An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2022-0275
Sector:	Insurance
Product / Service:	Income Protection and Permanent Health
Conduct(s) complained of:	Rejection of claim - did not meet policy definition of disability Rejection of claim - fit to return to work
Outcome:	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The complaint concerns the Provider's assessment of the Complainant's claim under an Income Protection Plan incepted by his employer. The Complainant made a claim under the Income Protection Plan in **April 2016**. The claim along with a subsequent appeal were declined by the Provider. The Complainant made a complaint to the Financial Services Ombudsman's Bureau regarding the declinature of the claim. That complaint was ultimately the subject of a Legally Binding Decision of this Office dated **16 March 2018**.

The Complainant's Case

The Complainant is represented in this complaint by his wife ("the Complainant's Representative").

In a submission dated **11 July 2019**, the Complainant's Representative says their understanding of the Legally Binding Decision was that the Provider had failed to adequately assess the Complainant's claim and that the Provider was required to re-assess the claim, particularly in relation to the Complainant's ability to return to work from the point of view of his cardiac health. To this end, Complainant's Representative says, they forwarded a report from the Complainant's GP and his Consultant Cardiologist to the Provider under cover of letter dated **10 October 2018**.

The Complainant's Representative says they were surprised when the Provider immediately requested two medical appointments, explaining it felt like an automatic response rather than taking into full consideration the Legally Binding Decision. The Complainant's Representative says they also queried why the same person was dealing with the Complainant's new appeal.

The Complainant's Representative says the reports of the Occupational Health Physician and the Consultant Clinical Neuropsychologist (the Neuropsychologist) have added an additional qualifying stipulation in relation to the Complainant's return to work and neither have given a clear express indication or statement on the Complainant's fitness to return to work immediately.

The Complainant's Representative says the Provider's offer of an *ex-gratia* payment is confusing and to date, a clear explanation regarding this offer has not been received. The Complainant's Representative says they remained unconvinced of the Provider's offer of an additional Independent Medical Examination with a consultant cardiologist, almost a year after the Preliminary Decision of the FSPO in **February 2018**. The Complainant's Representative says they did not consider the offer of External Case Management, would be of assistance to the Complainant.

Referring to the following passage from a letter from the Provider dated **31 January 2019**, *"… pending the outcome of the reassessment of your claim, and the final decision from the Financial Services and Pensions Ombudsman"*, the Complainant's Representative submits this led them to believe that the Provider had already predetermined the outcome of the re-assessment of the Complainant's claim even before all further specialist medical evidence had been obtained.

It is submitted by the Complainant's Representative that this is not a clear-cut case. The Complainant's Representative says the Provider has drafted the wording and conditions of the policy and submits that the onus is on the Provider to establish *"beyond a shadow of a doubt"* that the Complainant is fit to return to work. The Complainant's Representative says they feel the Provider has not provided clear and convincing evidence to this effect and the report of the Neuropsychologist raises more questions than it answers.

The Complainant's Representative remarks that the only option under the policy is, citing the relevant policy provision, *"… the Insured Person is unable to carry out the duties of his normal occupation …"*. The Complainant's Representative submits it is quite evident from the medical reports that the Complainant would be unable to return to his 'normal occupation' and there is no option to avail of a less stressful job within his company, albeit with a lower salary.

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The Complainant's Representative says the Provider has failed "*to assess the psychological input in people who suffer cardiac conditions."* The Complainant's Representative cites the following passage from a report from a Senior Clinical Psychologist:

> *"psychological input is significant in cardiac rehabilitation programmes. Many people who suffer from cardiac conditions can also suffer from shock and increased levels of stress and anxiety following their heart event."*

The Complainant's Representative submits that the Provider has failed to act in a fair and transparent manner in assessing the Complainant's claim. Despite the clear finding of the Legally Binding Decision, the Complainant's Representative says the Provider appears to continue on its own protocols in assessing claims. What is unfair, the Complainant's Representative says, is that these protocols are not clear and transparent, as is evident from the Provider's assertion that Independent Medical Examiners have refused a request for another party to be present during the assessment. The Complainant's Representative says this has never been their experiences with any medical health providers and is one more instance of the lack of transparency in the assessment by the Provider in its claims procedure.

The Complainant's Representative further says that the Provider has not been transparent in its dealings with them regarding the Complainant's claim. The Complainant's Representative says she understands that internal Provider documentation might not be available to them as consumers/customers but considers such documentation would be available to this Office. Following on from the Legally Binding Decision, the Complainant's Representative says there must have been an audit of the Complainant's file regarding the claim and such audit must have drawn conclusions both in relation to the historic and ongoing handling of the Complainant's claim. In the interests of transparency, the Complainant's Representative submits it is vital that the Provider pass this, and any associated documents, to this Office with lists of persons who handled the initial claim and of those who handled the current appeal together with a note of any protocol, guidelines, strategies and tactics.

The Complainant's Representative continues by setting out their financial position. The Complainant's Representative says the Provider is at no financial loss whatsoever, in stark contrast to their present and ongoing financial position. The Complainant's Representative says that both she and the Complainant are spiritually and physically exhausted with the Complainant's claim. The Complainant's Representative says that if there was any option for the Complainant to return to work at anything other than 'normal occupation', he would have taken a job at a lower income. The Complainant's Representative says they feel the Provider is *"treating this as a Third Party claim rather than a First Party claim."*

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The Complainant's Representative poses the question of why the Complainant would pursue this claim if there was any kind of alternative option available. The Complainant's Representative explains that she is disappointed that the Provider would not allow her to attend with the Complainant, at the Independent Medical Examination:

> *"we have been married for 36 years and I feel that I, more than anyone, has seen the impact close up of* [the Complainant's] *heart attack and subsequent mental and physical ill health."*

The Complainant's Representative says the recommendations of the Complainant's medical professionals, who owe a duty of care to the Complainant, must be taken on board, rather than the recommendation of a corporate company whose duty of care is to its shareholders and maximising profits. The Complainant's Representative states that the Complainant honestly believes that if he goes back to work in the company where he has already had several stress incidents, that he is very likely to suffer more stress which could ultimately lead to stroke or heart attack.

The Complainant and his representative delivered further submissions on **20 February 2020** and an updated Timeline. In this submission, the Complainant's Representative cited the following passages from the Preliminary Decision dated **February 2018**:

> *"but rather to establish in this instance, on the basis of an objective assessment of the medical evidence submitted, the Provider has adequately assessed the claim and was reasonably entitled to arrive at the decision it did upon assessment of the medical evidence received."*

The next passage cited, states:

> *"The Provider did not request the provision of any medical reports pertaining to the Complainant's cardiac health, either from the Complainant's GP or from his Consultant Cardiologist. Nor did it arrange an examination of the Complainant by an independent Consultant Cardiologist, with a view to assessing this aspect of his claim. In the absence of this inquiry, I take the view that the Provider has failed fully to assess all aspects of the Complainant's claim, both mental and physical, and has thereby failed adequately to assess the claim."*

The Complainant's Representative submits that, 'In the absence of this inquiry …', by not arranging for an examination of the Complainant by an independent consultant cardiologist (except to offer this one year later), the Provider has once again failed to adequately assess the Complainant's claim.

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The Complainant's Representative says this Office stated that: *"The role of the appointed medical examiner is to determine the individual's medical ability or otherwise to perform the duties of his or her normal occupation."* This is followed by the question of how the Provider can state in its letter of **15 July 2019** that: *"Therefore, whether or not a person actually resumes work cannot be a factor in our decision"*.

In this letter, the Complainant's Representative says the Provider also states that *"the onus is not on* [the Provider] *to prove you are fit to return to work immediately"*. The Complainant's Representative submits this implies that the onus is on the Complainant to prove the claim but at the same time, the Complainant was only allowed to do this in a manner prescribed by the Provider. The Complainant's Representative says this is evident from the letter dated **18 April 2019**, which states, as follows:

> *"The vast majority of Independent Medical Examiners prefer to assess and interview an Income Protection claimant alone, and in the past have refused a request for another party to be present during the assessment."*

The Complainant's Representative submits this has never been her experience in attending with the Complainant at any of his medical providers.

At the same time, the Complainant's Representative says the Provider's 'Income Protection Guide to Claims' states that: *"Employees who qualify under the scheme will be paid until … they are fit enough to return to work."* The Complainant's Representative submits that the policy wording of the Provider is ambiguous.

The Provider's comments in its letter of **15 July 2019** as to *"fit to return to work immediately"* and *"you are unable to carry out the duties of your normal occupation"*, the Complainant's Representative says, are confusing and, as a layperson, she would have thought that a person would have to be fit to return to work in order to carry out the duties of their normal occupation. The Complainant's Representative says the Provider is responsible for the wording of the policy and the onus is on the Provider to ensure it is clear and unambiguous.

As requested by the Provider, the Complainant's Representative says reports were submitted from the Complainant's GP and Cardiac Consultant and, having provided the required documentation to support the claim, and having the support of the Complainant's employer (the policyholder) in making the claim, the onus rests on the Provider to accept or reject these reports. From this moment, the Complainant's Representative says it is for the Provider to justify its refusal and so the onus of proving the claim (or refusal of the claim) swings from the Complainant to the Provider.

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The Complainant's Representative says that the Complainant is totally justified to question the Provider as to how it arrived at its conclusion.

The Complainant's Representative says that to deal with the claim in a fair and open manner, the Provider should have contacted the Complainant's medical witnesses and requested further information if it was felt that the contents of their reports were inadequate. Alternatively, or following on from this, the Complainant's Representative suggests that the Provider could have referred the Complainant to a cardiac specialist. Instead, the Provider's response was to immediately advise that it would be sending the Complainant to two medical advisers.

The Complainant's Representative says the comments about the Complainant having to prove the claim have to be viewed in context. The Complainant's Representative says the Provider points to different parts of the medical reports to turn down the Complainant's claim. Equally, the Complainant's Representative says she can point to other specific parts of the medical reports to prove the claim. As reports were requested by the Provider from professionals with whom they have a business relationship, the Complainant's Representative says they have to be viewed holistically and not just pick out the lines that suit them in refusing the claim.

