] and FCE [functional capacity evaluation] at claim assessment find fit to work with small restriction ...

No basis to readmit ... issue @ work that caused problem is now a fully automated process".

As a result, the Provider wrote to the Complainant on 5 April 2016 to advise, among other things, as follows:

"As part of the appeal process a medical report was obtained from [Dr T. M.], Occupational Physician who reviewed you on behalf of your employer on 23/1//2015.

In line with our appeals procedure, our Claims Manager has now carried out a full review of your claim. Following this review, they have confirmed, based on the medical evidence available, that they are unable to consider that you are continuing to suffer a Period of Disability, which requires you to be totally unable to follow your normal occupation of Packaging Operative".

I note from the documentation before me that the Complainant's Employer emailed the Provider on 11 May 2016 to advise, among other things, "There were no alternative positions available at the time" for the Complainant and that "The process is semi-automated, there is still a requirement for placing caps on jars but not to the same extent of a manual process".

In addition, in its later correspondence to the Complainant dated 18 May 2016, the Provider also advised, among other things, as follows:

"All the medical information and reports were reviewed by our Health Claims team in conjunction with our Chief Medical Officer (CMO) at the various stages of this claim assessment. It is our understanding that a large part of the work previously undertaken involving 'capping' has now been automated which involved 'repetitive pressure type arm activity'. Our CMO's view of this claim on 16th February 2016 was that there was no basis to admit and that you are fit for the vast majority of your job.

It is our view that you do not meet the claim criteria for a valid claim under this group income protection scheme. It is also our view with reasonable accommodation from your employer that you are medically capable of returning to work".

/Cont'd...

I note from the documentation before me that the Complainant later attended with Dr T. M., the Occupational Health Physician for the Complainant's Employer on 22 February 2017 and that he advised in his occupational health assessment, among other things, as follows:

"I have advised [the Complainant] to seek a consultation with a neurosurgeon or an orthopaedic surgeon through her GP as her pain complaint involves her neck right upper shoulder and shooting pains down her right arm which she finds very debilitating and distressing and has run a protracted course over some five years now. I believe that any attempt on her behalf of returning to work would not be successful due to the severity and persistence of her complaint so I am of the opinion that she will continue to be certified as unfit for work in the foreseeable future".

In this regard, I note the Provider's position that it would normally expect for such specialist referrals and reports in support of a valid claim to have been sought and obtained at an earlier stage, given that the Complainant had been absent from work since March 2014, at that stage for nearly three years. In addition, I note that there is no documentation before me indicating that the Complainant subsequently consulted with a neurosurgeon or an orthopaedic surgeon, as advised.

I note that the Complainant also attended with Ms F. C., Clinical Specialist Physiotherapist on 21 April 2017, who in her ensuing report to the Complainant's GP, Dr J. McG. dated 25 April 2017 advised, as follows:

"I reviewed [the Complainant] today at [Dr P. O'C.]'s Rheumatology clinic. She presented with right shoulder and neck pain. She also reported whole hand pins and needles when right side lying. She has significant right pain and sleep disturbance. Her pain is aggravated by all activities involving her right upper limb. [The Complainant] informs me that she had repetitive strain injury of her right wrist in 2012 and developed right shoulder and neck pain in 2014 which caused her to leave work. She has been off work since March 2014. She has had pain injections with the pain team which have given her short term relief. She has had physiotherapy in her local primary care team which give her no benefit.

On examination there was a full glenohumeral joint range of movement with pain at end range hand behind back position. There was also full cervical spine range of movement with a scalene stretch at the end of left side rotation. Impingement signs were negative. The ACJ and long head of biceps were non-tender on palpation. The rotator cuff was intact. A bilateral upper limb neurological examination was normal. An x-ray of the right shoulder on 13/09/2011 was normal.

My impression is that [the Complainant] has myofascial right upper quadrant pain. She has a normal joint and rotator cuff exam today. I have referred [the Complainant] to her local primary care team Physiotherapist to engage in a strengthening programme which may enable her to return to work. I have advised [the Complainant] regarding a graded return to work. I discharge her to your care".

/Cont'd...

I note that the Provider referred this report to its Chief Medical Officer, Dr P. H., Specialist in Occupational Medicine for her consideration and that having assessed this report, she advised the Provider by email on 22 May 2019, as follows:

"I have review[ed] additional information provided by her physiotherapist, working with her rheumatologist. The examination findings are largely normal – with normal joint and rotator cuff examination. Full range cervical spine movement, no impingement signs, non-tender ACJ and biceps on examination.

A phased graded return to work was recommended in tandem with a strengthening programme.

My view remains that [the Complainant] is not totally disabled and that she is fit for work. I do not believe this report alters this view".

Furthermore, I note from the documentation before me that in his correspondence dated 6 December 2017, the Complainant's GP, Dr J. McG. advises, as follows:

"[The Complainant] has now left work as she felt that her trying to get well enough for work was very stressful.