In the Provider's letter of **15 July 209**, the Complainant's Representative says the Provider explains that:

> *"I can confirm that* [the Occupational Health Physician] *is an extremely experienced physician who has significant expertise in assessing fitness for work for multiple medical conditions including cardiac and mental health conditions."*

However, the Complainant's Representative says the Occupational Health Physician's information on the medical service provider's website states that *"she studied gastroenterology, pharmacology, general practice and later occupational medicine."* The Complainant's Representative says there is no mention of any qualifications relating to cardiac complaints. Whereas the information on the Chief Medical Officer of the nedical service provider states he studied cardiology and he is the only member of 'Key Staff' where cardiology is mentioned.

The Complainant's Representative says the Provider states in its letter of **15 July 2019**, that:

> *"you will note that the Ombudsman made reference to* [the Provider] *arranging an examination with a specialist medical examiner and not specifically with a Consultant Cardiologist."*

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Equally, the Complainant's Representative says, the Ombudsman also noted:

> *"Nor did it arrange an examination of the Complainant by an independent Consultant Cardiologist, with a view to assessing this aspect of his claim."*

The Complainant's Representative submits that the Provider has failed to adequately assess the claim and was not reasonably entitled to arrive at the decision it did, upon assessment of the medical evidence received. This is based on the fact that the Provider did not offer to arrange a further independent assessment with a consultant cardiologist until their letter of **18 February 2019** - a full year after the Legally Binding Decision.

The Complainant's Representative submits that neither of the medical reports requested by the Provider are conclusive. The Complainant's Representative says the Occupational Health Physician's report stated that it may be worthwhile obtaining an up to date psychiatric review, and there are also contradictory statements in her report. The Complainant's Representative says while her report states, *"He reads voraciously which is very much against him having any significant or material cognitive impairment"*, this does not tie in with *"He feels his concentration is terrible and that he has to write everything down"* and *"accesses books and started reading them and then realises that he had read them before."*

The Complainant's Representative says the Neuropsychologist also adds an additional qualifying note to her report: *"Technically there is no reason why* [the Complainant] *cannot return to work to fulfil the functions he has done over the years … his mood would need to improve before he would have a reasonable chance of succeeding in any place of work."* The Complainant's Representative also says the Neuropsychologist states that: *"On a single meeting, I am unable to offer a definitive diagnosis for* [the Complainant]*."*

The Complainant's Representative submits that neither report gives a clear, definitive statement *"… that you are able to carry out the duties of your normal occupation, as required by the policy definition"*. The Complainant's Representative further submits that there is no clear, definitive statement from either of the Provider's two medical examiners that the Complainant is fit to return to work and neither of the two reports have established beyond doubt that the Complainant can pursue his normal occupation.

Based on the above submissions, the Complainant's Representative says the Provider has failed to correctly assess the Complainant's claim upon the assessment of the medical evidence received.

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The Provider's Case

The Provider says it received a claim form in **April 2016** from the Complainant advising that he was complaining of stress and depression. The Provider says the Complainant also underwent a telephone interview and advised during this interview that he was complaining of stress and that he previously had a heart attack in **2012** which necessitated four months off work.

The Provider refers to the policy definition of 'Disablement' and says that the Legally Binding Decision, stated:

> *"To benefit, pursuant to the policy, the Complainant must show that he is 'unable to carry out the duties pertaining by reason of disablement arising from bodily injury sustained or sickness or illness contracted.'"*

Therefore, the Provider says the Complainant must be able to demonstrate that he meets the definition of Disablement and based on the evidence received to date, it is the Provider's opinion that the test has not been met. However, the Provider says it would be prepared to arrange a further independent medical examination on the Complainant's behalf, as well as considering any additional reports the Complainant wishes to make available in support of his position.

The Provider says it is satisfied that the terms and conditions of the policy are clear and unambiguous in relation to determining if a claim should be paid. The Provider says the definition of Disablement is a standard definition, widely used by multiple insurers in both Ireland and other countries. A claim will be paid where a claimant meets this definition and is medically unable to carry out their normal duties. However, the Provider says, in the Complainant's case, its position is that, as insurer of the policy, the definition of Disablement has not been satisfied and there is no medical reason to indicate that the Complainant could not resume his normal occupation, should he choose to do so.

In respect of the directions contained in the 'Summary' of the Legally Binding Decision regarding further medical evidence, the Provider says it wrote to the Complainant on **27 March 2018** and invited him to submit reports from his GP and Consultant Cardiologist, which letter also advised that the Provider would review the matter again fully, on receipt of these reports.

The Provider says it received an email from the Complainant on **25 June 2018** advising that he had been seen by his Consultant Cardiologist who was arranging for a cardiac MRI to take place. The Provider says it acknowledged this email and advised that it looked forward to receiving the reports when available.

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On **11 October 2018**, the Provider says it received two reports from the Complainant: one from his GP dated **26 April 2018** and one from his Consultant Cardiologist dated **26 September 2018**. On the basis of the comments in the Summary of the Legally Binding Decision, the Provider says it wrote to the Complainant on **31 October 2018** to confirm that it would be arranging two further assessments, to assess both the mental and physical aspects of his claim.

The Provider says that the Complainant's Representative replied the same day expressing surprise that the Provider was arranging two assessments and saying that she would check the Legally Binding Decision again.

The Provider says it received a letter from the Complainant's Representative in which she disagreed with its interpretation of the Legally Binding Decision and advised that the reference to a specialist medical examiner was singular rather than plural and suggested further clarification be sought from this Office if necessary. The Provider says it replied on **19 November 2018** outlining that it believed it was clear from the Summary that the Provider was to consider both the physical and mental aspects of the Complainant's claim.

The Provider says it indicated that it would therefore be arranging an assessment of the Complainant's physical status initially and if this assessment confirmed he was unfit for work, his claim would be admitted. The Provider says its letter went on to say that if the Complainant was found fit to carry out the duties of his normal occupation from a physical perspective, the Provider would arrange a further assessment to review the Complainant's claim on mental health grounds.

The Provider says the letter further advised that if the Complainant did not wish to proceed with the second assessment in this scenario, the matter could be referred back to this Office for further clarification. The Provider says in this letter it was confirmed that an appointment had been arranged for the Occupational Health Physician, specialist in occupational health for **3 December 2018,** to assess the physical aspects of the Complainant's condition.

The Provider says the Occupational Health Physician is one of the most experienced occupational health physicians in the country and is widely regarded as one of the leading experts in assessing work disability for multiple conditions, including people suffering from cardiac complaints. Given their specific training and expertise, the Provider says many other specialities (often including the areas of cardiology), will defer to the specific and unique expertise of an occupational health physician when it comes to determining fitness or otherwise for work.

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While the Occupational Health Physician does not specialise in cardiology, the Provider says this is not necessary in order for her to perform the requirements of her role and, based on her occupational health qualifications and detailed expertise in the area of occupational medicine, she is uniquely positioned to make these proper and realistic determinations on fitness or otherwise for work, across a wide variety of conditions, including cardiac complaints.

The Provider has set out the report of the Occupational Health Physician in detail in its Complaint Response. The Provider says it is clear from this report that the Occupational Health Physician carried out a detailed assessment of the Complainant's physical and mental health and it was her conclusion that the Complainant did not meet the definition of "Disablement" and was fit for work. The Provider notes the Complainant's Representative's opinion that the Occupational Health Physician's opinion is qualified and not totally definitive, which the Provider does not accept. The Provider submits that the Occupational Health Physician clearly stated that in her considered view, the Complainant was not totally disabled and was fit for work. However, based on the Complainant's subjective reports of memory loss, lack of concentration and cognitive difficulties, the Occupational Health Physician suggested that a neuropsychological assessment would be useful, to objectively determine if any such deficits did exist.

Addressing the point made by the Complainant's Representative that although the assessment by the Occupational Health Physician was related to the physical element of the Complainant's claim yet almost totally focused on the Complainant's mental health, the Provider says a detailed assessment of both the Complainant's physical and mental health was carried out and if there appears to be a specific bias towards the mental health aspects it is because the Complainant told the Occupational Health Physician that his primary difficulties related to his mental health issues and he went on to describe how these were affecting him.

The Provider says it also notes that the Complainant's Representative pointed to inconsistencies in the Occupational Health Physician's report; in particular, the reference to the Complainant's poor memory and focus issues in one section, and his ability to read avidly in another section. The Provider agrees that there is an inconsistency in this respect but disagrees with the inference that the Occupational Health Physician is at fault.

The Provider submits that this inconsistency came from the Complainant as it was he who was describing his activities of daily living and his current symptoms and the Occupational Health Physician was simply noting these and reporting on what the Complainant had told her on the day, rather than endorsing these self-reported complaints.

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The Provider says that while it does not believe, based on its assessment of the claim, that the Complainant has adequately demonstrated that he meets the definition of Disablement under the policy, it previously advised the Complainant and his Representative that it is more than happy to arrange a further independent medical examination with a consultant cardiologist to provide further clarity in relation to the Complainant's cardiac status and his ability or otherwise to carry out the duties of his normal occupation. The Provider says the Complainant has declined this offer which remains open for him to consider. The Provider says that the purpose of this assessment would be to bring full clarity to this issue and assuage any specific concerns the Complainant may have in relation to the Provider's assessment of this aspect of the claim.

The Provider says it has given the Complainant every opportunity to demonstrate that the necessary total "Disablement" exists in his case. However, the Provider says that what it has received to date in support of the claim - apart from the Complainant's own self-reports and those of his Representative - are several reports from the Complainant's doctors, none of which clearly demonstrate he is unfit to carry out the duties of his normal occupation, and which are qualified at best.

In terms of the Complainant's independent medical examinations, the Provider says the Complainant's job description which was enclosed with the 'Employment Information Form' was not provided to the independent medical examiners. However, the Provider says Consultant Psychiatrist 1, who initially examined the Complainant, was provided with a copy of the Employment Information Form. In addition, the Provider says Consultant Psychiatrist 1 was provided with a copy of the claim form which outlines the Complainant's role in great detail. The Provider says it is satisfied Consultant Psychiatrist 1 had a very good understanding of the Complainant's occupation at the time of the assessment. For completeness, the Provider says it has sent Consultant Psychiatrist 1 the actual job description provided by the Complainant's employer and that Consultant Psychiatrist 1 replied confirming that his opinion was unchanged.

The Provider says the Complainant appealed its decision and submitted a report for his specialist Consultant Psychiatrist A, which the Provider states, made no reference to the Complainant's role at all, but yet concluded that the Complainant was unfit for work. On receipt of this report, the Provider says it arranged for the Complainant to attend an additional independent assessment with Consultant Psychiatrist 2. The Provider says that Consultant Psychiatrist 2 listed all the information which he received prior to his assessment, including the Employment Information Form, the claim form and the appeal report of Consultant Psychiatrist A. For completeness, the Provider advises that it sent a copy of the Complainant's job description to the Consultant Psychiatrist 2, who replied confirming that this does not alter his original opinion.

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The Provider says the Occupational Health Physician advised that she cannot recall if she saw an actual copy of the job description when the Complainant attended for an independent assessment in **2018**. However, the Provider says, she has advised that she took a detailed occupation history with a review of the job requirements and responsibilities at the time of her assessment. The Provider says the Occupational Health Physician also confirmed that having reviewed the job description and her own report, her opinion was unchanged.

The Provider says it also checked the documents sent to the Neuropsychologist prior to her assessment. The Provider advises that she received a copy of the claim form which went through the Complainant's duties in great detail. The Provider says the Neuropsychologist did not receive a copy of the Employment Information Form or the Complainant's actual job description which was provided by the Complainant's employer with the claim forms. The Provider states the Neuropsychologist also discussed the nature of the Complainant's role with him during her assessment. The Provider says it is therefore satisfied that the Neuropsychologist had a very good understanding of the Complainant's occupation at the time of her assessment.

In terms of the independent medical examiners who assessed the Complainant, the Provider says it is satisfied that these individuals examined the Complainant with regard to his job specification. The Provider states that independent medical examinations are arranged specifically for this purpose - to enable an independent opinion to be sought on a person's fitness or otherwise to carry out the duties of their normal occupation. When writing to an examiner confirming the appointment details, the Provider says its letter stated, as follows:

> *"The claim is payable as long as the definition of disability as required under the policy is satisfied. Disablement is deemed to exist where the insured person is unable by reason of illness or injury to carry out the duties of their normal occupation, and is not following any other occupation."*

The Provider says the letter also goes on to state that:

> *"Please note that the illness or disability must be assessed in relation to the exact nature of the job requirements. You should also note that the availability of such work is not an issue."*

This statement is underlined, the Provider advises, to reflect the importance of the brief and the examiner's task.

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The Provider advises that four independent examiners were used in the assessment of the Complainant's claim and are all extremely experienced examiners who fully understand the nature of the brief and the importance of providing an opinion in relation to a person's fitness or otherwise to carry out the duties of their normal occupation. While the examiners would all have had the opportunity to discuss the nature of the Complainant's role with him on the date of their respective assessments, the Provider says it is satisfied it provided each examiner with sufficient information in relation to the role to allow them make their determination.

The Provider says it received and considered the following reports from the Complainant as part of its assessment:

Consultant Psychiatrist A	7 October 2016
Consultant Cardiologist	26 September 2018
Complainant's GP	26 April 2018

The report of Consultant Psychiatrist A, the Provider says, was submitted by way of appeal following its decision in **June 2016** not to admit the Complainant's claim for payment. While Consultant Psychiatrist A did not mention the nature of the Complainant's role in her report, the Provider says it arranged a further independent psychiatric assessment on foot of this report to enable a further full review of the case. The Provider says Consultant Psychiatrist A's report was provided to Consultant Psychiatrist 2 in advance of his assessment and Consultant Psychiatrist 2 concluded that the Complainant did not meet the definition of Disablement under the policy and was medically fit to resume his normal occupation. While noting Consultant Psychiatrist A's report and her view on the Complainant's fitness for work, the Provider says it was its opinion based on the weight of the medical evidence, that the definition of Disablement had not been met in this case and consequently, it was not in a position to admit a claim in respect of the Complainant.

The reports from the Complainant's GP and Consultant Cardiologist, the Provider says, were submitted following the Legally Binding Decision in **March 2018**.

The Provider says the Complainant's GP report is very short in nature and simply stated that this individual was the Complainant's GP, the Complainant suffers from ischaemic heart disease having previously had a coronary stent inserted in **2012** and that psychological stress can potentially increase risk in patients with ischaemic heart disease. The Provider states that this report did not address the nature of the Complainant's role or provide an opinion on fitness or otherwise for work. The Provider says it gave full consideration to this report and that the assessments carried out by Consultant Psychiatrist 1 and Consultant Psychiatrist 2 did not agree with its findings. The Provider has cited passages from each of these reports in support of this point in its Complaint Response.

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Similarly, the Provider says that the report from the Consultant Cardiologist is very short and does not specifically address the nature of the Complainant's role or his fitness or otherwise for work. The Consultant Cardiologist encouraged the Complainant to minimise exposure to an environment where he is exposed to very significant stress. The Provider says while it agrees with the Consultant Cardiologist in this respect, such a suggestion does not automatically imply that the Complainant is unfit for his previous role as a client advisor. The Provider says there is also an obligation on employers to provide a safe working environment for their employees. Where a person is exposed to excessive stress, this is essentially a work matter that needs to be resolved between an employer and an employee and managed in this context accordingly. In the Consultant Cardiologist's report, the Provider says the Consultant Cardiologist confirmed the following:

> *"He is walking 10,000 steps a day, was in sinus rhythm in clinic, BP 124.86. Given his anatomy, we have sent him forward for a cardiac MRI scan performed on the 20th August, which showed no evidence of inducible ischaemia, which is very satisfactory, ejection fraction 64% with inferior Akinesis consistent with his prior heart attack. I will see him back in a year's time with a repeat stress test."*

On receipt of these reports, the Provider says a further medical examination was arranged with the Occupational Health Physician. It was the Occupational Health Physician's opinion based on her detailed assessment that the Complainant did not meet the definition of Disablement under the policy and was medically fit to resume his normal occupation. Therefore, the Provider says that although it considered the additional reports from the Complainant's GP and Consultant Cardiologist, neither of which provided an opinion on fitness or otherwise for work, it remained of the opinion based on the weight of the evidence, that the definition of Disablement under the policy had not been met.

Following receipt of the Occupational Health Physician's report and on her specific recommendation, the Provider says it arranged further neuropsychological testing in **March 2019** with the Neuropsychologist, to assess the Complainant's concentration and memory to ensure there was no underlying cognitive impairment. It is clear from this report, the Provider says that there was no such impairment, and this report supports the Provider's opinion that the definition of Disablement under the policy has not been met.

The Provider explains that a decision on admissibility of an income protection claim is based on the weight of the medical evidence available. The reports of the Complainant's GP and Consultant Cardiologist, the Provider says, are very short and do not discuss the Complainant's role or provide an opinion on fitness for work. Similarly, Consultant Psychiatrist A does not mention the nature of the Complainant's role at all but concluded that he was unfit for work.

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Against these reports, the Provider says, it must contrast the detailed comprehensive independent assessments of Consultant Psychiatrist 1, Consultant Psychiatrist 2, the Occupational Health Physician and the Neuropsychologist, all of which considered and provided an opinion on the Complainant's fitness or otherwise to carry out the duties of his normal occupation.

The Provider says that Consultant Psychiatrist 1 and Consultant Psychiatrist 2 saw the Complainant prior to the Legally Binding Decision in March 2018. The Provider also says the reports of the Complainant's GP and Consultant Cardiologist focussed on the Complainant's cardiac condition and were received after the Legally Binding Decision, when the Provider says, it had been instructed to also investigate the physical aspects of the Complainant's condition. Therefore, these reports were not sent to these psychiatrists. The Provider advises that while it would be its practice to refer all relevant reports to the independent medical examiner prior to their examination, given the length of time that had elapsed, the Occupational Health Physician could not specifically recall if she saw these reports prior to her assessment, and she also advised that she does not retain the data once her report is released. The Provider advises that it sent copies of both reports to the Occupational Health Physician again and she issued a further reply, noting:

> *"However I can confirm that the cardiac report is very reassuring with regard to his cardiac function, stress test and an absence of inducible myocardial ischaemia. I can confirm having reviewed these letters and my own report that my opinion would have remained unchanged with regard to his fitness to resume work from a cardiac and mental health perspective."*

The Provider advises that both reports were provided to the Neuropsychologist in advance of her assessment.

In terms of the Consultant Cardiologist's report, Provider says that any occupation carries a degree of stress which would be manageable, provided the levels of stress are not excessive. There is an onus on an employer to provide a safe working environment and where they do not, the Provider says this is essentially a workplace issue between an employer and an employee which is outside the scope of an income protection policy, to consider. The Provider says that when making its determination on fitness for work, the question of a return to work, the manner in which it is organised (including the duration of any phased return to work) or whether a return to work is indeed possible or can take place at all, are matter totally separate and distinct from any decision it makes regarding fitness for work under the policy.

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The Provider says that if the Complainant was exposed to very significant levels of stress while performing the normal duties of his occupation, this is an industrial relations issue which would need to be resolved between the Complainant and his employer. The Provider states that its role is to assess the Complainant against the duties of his normal occupation, which is a sedentary, clerical occupation, working 35 hours per week in a normal environment with normal stress levels and the medical evidence clearly indicates that the Complainant is medically fit to carry out his role.