She has many medical problems in addition to her repetitive strain type illness to right cervical and thoracic region. She has significant vision loss in one eye, also chronic lumbar disc lesion with sciatica, also recurring Bronchitis.

Even examining her to assess her right cervical spondylosis did aggravate the condition and caused pain relapse.

She will need long term anti-inflammatory + analgesic medications for this condition and I believe she had no choice but to relinquish her employment due to ill health",

In this regard, I accept the Provider's position that this letter from the Complainant's GP does not provide any supporting or specialist reports that would provide evidence that the conditions complained of by the Complainant render her totally unable to undertake her normal work duties.

In order for an income protection claim to be payable, the Complainant must satisfy the policy definition of disability, as follows:

"Period of Disability

A period throughout which a Member is totally unable to carry out his 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 Normal Occupation".

/Cont'd...

In this regard, however, I accept that it was reasonable for the Provider to conclude from the evidence before it that the Complainant was not totally unable to carry out her duties as a factory packaging operative due to a recognised illness or accident and thus that she did not satisfy the policy definition of disability. As a result, I accept that the Provider declined the Complainant's income protection claim in accordance with the terms and conditions of the Group Income Protection Scheme.

I note that in her correspondence to this Office dated 2 April 2018, the Complainant advises that *"when I worked for [my Employer] I was employed as a factory operative and not as an [assistant packaging supervisor], they are completely different positions"*. In this regard, in her income protection claim form the Complainant describes her role as *"Filler, capping jars by hand – machine operator...I am a packaging operator"* and the claim form completed by her Employer listed her occupation as *"Packaging Operative"*, though it furnished the Provider with a job description for *[Assistant Packaging Supervisor]*. I have referred to the Complainant's job title throughout as factory packaging operative. Regardless of the title used, I am satisfied that it is clear from the file that the Complainant's job entailed production line packaging and that she herself advised of her duties during the Functional Capacity Evaluation and the independent medical examination that she attended at the behest of the Provider.

I am also satisfied that as part of its Functional Capacity Evaluation, the Rehabilitation Centre had access to a Functional Job Analysis previously conducted by the Occupational Rehabilitation Centre, where it had carried out an onsite ergonomic assessment at the inception of the Employer's Group Income Protection Scheme that detailed the critical job demands for those working in the packaging hall where the Complainant worked, and that it was against this detailed job description that the Complainant underwent a functional capacity evaluation on 13 and 14 July 2015, which concluded that she was fit to work, albeit with an accommodation of restricting lifting up to 10kg. Furthermore, I note that when Dr H. M., Specialist in Occupational Health carried out his independent medical examination of the Complainant on 8 September 2015, he also had access to the Functional Capacity Evaluation. In this regard, I accept that those who examined the Complainant were clear of the duties that she performed in her role with her Employer.

In addition, whilst the Complainant submits *"I felt that my claim was not to be taken as seriously as it should have been"*, I am satisfied that this is not borne out by the evidence before me. For example, I note that the Provider arranged for the Complainant to undergo a two day Functional Capacity Evaluation and to attend for an independent medical examination. I accept that this indicates that the Provider fully and properly assessed the Complainant's income protection claim.

I note that the Complainant further submits in her correspondence dated 20 February 2017, as follows:

"I have been made aware that two of my colleagues in a similar situation in terms of injury to myself have been treated completely differently to me."

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As I was aware after six months of forced absence from employment due to injury, the forms from the group scheme should have been available to me by [my Employer]. This was not the case for me but was for my two colleagues. When I raised the issue with my employer I was told that this was inaccurate and that [the Provider] themselves issued the above mentioned paperwork, which has been denied by both parties now”.

It is clear to me that in the normal course of events the Provider would be unaware that the Complainant, or any individual member of the Group Income Protection Scheme for that matter, would be absent from work and eligible to submit an income protection claim for assessment until such time that the individual member in question, or the Employer, as the policyholder, or its appointed broker advised the Provider in that regard. There is no evidence before me indicating that the Provider was made aware that the Complainant was absent from work since 27 March 2014 until May 2015.

Finally, I note that the Provider acknowledges that although it says it provided a high level of update to the Complainant and her Employer’s broker throughout its assessment of her income protection claim and subsequent appeal, some telephone calls were not returned and there were some minor delays in the appeal process.

In this regard, the Provider submits that most of these delays were due to awaiting outstanding medical reports and internal claim reviews. As a result, the Provider offered the Complainant a customer service award in the amount of €750. I note that in her correspondence to this Office dated 20 December 2018 the Complainant declined this offer, however the Provider has advised that it remains open to her to accept. Given the nature of the delays, I consider this offer to be reasonable in the circumstances and note that it remains a matter for the Complainant to now advise the Provider directly whether she wishes to accept or decline its offer.

For the reasons outlined above, I do not uphold this complaint.

Conclusion

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is rejected.

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

**GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

4 October 2019

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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.