The Provider submits that any additional stress which the Complainant had been experiencing was not related to the execution of his duties, but was in fact related to an ongoing investigation which he declined to engage in. In this regard, the Provider says it is important to point out that the Complainant told the Occupational Health Physician that: *"He tells me he loved the job, describes no difficulties at work or with interpersonal relationships with clients or otherwise."* The Provider submits that this statement is clearly inconsistent with a person who is otherwise claiming they are experiencing very significant stress levels in the execution of their normal duties and would seem to point to the fact that any additional stress the Complainant may have been experiencing, was due to the ongoing investigation and not in fact related to his normal role. In addition, the Provider says engaging in a workplace investigation is an entirely separate matter from the question of determining an insured person's fitness or otherwise to carry out the duties of their normal occupation.

The Provider says the Consultant Cardiologist recommendation to minimise exposure to an environment where the Complainant is exposed to very significant stress, is a very reasonable recommendation which the Provider fully agrees with and supports. However, the Provider says this comment does not automatically imply that the Complainant is unfit for his role as a client advisor, which essentially is a sedentary role carried out in an office environment. The Provider says it believes that based on the weight of the evidence obtained the Complainant is fit to carry out this role, provided he is not exposed to any undue or abnormal levels of stress as would be expected to be the case for any employee. The Provider says it offered to carry out a further full review of the Complainant's claim and to arrange an independent medical examination with a consultant cardiologist and this offer remains open to the Complainant. In this respect, the Provider says it rejects the comments of the Complainant's Representative that this is simply a further 'tick the box' exercise.

In respect of the comments of the Complainant's GP that psychological stress can potentially increase risk in patients with ischaemic heart disease, the Provider says that it has considered these comments. However, this is a matter of perspective and while undue, as opposed to normal levels of stress, can potentially increase risk in patients with ischaemic heart disease, there is no evidence to suggest that the Complainant's normal sedentary, clerical occupation gave rise to very significant levels of stress.

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In addition, the Provider says that the Consultant Cardiologist report was very reassuring in that the Complainant's cardiac state was then currently stable. It was also reassuring that the Complainant's BP was normal, he was taking 10,000 steps per day and there was an absence of inducible myocardial ischaemia. The Provider says its opinion is that the Complainant would not be unduly compromised in being exposed to the normal levels of stress that are inherent in a clerical, sedentary occupation or indeed in carrying out his normal activities of daily living.

What is clear, the Provider says, is the fact that the Complainant was the subject of an investigation at the time he ceased work and this investigation may have led to increased stress levels at this time. The Provider refers to a Occupational Heath Report dated **19 February 2016**, and notes that a company doctor arranged for an additional independent assessment with a Consultant Psychologist and it was the opinion of the Consultant Psychologist that the Complainant was fit to engage in an industrial relations process and was fit to make a decision as to whether he wanted to return to work at that stage, or not.

The Provider says the Complainant did not engage in the process and remained out of work. The Provider advises that it has not seen the report of the Consultant Psychologist, however, it believes that this additional report would be important in terms of providing further context concerning the Complainant's continued absence from work and his fitness or otherwise to engage in the industrial relations process.

Regarding the report of the Neuropsychologist, the Provider says the neuropsychological assessment was arranged following an Occupational Health Physician's assessment. The Provider refers to a number of aspects of this assessment in its Complaint Response and submits that the Neuropsychologist confirmed that, technically, there was no reason why the Complainant could not return to work to fulfil the functions he has done over the years. The Provider says the Occupational Health Physician recommended neuropsychological testing to rule out any underlying cognitive impairment. The Provider states it is clear from the Neuropsychologist report that no such cognitive impairment exists, and that the Complainant is performing at a high level overall. It, therefore, remained the Provider's opinion that the Complainant did not meet the definition of Disablement under the policy.

The Provider says its opinion is that from a medical perspective, the Complainant could have resumed work at anytime, had he chosen to do so and the fact that there may be other non-medical reasons impacting the Complainant's decision not to resume work in the interim, means that it may now be difficult for him to do so, but the Provider says, these issues cannot be a factor in its decision.

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As previously advised, the Provider states that its role is to determine whether or not a person meets the definition of Disablement under the policy and the question of a return to work or whether a return to work is indeed possible, are not relevant to this decision. Therefore, the Provider says any non-medical issues that may exist and are impacting on a possible return to work, are outside the scope of the income protection policy and are a matter for an employer and the employee to resolve in an industrial relations context.

The Provider says it recognises that a successful return to work can ultimately be in the best interests of the customer. In this particular case, there would be many non-medical barriers that would need to be broken down, for this to happen. In recognition of the difficulties in re-integrating the Complainant back into his former role, the Provider says it offered to pay six months benefit strictly on an *ex-gratia* basis, without any admission of liability, to support such a transition.

The Provider advises that this payment would have been made to the Complainant's employer as owner of the policy, who would pass this to the Complainant through the normal payroll system. The Provider says it also offered the services of a very experienced Case Manager with extensive expertise in helping employees return to the workforce, after prolonged absence.

In respect of its letter dated **15 July 2019**, the Provider says this was in response to a letter from the Complainant's Representative dated **29 May 2019** in which she stated: *"We feel that* [the Provider] *have not established beyond a shadow of a doubt that* [the Complainant] *is fit to return to work immediately and 'carry out the duties pertaining to his normal occupation.'"* The Provider says it responded by saying that the onus is on a claimant who makes a claim under an income protection policy, to demonstrate that they meet the definition of Disablement and the onus is not on the insurer to prove the claimant is fit for work beyond a shadow of a doubt.

Throughout the course of the assessment of this claim, the Provider says the Complainant's representative has expressed reservations about the Provider's intentions. The Provider states that it completely rejects these observations. The Provider says it has considered the Complainant's claim in good faith at all times and has arrived at its decision based on the weight of the medical evidence.

The Provider explains that its claim philosophy is to treat customers with dignity and respect and to pay all valid claims. In this regard, the Provider says it pays many claims to people with many different medical conditions and would therefore reject the suggestion that when assessing income protection claims, its main duty of care is towards shareholders and to maximise corporate profits and shareholder value.

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Referring to the Legally Binding Decision, the Provider says it was stated that:

> *"To benefit, pursuant to the policy, the Complainant must show that he is 'unable to carry out the duties pertaining to his normal occupation by reason of disablement arising from bodily injury sustained or sickness or illness contracted.'"*

In support of the contention that he is unfit for work, the Provider says the Complainant has provided the following reports:

- An appeal report from his GP which did not explore the nature or responsibilities of his role and yet concluded he was unfit for work.
- A very brief GP report dated **April 2016** which makes no reference to fitness or otherwise, for work which simply makes a generic statement with no underlying context, that psychological stress can potentially increase risk in patients with ischaemic heart disease.
- A short report from the Consultant Cardiologist dated **September 2018** which does not offer an opinion on fitness for work but asked the Complainant to minimise his exposure to very significant work stress. The report is otherwise very reassuring and indicates that the Complainant's cardiac condition is stable.

The Provider says it does not believe these reports clearly demonstrate that the Complainant meets the definition of Disablement under the policy. Against these reports, the Provider says it must weigh up the following medical reports which clearly do not support the Complainant's view that he meets the definition of Disablement under the policy:

- A company doctor report dated **February 2016** which confirms that the opinion of an independent specialist was sought, which confirmed the Complainant was fit to engage in an industrial relations process and was fit to make a decision as to whether he wanted to return to work at that stage or not. The Provider says it has requested the Complainant's consent to seek a copy of this report.
- A detailed independent psychiatric report from Consultant Psychiatrist 1 dated **June 2016** who concluded that the Complainant did not meet the definition of Disablement under the policy.
- A detailed independent psychiatric report from Consultant Psychiatrist 2 dated **November 2016** who also concluded that the Complainant did not meet the policy definition of Disablement.
- A detailed report from the Occupation Health Physician dated **December 2018**, a specialist in occupational health medicine who was of the opinion that the Complainant was fit for work from a physical and mental health perspective.

/Cont'd…

- A neuropsychological assessment from the Neuropsychologist dated **February 2019,** which confirmed that technically there was no reason why the Complainant could not return to work.

Therefore, the Provider says it remains its opinion that based on the weight of the medical evidence, the Complainant does not meet the definition of Disablement as required by the policy.

The Complaint for Adjudication

The complaint is that the Provider wrongfully or unreasonably refused to admit the Complainant's claim, having failed to properly assess both the mental and physical aspects of the Complainant's claim.

Goodwill Gesture offered

In its complaint response, the Provider said that in recognition of the difficulties of re-integrating the Complainant into his former role, it was offering to pay six months' benefit strictly on an *ex-gratia* basis without any admission of liability to support such a transition.

By email dated **25 June 2020**, this Office requested that the Provider confirm the basis on which it was offering to make the six month *ex-gratia* payment to the Complainant. In an email dated **9 July 2020**, the Provider advised that the offer would be in full and final settlement of the complaint. This offer was not however accepted by the Complainant and accordingly, the investigation of this complaint has continued on the basis that the matter remained unresolved.

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.

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

A Preliminary Decision was issued to the parties on **19 July 2022**, 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 substantive submissions from the parties, within the period permitted, the final determination of this office is set out below.

I note that by letter dated **10 December 2021**, the Complainant's Representative confirmed that the Complainant wished for the contents of the complaint file in respect of the previous complaint originally made to the Financial Services Ombudsman's Bureau, and which led to the Legally Binding Decision of **March 2018**, to be taken into consideration as part of the adjudication of this complaint.

By letter dated **15 December 2021**, this Office advised the Complainant's Representative that the complaint file in respect of that previous complaint would be included in the file of the present complaint. By email dated **15 December 2021**, this Office forwarded the above correspondence to the Provider.

The Income Protection Plan

I note that the Complainant's employer incepted an Income Protection Plan with the Provider in **January 2008** for the benefit of its employees. The Complainant became a member of the Income Protection Plan on **13 April 2016**.

The plan document states at the second paragraph that:

> *"This Policy witnesses that in consideration of the payment to the Company of the Premiums to be paid as provided in the Schedule the Company hereby provides the insurances described in this Policy and on proof to its reasonable satisfaction of the benefits becoming payable shall pay to the Grantees at the Chief Office of the Company the benefits expressed herein"*

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I note to following provisions of the plan document:

> *"**1. Disablement –** For the purpose of this Policy*
>
> *(i) Total disablement shall be deemed to exist where (a) the Insured Person is unable to carry out the duties pertaining to his normal occupation by reason of disablement arising from bodily injury sustained or sickness or illness contracted and (b) the Insured Person is not engaging in any other occupation for profit or reward or remuneration*
>
> *and*
>
> *(ii) partial disablement shall be deemed to exist where (a) following a period of total disablement as in Sub-Provision 1 (i), which period is to be decided by the Company, an Insured Person is unable to carry out the duties pertaining to his normal occupation by reason of disablement arising from bodily injury sustained or sickness or illness contracted and (b) the Insured Person with the written consent of the Company re-engages in his normal occupation with loss of earnings as a result or engages in some other occupation for profit or reward or remuneration.*
>
> ***2. Amount –***
>
> *(i) Subject to Provision 3, Provision 4, Provision 6 and Sub-Provision 7 (iii), in the event of total disablement as in Sub-Provision 1 (i) there shall be payable under this Policy an amount equal to the Benefit.*
>
> *(ii) Subject to Provision 3, Provision 4, Provision 6 and Sub-Provision 7 (iii), in the event of partial disablement as in Sub-Provision 1 (ii) there shall be payable under this Policy an amount equal to the Benefit less any amount of earnings or profit or reward or remuneration received by the Insured Person from his normal or other occupation*
>
> *Provided That the Company shall at its discretion and having regard to the rehabilitation process of the Insured Person be prepared to forego all or part of the aforementioned reduction from Benefit for such period as the Company shall decide.*
>
> […]

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7. Provision of Evidence Tests and Information –

(i) Subject to Provision 10 the Grantees and Insured Person shall furnish to the Company at the Grantees expense all such data, evidence, tests and information as the Company shall require upon or with regard to the happening of any matter affecting or relating to the insurance of any person under this Policy and the Company shall be entitled to act upon the data, evidence, tests and information so furnished […]

(iv) The Insured Person as often as is required by the Company shall submit to medical examination and tests to include the taking and testing of blood, urine or other samples. […]

10. Claim Procedure – *Written notice of disablement of the Insured Person shall be given to the Company at least 105 days prior to the date on which the Benefit is due to become payable. All certificates, data, evidence, tests and information required by the Company as a result of such notice shall be furnished at the expense of the Grantees and shall be in such form and of such nature as the Company may prescribe* […]*"*

The Claim

I note that the Complainant completed a 'Claim Notification Form' dated **7 April 2016** in respect of stress and depression which was preventing him from returning to work. On the claim notification, it was stated that the Complainant's symptoms first began on **[Date Redacted] 2014** and that the Complainant had stopped working on **[Date Redacted] 2015**.

The Complainant's employer completed a Provider 'Employment Information Form' dated **14 April 2016**, which contained a detailed description of the Complainant's job.

Following the submission of the claim notification, a claim form was completed over the phone on **4 May 2016,** with a third party service provider acting on behalf of the Provider. It appears the Provider then wrote to the Complainant enclosing a copy of the claim form for review. This was signed by the Complainant and dated **9 May 2016**.

At section 2 of the claim form, the following information was recorded in respect of the stress/difficulty of the Complainant's job:

> *"There is always a degree of stress as often had 50 emails during the course of the day and insurance companies do not have technical knowledge. Stress of the job was a continuous stress but a healthy stress and got a good vibe out of it.*

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> *Built up relationships with 15 or 16 companies and had a connection* (sic) *all of them. Had a strong sense of personal achievement. However company is a different kind of stress as not supportive. Had good relationships with clients and company's view was to put the company first. Had a sense of alienation and no validation. 2 things - one was fighting insurance companies on behalf of clients and the other was the company"*

At section 3 of the claim form, the following information was recorded in respect of the Complainant's description of his symptoms:

> *"Cause of stress in claimant opinion was the heart attack. Thinks went back to work too soon as job could have been in jeopardy. It is a small office and management did not even acknowledge fact been off sick. Felt there was a physical dislike coming from management. Physical symptoms are pain in the chest.*
> *Joined a gym after heart attack, thinks tore a muscle and any time gets tired, gets a pain in chest which is slightly there at present. Also has a permanent ache in both hands which get really bad and gets pain back of neck and shoulders and fatigue. Gets a lot of headaches. Mental sometimes are the worst, cannot face going out, lack of concentration and no sense of connection with people (30 minutes is long enough) Anxiousness that something may go wrong all the time. Hobbies are reading and much and it is hard to focus and concentrate. Normally organised, head is neat and tidy and focused but does not seem to have this."*

The Complainant's GP

The Complainant's GP wrote the following letter dated **28 April 2015**:

> *"*[The Complainant] *attended me today in a state of stress, anxiety and agitation. I understand that he has been requested to correspond and attend meetings and engage with his employers this week. My colleague* [named doctor] *issued him a sick certificate on Monday 13th April declaring him unfit for work until the 8th of May. He is therefore unfit for work and for all engagements with his employer until that time, including emails and meetings and discussions."*

The Complainant's GP wrote the following letter dated **18 March 2016**:

> *"*[The Complainant] *has been invited to attend an investigation meeting on Monday 21st March 2016. Unfortunately, due to on-going stress he is medically unfit currently to attend this meeting as it would likely exacerbate his mental and physical health complaints."*

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The Complainant's GP wrote the following letter dated **12 May 2016**:

> *"*[The Complainant] *is currently on sick leave due to work related stress. If he were to attend this meeting I feel it would have a negative impact on both his physical and mental health. He is therefore unfit for work and for all engagements with his employer indefinitely."*

The Occupational Physician

In its Final Response letter dated **7 December 2016**, the Provider advised the Complainant that as part of its assessment of the claim, it requested copies of his 'employer's Company Doctor reports'.

In an Occupational Health Assessment dated **20 April 2015**, the Occupational Physician stated that:

> *"Having assessed* [the Complainant] *today and having discussed matters with him in relation to his health and wellbeing, I find him fit to engage with an investigation process and attend a relevant meeting.*
>
> [The Complainant] *expressed some uncertainty on his part in relation to the pending process and informed me that he would like further clarity in relation to a number of items with regard to this process.*
>
> *I would also propose that* [the Complainant] *be allowed a few days to gather his thoughts and prepare himself for this meeting. He should continue with measures in place to maintain his well-being at this time and may benefit from further counselling in due course.*

In a letter dated **17 July 2015**, the Occupational Health Physician noted that:

> *"Following on from previous letter to you in June, I have received a letter from* [the Complainant's] *GP. The letter outlines the reason for his current absence and his current therapeutic plan.*
>
> *Unfortunately, there is no comment in relation to* [the Complainant's] *capacity to engage with his employer in relation to the proposed investigation. It was noted, however, that he was deemed unfit for work at this time as it was felt that re-entering his work environment would only exacerbate his symptoms."*

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In a letter dated **21 August 2015**, the Occupational Health Physician noted that:

> *"*[The Complainant's] *GP has recently reviewed him on 7 August 2015 and is of the opinion that he is currently unfit to engage in an investigatory process with his employer, even at a neutral venue, with family support.*
>
> *His GP is of the opinion that this initiative would only further his stress and anxiety, would be of little benefit, and would likely only exacerbate his symptoms.*
>
> *Furthermore, it is her opinion, in view of his background medical condition, that all measures should be taken to minimise his stress levels."*

In an Occupational Health Assessment dated **31 August 2015**, the Occupational Physician stated that:

> *"Whilst I believe it would be in* [the Complainant's] *best interest to engage with his employer, I do not believe that he is prepared for this process to commence until his reported symptoms have stabilised. Furthermore, in my opinion, I believe that there has been a deterioration in* [the Complainant's] *health and well-being over the last four and a half months since his last assessment. Therefore, I have recommended he attend his medical advisor to seek additional appropriate investigation and further management of his reported physical and psychological symptoms. This should help allay any concerns that both he and his medical and health advisors may have, particularly in relation to his underlying physical health. This should also help facilitate a further stabilisation of his psychological health. In the normal course of events, following referral to appropriate specialists, these investigation and further management could be completed within a number of weeks.*
>
> *Given the reported circumstances in relation to the initial response from work, the length of absence to date, and the medical advice outlined to* [the Complainant] *by his GP, I remain guarded in my opinion as to when* [the Complainant] *will be prepared to engage in an investigatory process with his employer.* […]*"*

By letter dated **19 February 2016**, the Occupational Physician wrote to the Complainant's employer to advise that:

> *"in the opinion of the specialist who assessed* [the Complainant]*, he is fit to engage in an industrial relations process and is fit to make a decision as to whether he wants to return to work at this stage or not."*

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I note that the reports and correspondence from the Occupational Physician were provided to Consultant Psychiatrist 1 and Consultant Psychiatrist 2 for the purpose of their assessment of the Complainant.

Medical Assessment

By letter dated **24 May 2016**, Senior Claims Assessor 1 wrote to Consultant Psychiatrist 1, arranging a medical assessment, as follows:

> *"The claim is payable as long as the definition of disability as required under the policy is satisfied. Disablement is deemed to exist where the insured person is unable by reason of illness or injury to carry out the duties of their normal occupation, and is not following any other occupation.*
>
> […]
>
> [The Complainant] *is employed as an Administrative Worker with* [Employer].
>
> *Please note that the illness or disability must be assessed in relation to the exact nature of the job requirements. You should also note that the availability of such work is not an issue.*
>
> *I enclose copies of our medical evidence to date.* […]
>
> *In the course of your report,* […] *we would be grateful if you could answer all of the following:*
>
> 1. *What is the exact diagnosis of the condition?*
> 2. *Please outline the exact nature and severity of current symptoms and comment on the following:*
>   a. *How does* [the Complainant] *spend a typical day?*
>   b. *What restrictions/limitations do his symptoms place on his ability to carry out normal activities such as housework, shopping, exercise, driving, socialising, etc.?*
> 3. *Please outline all current treatment and non-drug therapy.*
> 4. *In your opinion, is current treatment likely to lead to a resumption of work?*
> 5. *If no, are there any further treatment options which could be explored?*
> 6. *What goals has* [the Complainant] *set himself regarding a return to the work force and what progress against these goals has he achieved?*
> 7. *In your opinion, is he currently fit to carry out his normal occupation?*
> 8. *If no,*

/Cont'd…

a. *What are the main symptoms preventing a return to work?*
b. *What is the objective evidence of these symptoms on examination?*
c. *What aspects of* [the Complainant's] *role is he currently unable to perform?*

9. *In your opinion, if he is currently unfit for full time work, is he currently fit to resume his normal occupation on a phased basis? If yes, how many hours per week do you recommend?*
10. *Are there any factors that are inhibiting recovery?*
11. *What is the future prognosis of the condition?"*

The Complainant attended for a psychiatric assessment with Consultant Psychiatrist 1 on **7 June 2016**. The relevant report is dated **7 June 2016**.

At section 20, the report states, as follows:

*"**20. <u>Conclusions / Opinion</u>***

20.1. Diagnosis:

[The Complainant's] *current symptoms are not diagnostic of any significant psychiatric disorder. There may have been a symptom constellation diagnostic of an adjustment disorder when he went on sick leave in April 2015, with the stressor necessary for this diagnosis being the workplace problems which had occurred. There now appears to have been remission of symptoms.*

20.2. Circumstances of development of illness:

As outlined in section 5 of this report, [the Complainant] *developed symptoms in response to problems in the workplace, which culminated in him [Result Redacted].*

20.3. Current symptoms:

Current symptoms are outlined in section 6 of this report. Current symptom severity is mild.

20.4. Level of function and effects of illness on ability to carry out normal activities:

/Cont'd…

Daily routine is outlined in section 8 of this report. There are no significant negative effects on his ability to carry out normal daily activities.

20.5. Treatment:

Treatment is outlined in section 7 of the report. [The Complainant] *is not prescribed any psychotropic medication and there is no indication for such medication at this time. He has not required referral to a consultant psychiatrist for treatment.*

20.6. Current mental state:

Current mental state is outlined in section 19 of this report. There is no objective evidence of a significant depressive illness.

20.7. Goals towards a return to work:

Work-related issues are outlined in section 5 and nine of this report. There are significant work-related problems in this case. [The Complainant] *expressed a wish to return to work and said his goal is to return next year, by which time he believes there will have been management changes in the company.*

20.8. Reasons cited for being unable to work:

These are outlined in section 9 of this report.

20.9. Degree of disability / fitness for work:

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

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

20.10. Prognosis:

/Cont'd…

These are workplace issues which need to be resolved in this case and the outcome is going to depend on resolution of these problems."

Claim Outcome

By letter dated **29 June 2016**, the Provider wrote to the Complainant's employer declining the claim, as follows:

"As you are aware, disablement is deemed to exist where the insured person is unable by reason of illness or injury to carry out the duties of their normal occupation and is not following any other occupation.

We have recently received the results of the Independent Medical Examination with [Consultant Psychiatrist 1]. *It is our opinion based on the medical evidence received that* [the Complainant] *is not currently totally disabled from following his normal occupation as required by the policy and is fit to return to work.*

I must advise therefore that we are unable to admit this claim. It appears that there (sic) *work related issues that may be impacting on* [the Complainant's] *ability to return to work, but these cannot be a factor in the assessment of a claim.* […]*"*

By letter dated **30 June 2016**, the Provider wrote to the Complainant advising him of the outcome of the claim, as follows:

"Under the terms of the policy, disablement is deemed to exist where the insured person is unable by reason of illness or injury to carry out the duties of their normal occupation and is not following any other occupation.

As part of the assessment of your claim, we arranged for you to attend an independent medical examination with [Consultant Psychiatrist 1]. *This examination took place on 07 June 2016, and we have recently received* [Consultant Psychiatrist 1's] *report.*

In his report, [Consultant Psychiatrist 1] *had advised: "In my opinion* [the Complainant] *is currently fit to carry out his normal occupation. There is no objective evidence of disabling psychiatric illness that prevents him from performing the material and substantial duties of his normal occupation. Any residual symptoms are not disabling in nature."*

/Cont'd…

Therefore, it is our opinion based on the medical evidence received that you are not currently totally disabled from following your normal occupation, as required by the policy, and are now fit to return to work and we are not in a position to admit your claim. […]*"*

The Appeal

By email dated **1 July 2016**, the Complainant advised the Provider that he wished to appeal its decision to decline the claim. On **11 July 2016**, Senior Claims Assessor 2 requested that the Complainant submit an up-to-date specialist report which clearly indicated that he was totally disabled from following his normal occupation. Under cover of letter dated **11 October 2016**, the Complainant furnished a report from Consultant Psychiatrist A dated **7 October 2016** in respect of an attendance on **12 September 2016**. This report states, as follows:

*"**Diagnosis:** Adjustment Disorder / episode of Mixed Anxiety and Depression that relates to his perception of the situation in his workplace from 2012 and particularly since 2014.*

This is having a significant impact on his mental and physical health and he is not functioning at present. Currently symptomatic with depressed mood and anxiety, poor concentration, panic and re-emergence OCD symptoms.

***Relevant Factors:** Ongoing issues in workplace with excess demands, investigations and a sense of being undervalued, unsupported and humiliated. Feels sense 'mismatch' between him and the company and a loss of trust. Has narrowed his life style in an effort to cope and reduce anxiety and panic. Has not been in workplace since [Date Redacted] 2015 but symptoms have not subsided. Feels 'broken'.*

Likely all triggered by Myocardial Infraction in 2012 and has struggled at various levels to manage in the workplace since that time. Has sense of loss of plans in job and for the future. Unable to see a way out of his current situation.

GP started medication, Escitalopram 5 mg daily. Attending therapy which is helping. Lost job due to [Cause Redacted] in past and this experience may have aggravated sense of loss.

Difficult upbringing and significant adversity in early years would have left him vulnerable to mental health difficulties overall.

/Cont'd…

Presents as flushed and agitated. Tends to talk to excess which in my view is an effort to mask significant distress and tends to downplay and understate the impact and his upset and sense of loss. Became increasingly distressed when going over events in the workplace particularly his sense of humiliation and his sense that he is not being treated fairly. At times he was difficult to keep to the point due to significant anxiety. Had a sense of guilt and regret about the past and of being perceived as 'weak' in the workplace. Mood is sad, depressed and he has a positive death wish and has researched suicide. While denying current intent I would consider that he is a moderate risk of self-harm. Appears to have some difficulty articulating his needs which can appear as irritability and anger.

Risk: *Has considered [potential harm redacted] and looked up means. Potential and needs monitoring.*

Treatment and Recommendations: *Needs intervention. Recommend he should continue therapy and continue Escitalopram and possibly increase as tolerated to 20mg daily. I consider that he will need considerable therapeutic input over time and with his current level of symptoms, agitation and distress I find it hard to see how he would be able at present to return to the workplace.*

Perhaps if he responded to intensive therapy over the next 12 to 24 months he might be able to consider a return but I think this is unlikely. Overall, I consider that as things stand at present that it would be harmful for him to return to the same situation and would likely result in a deterioration in his mental and physical health with the potential to have a tragic outcome. Has done well not to resort to alcohol. His prognosis is guarded at best and he may not make a full recovery longer term."

I note that the Complainant attended for a psychiatric assessment with Consultant Psychiatrist 2 on **3 November 2016** at the request of the Provider. The relevant report is dated **3 November 2016**. At pages eight and nine, the report states as follows:

*"**Conclusions/Opinion:***

1. [The Complainant] *was unhappy in his work after his myocardial infraction in 2012.*
2. *He perceived that there was some animosity towards him and he also felt animosity towards his employers of whom he had a low opinion.*
3. *With the departure of his former boss, whom he believed had protected him to a degree, tension developed between* [the Complainant] *and his employers such that he was [Actions Redacted].*

/Cont'd…

4. *He did not return to work after his suspension claiming unfitness due to stress and depression.*
5. [The Complainant] *was subsequently regarded as mentally fit to engage in the investigation against him at work and also fit to return to work.*
6. *However, it appears he has no intention of returning to his current employers.*
7. *His symptoms are quite non-specific and mild and he is receiving very little treatment for them at present.*
8. *His activities of daily living are quite satisfactory.*
9. *He does experience a sense of loss and unfulfillment which is more than likely to the absence of a current occupational role.*
10. *It would be very much in his interest to return to work which would offer him an increased sense of focus and self-esteem.*
11. [The Complainant] *is not unable by reason of illness or injury to carry out the duties of his normal occupation.*
12. *His prognosis is good."*
13.

By letter dated **23 November 2016**, the Provider wrote to the Complainant declining the appeal, as follows:

> *"In his report,* [Consultant Psychiatrist 2] *has advised: "*[The Complainant] *is not unable by reason of illness or injury to carry out the duties of his normal occupation."* [Consultant Psychiatrist 2] *also advised: "It would be very much in his interest to return to work which would offer him an increased sense of focus and self-esteem."*
>
> […]
>
> *It is our opinion based on* [Consultant Psychiatrist 2's] *report that you are not currently totally disabled from following your normal occupation as required by the policy and you are medically fit to resume your normal occupation. I regret to advise we are standing over our original decision and we are not therefore in a position to admit your claim.*
>
> *It appears from the information you provided to* [Consultant Psychiatrist 2] *that there may be work issues which may have an impact on a successful return to work in your respect. In this regard, we are happy to make available the service of a specialist Case Manager,* [Named Entity]. [Named Entity] *have significant expertise in returning employees to work in complex work-related situations. They will therefore meet with you and also separately with your employer to assess the issues at hand.* [Named Entity] *will then draw up a return to work plan with the agreement of all the parties, which they would manage and oversee.* […]*"*

/Cont'd…

Following a brief email exchange between the Complainant and Senior Claims Assessor 1, the Complainant requested a Final Response letter on **2 December 2016**.

The Provider issued a Final Response letter dated **7 December 2016**, stating:

> *"*[W]*e arranged for you to attend an independent medical examination with* [Consultant Psychiatrist 1]*, on 7 June 2016. We also requested copies of your employer's Company Doctor reports. These reports were received on 1 June 2016 and sent to* [Consultant Psychiatrist 1] *for his information.*
>
> […]
>
> *An Income Protection Claim can only be paid when the objective medical evidence confirms that a claimant is medically unfit for work. In your case, it is clear that there are non-medical issues, such as the difficulties you describe with your employer, which are the reason for your absence from work. These issues cannot be a factor for us when determining your fitness or otherwise for work.*
>
> *It was our opinion, based on the medical evidence received, that you did not meet the definition of disablement as required by the policy and that you were fit to carry out your normal occupation.* […]
>
> *On 11 October 2016 you submitted a report from* [Consultant Psychiatrist A] *in support of your appeal. Having reviewed this report, in order to consider your appeal further, we arranged for you to attend an independent medical examination with* [Consultant Psychiatrist 2]
>
> […]
>
> *Based on the result of* [Consultant Psychiatrist 2's] *examination, it remains our opinion that you do not satisfy the definition of disablement, as required by the policy, and you are fit to return to work. We are therefore standing over our decision to decline your claim.*
>
> *As part of the consideration of your claim and the subsequent appeal, you have attended two independent medical examinations with two different Consultant Psychiatrists. Both of these doctors are of the view that you are fit to return to work at your normal occupation as a Client Manager with* [Employer]*.* […]*"*

/Cont'd…

Complaint to the Financial Services Ombudsman's Bureau

A complaint was received by the Financial Services Ombudsman Bureau (now the Office of the Financial Services and Pensions Ombudsman) in December 2016, regarding the Provider's declinature of the claim.

This Office issued a Legally Binding Decision dated **16 March 2018** where the complaint was upheld in part. At pages 16 and 17 of the Legally Binding Decision it states, in part, as follows:

> *"In view of the repeated references to the Complainant's heart condition in his Claim Form, in association with his stress and depression, it is evident that this has represented a recurring aspect of the Complainant's claim from the outset. It is my opinion that the Provider should have made reasonable inquiry into this aspect of the Complainant's claim, with a view to assessing the Complainant's claim on both physical and mental health grounds. The Provider did not request the provision of any medical reports pertaining to the Complainant's cardiac health, either from the Complainant's GP or from the Consultant Cardiologist. Nor did it arrange an examination of the Complainant by an independent Consultant Cardiologist, with a view to assessing this aspect of his claim.*
>
> *In the absence of this inquiry, I take the view that the Provider has failed fully to assess all aspects of the Complainant's claim, both mental and physical, and had thereby failed adequately to assess the claim. In these circumstances, I consider that the claim should be re-assessed on both mental and physical grounds.* […]
>
> ***Summary***
>
> *In conclusion, having reviewed and considered the submissions made by the parties to this complaint, as set out above, it is my Decision that this complaint is upheld in part.*
>
> *I take the view that the Provider has failed to assess all aspects of the Complainant's claim for disability benefit, both mental and physical, and has thereby failed adequately to assess the claim. Consequently, I consider that the Complainant's claim should be re-assessed by the Provider on both mental and physical grounds.*
>
> *In these circumstances, the Complainant is to be given the opportunity to submit to the Provider medical evidence from his GP and from his Consultant Cardiologist, pertaining to his ability to return to work from the point of view of his cardiac health, for assessment by the Provider. Thereafter, if the Provider wishes to obtain further*

/Cont'd…

specialist medical evidence, the Provider may request the Complainant to undergo an examination by a specialist medical examiner, if it wishes to do so.

Once the Provider has received this additional medical evidence, the Provider is to complete its final assessment of the Complainant's claim, taking into account all medical evidence presented, relating to both medical and physical aspects of the claim, and issue its decision to the Complainant.

Thereafter, if the Complainant remains unhappy with the outcome of the full assessment of his claim, it remains open to the Complainant to submit an appeal to the Provider in the normal way, and ultimately to pursue a new complaint to this office."

Further Medical Reports

Following the Legally Binding Decision, Senior Claims Assessor 1 wrote to the Complainant on **27 March 2018**, as follows:

"We note the ruling and wish to apologise for not assessing the physical element of your claim. The FPSO has invited you to submit reports to [the Provider] *from your GP and Consultant Cardiologist and we will review the matter on receipt of these reports.* […]*"*

I note that the Complainant wrote to Senior Claims Assessor 1 on **10 October 2018**, enclosing a letter from his GP dated **26 April 2018** and a letter from the Consultant Cardiologist dated **26 September 2018**. In his letter, the Complainant stated, in part, that:

"My initial claim stated that I was suffering from stress as a result of a heart attack and the documents enclosed confirm details regarding the heart attack.

My stress levels are still high, compounded by physical symptoms which were relayed to the "independent Consultant Physicians" employed by you but which were ignored in their assessment reports."

I note that the Complainant's GP wrote the following letter dated **26 April 2018**:

"I am [the Complainant's] *GP.* [The Complainant] *suffers from ischaemic heart disease; he had a coronary stent inserted in 2012.*

/Cont'd…

Psychological stress can potentially increase risk in patients with ischaemic heart disease."

I note that the Complainant's Consultant Cardiologist wrote the following letter to the Complainant's GP dated **26 September 2018**:

"Many thanks for asking me to see this [Age Redacted] man again, who had a cardiac incident six years ago, which necessitated stenting to two vessels with a documentation of a third right coronary artery CTO with collateral. He is still experiencing episodes of atypical chest pain at rest, while standing at photocopier, etc. There has been some very significant work stress and I have asked him to try and minimise exposures to this type of environment. He is walking 10,000 steps a day, was in sinus rhythm in clinic, BP 124/86. On the stress test, he performed a 10 minute stress test. There were no ST change and no pain. Given his anatomy, we have sent him forward for a cardiac MRI scan performed on the 20th of August, which showed no evidence of inducible ischemia, which is very satisfactory, ejection fraction 64% with inferior Akinesis consistent with his prior heart attack. I will see him in a years' time with a repeat stress test."

The Provider's Request for Further Medical Assessments

In an exchange of emails between the parties on **31 October 2018**, Senior Claims Assessor 1 advised the Complainant that it was in the process of arranging two medical appointments for the Complainant. Senior Claims Assessor 1 also advised that while she would be handling the claim on a day-to-day basis, she would not be involved in any decision making – it would be referred to personnel not previously involved in the previous assessment of the claim. Shortly after this, the Complainant's Representative queried the number of appointments being arranged, indicating that she would have to review the Legally Binding Decision again. In response to this, Senior Claims Assessor 1 advised, as follows:

"The decision of the FSPO was that once the provider […] *had received the additional medical evidence – which* [the Complainant] *brought into me a couple of weeks ago, we were to complete the final assessment of the claim taking into account all the medical evidence relating to both mental and physical aspects of the claim. This is why we are arranging the 2 assessments – to cover both aspects."*

By letter dated **1 November 2018**, the Complainant's Representative expressed her disagreement with the Provider arranging two medical assessments.

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At the second paragraph of this letter, the Complainant's Representative stated:

> *"You will note that 'a specialist medical examiner' is singular rather than plural. This, in our view, is an examination by a specialist medical examiner 'pertaining to his ability to return to work from the point of view of his cardiac health, for assessment by the Provider'. Indeed your letter of 27th March, 2018 apologised for not assessing the physical aspect of our claim.* […]*"*

This letter also queried Senior Claims Assessor 1's involvement in the claims process, as follows:

> *"*[W]*e are concerned that, having been told by yourself that you would no longer be dealing with this appeal because of your previous involvement in same, you are still handling the claim on a day to day basis. As the decision making will be dealt with by people not previously involved in the previous assessment of our claim, we would request that the day-to-day handling of our claim also be dealt with by these people."*

By letter dated **19 November 2018**, Senior Claims Assessor 3 wrote to the Complainant advising that she would now be handling the claim. The letter further explained:

> *"The decision of the Financial Services and Pensions Ombudsman (FSPO) was that* [the Provider] *can request for you to undergo an examination by a specialist medical examiner. I understand that this finding would seem to suggest that you attend a single medical assessment however, the other points made in the FSPO's findings directs* [the Provider] *to re-assess both mental and physical aspects of your claim. In order to do this we may require you to attend two assessments.*
>
> *We will organise an Independent Medical Examination to assess the physical aspects of your claim first. If this report confirms that you are unfit for work, the claim will be paid and reviewed in line with the normal terms and conditions of the policy. If however, this examination finds that you are fit to carry out the duties of your normal occupation from a physical perspective, we believe the fairest approach would be to then conduct a further Independent Medical Examination to re-assess your claim on mental health grounds.* […]*"*

In response to this, by letter dated **22 November 2018**, the Complainant's Representative wrote as follows:

> *"We find it interesting that* [the Provider] *have requested a physical assessment examination by an Occupational Health Physician rather than a cardiologist. We note*

/Cont'd…

that the FSO stated in their Preliminary Decision "Nor did it arrange an examination of the Complainant by an independent Consultant Cardiologist, with a view to assessing this aspect of his claim.

We would mention that [the Complainant] *has some misgivings about* [the Healthcare Provider]*, since he previously attended them at the request of his employer and is concerned about their impartiality.*

We note your comments regarding further medical assessment. However we would point out that [the Provider] *already have two reports assessing this claim on mental health grounds, as opposed to the one report provided by us in this respect. If* [the Provider] *now require a third report on mental health grounds, this would not, in our view, appear to be either balanced or fair.* […]*"*

Further Medical Assessments

I note that the Provider wrote to the Occupational Health Physician on **19 November 2018**, arranging a medical assessment of the Complainant, as follows:

"The claim is payable as long as the definition of disability as required under the policy is satisfied. Disablement is deemed to exist where the insured person is unable by reason of illness or injury to carry out the duties of their normal occupation, and is not following any other occupation. […]

Please note that the illness or disability must be assessed in relation to the exact nature of the job requirements. I enclose a copy of the job description/Employment Information Form which outlines the job requirements in more detail. You should also note that the availability of such work is not an issue.

Please focus on the physical aspects during the examination. I enclose copies of our medical evidence to date. […]

In the course of your report, […] *we would be grateful if you could answer all of the following:*

1. What is the exact diagnosis of the condition?
2. Please outline the nature and severity of current symptoms?
3. What limitations or restrictions are the symptoms placing on normal daily activities?
4. What treatment is [the Complainant] *currently receiving to address these symptoms?*

/Cont'd…

5. Has [the Complainant] *set any goals for himself regarding a return to work?* […]
6. In your opinion, is [the Complainant] *currently fit to carry out his normal occupation?*
7. If not, please confirm:
a) What specific symptoms prevent him from doing so?
b) What difficulties would these present in the workplace?
c) Can you recommend any other treatment options that might facilitate a return to work?
d) When in your opinion will he be fit to resume his normal occupation? […]"

I note that the Complainant attended for an assessment with the Occupational Health Physician on **3 December 2018** and a report was subsequently prepared by the Occupational Health Physician dated **24 December 2018**. This report begins with four sections outlining the Complainant's social, family, medical and occupational history. I note that the 'Occupational History' section contains details of the Complainant's occupational duties. The next section, which is approximately one page in length, is titled 'History of Presenting Complaint'. This was followed by a section on 'Activities of Daily Living'. The report continued as follows:

*"**Examination:** On examination he appears well and in no distress. He appeared slightly distracted and agitated. His affect appeared normal. No undue anxiety. He had no difficulty with recall throughout a one hour consultation.*

Height […] *Weight* […]

Blood pressure: 134/82. Pulse: 72 sinus rhythm.

Cardiovascular, respiratory and abdominal examination: Normal.

There was no evidence of any localised left chest tenderness. He had a normal grip both hands bilaterally and no evidence of any synovitis, joint swelling or any abnormalities defined in relation to the fleeting joint pains he experiences when he gets stressed.

Summary: *This gentleman has been absent from work for 3 1/2 years. He initially went out with a heart attack in October 2012 with 3 stents inserted. He started working 3 months thereafter. From a cardiac standpoint he has been well since without any symptoms. He tells me he had recent follow up with a stress test, MRI in 2018 which he was advised was satisfactory. He is due a further cardiology review in about a year.*

/Cont'd…

His primary difficulties he tells me have been linked predominantly to his mental health with difficulty coping, feeling overwhelmed at times, variable mood scores, anxiety, difficulty with focus, concentration and memory. He tells me these symptoms have persisted over the last 3 1/2 years. He goes for counselling 7 sessions annually. His consultation with [Consultant Psychiatrist A] *was a single once off evaluation with a view to preparing a report for* [the Provider]*. He has not had a review he tells me since that time.*

On assessment he appeared well, if a little bit agitated and anxious about the assessment. Affect appeared normal. I could find no evidence of any significant abnormalities affecting his concentration, focus and his memory and recall appeared quite reasonable throughout assessment.

At the present time, I can find no convincing objective evidence that this gentleman is so disabled that he is unfit for work.

It may be worthwhile obtaining an up to date psychiatric review – I note previous review 2016 did not find him disabled from a psychiatric view point and I am of the same view. I would suggest neuro-psychological testing might be useful to assess concentration, memory to ensure there is no underlying cognitive impairment underlying his complaints of difficulties with focus, concentration and memory which may well be linked to mild anxiety. He reads voraciously which is very much against him having any significant or material cognitive impairment.

At the present time, I find no convincing evidence that any mental health symptoms or physical symptoms of which he complains are so disabling that they would interfere with his capacity to work. Activities of daily living are entirely unrestricted at the present time. In my considered view this gentleman is fit for work and is not totally disabled."

I note that following this assessment and in light of the recommendation made, by letter dated **16 January 2019**, Senior Claims Assessor 3 wrote to the Complainant, as follows:

"Firstly, we note the comments in your letter of 22nd November 2018. With regard to the Independent Medical Examination with [the Occupational Health Physician]*, the purpose of this assessment was to determine your functional capabilities in carrying out the duties of your normal occupation, and therefore concluding whether or not you meet the definition of disability under the policy. We are satisfied that it was correct to arrange an Independent Medical Examination with an Occupational Physician in order to do so. We understand that you have attended* [the healthcare

/Cont'd…

provider] *on behalf of your employers however, we do not feel that there is an issue in this regard.*

We have now received the results of the assessment with [the Occupational Health Physician]*. It is our opinion that you are fit for work from both a physical and psychological perspective and are therefore not totally disabled. However, she had recommended a Neuropsychological review to address any other symptoms which may be preventing you from carrying out your normal occupation. Taking this into account, we are prepared to arrange a further assessment before making a final determination on your fitness for work.* […]*"*

This was followed by a further series of correspondence between the parties where the Complainant's Representative raised a number of issues (as outlined in the submissions submitted to this Office as part of the present complaint) regarding the Provider's assessment of the Complainant's claim. I note that on **18 February 2019**, the Provider wrote to the Complainant in response to a number of issues raised in previous correspondence. In light of the Complainant's position that an occupational health physician was not an appropriate consultant to carry out an assessment of the Complainant's cardiac health, the Provider indicated that it would be willing to arrange an independent medical examination with a consultant cardiologist if the Complainant was agreeable to this.

The Complainant's Representative responded to this letter on **26 February 2019** referring to the findings contained in the Preliminary Decision of the Financial Services and Pensions Ombudsman dated **February 2018**, and the Complainant's cardiac health. While the Provider's offer was not expressly declined, I note that there was no indication of a willingness on the part of the Complainant to attend a medical assessment with a consultant cardiologist.

The Provider wrote to the Neuropsychologist on **14 February 2019**, in very similar terms to its letter of **19 November 2018** to the Occupational Health Physician. However, I note that the reference to *"job description/Employment Information Form"* was not contained in the equivalent underlined paragraph of this letter. I also note the following additional questions that the Neuropsychologist was asked to consider:

"8. In your opinion, if [the Complainant] *is currently unfit for full time work, is he currently fit to resume his normal occupation on a part-time basis?*
9. If yes, how many hours per week do you recommend?
10. What is the future prognosis of the condition? […]*"*

I note that on **26 February 2019,** the Complainant underwent a neuropsychological assessment with the Neuropsychologist.

/Cont'd…

The 'Neuropsychological Report' prepared by the Neuropsychologist begins with a 'History' section and then an 'Interview' section detailing the information conveyed by the Complainant during the assessment which includes a section detailing the Complainant's description of his current difficulties.

The report then set out the neuropsychological tests which took place and the outcome of these tests. On the final page of this report, it states as follows:

> *"Overall, testing indicates that* [the Complainant] *is a man of very bright intellectual potential, who has under-utilised his talents throughout his life and is still under-utilising them. There was no evidence of brain damage on any formal tests. However his test responses are indicative of a long-standing difficulty in fitting into the work-place, which appears to have led to conflict in work, problems in* [the Complainant] *defining his position in the organisation, and problems in his perceived inability to influence the situation. He experienced long-term stress, had a heart attack and once out of the stressful situation has been unable to find a way back. He now has a fear of re-engaging with work, and may indeed not be able to do so. He has done little during his lay-off to keep his brain active, and his world has shrunk to a considerable degree.*
>
> ***Conclusion***
>
> [The Complainant] *suffered a heart attack on 1st October 2012, which affected his capacity to work and he has been out sick since [Date Redacted] 2015. While he has not had a recurrence of heart disease, he reports many vague and mild symptoms of pain, which are probably related to anxiety and are sufficient to cause him avoidance of work. Given his history of conflict in work he is now under-confident and fearful of returning.*
>
> *In the formal assessment situation* [the Complainant's] *cognitive and memory abilities all lie at the top of the High Average or Average ranges of functioning, at or above the 58th percentile, with some abilities as high as 90th percentile. Verbal and short term memory skills are excellent, and his capacity for visuo-motor and spatial problem solving is well within the top end of the Average range of ability. His processing speed, and attention generally, are slowed due to anxiety and a tendency for distractability and for following his own agenda, seeking patterns or following his own interests.*

/Cont'd…

Technically there is no reason why [the Complainant] *cannot return to work to fulfil the functions he has done over the years. However it seems clear that, in view of his negative experiences and memories relating to* [his employer]*, he is unable to contemplate returning there. He has not undergone any focused treatment to date. Six sessions per year with an employment-related counsellor is not in my view an appropriate treatment regime for* [the Complainant's] *difficulties, in terms of his deep resentments against his employer, his pattern of self-analysis and self-reliance, and his relatively unintegrated position in the work-force. He needs regular and frequent support from a skilled psychotherapist to help him address his current situation, let go of the past and his feelings of paranoia, and formulate plans for using his undoubted superior intelligence in a manner that is adaptive for him.*

On a single meeting, I am unable to offer a definitive diagnosis for [the Complainant]*. However it is clear that intellectually he is unused to applying himself to focused tasks, and would need a period of preparation before returning to any job. His normal daily activities are solitary, low in physical activity and lacking in mental challenge. His motivation for seeking out such challenges is low, and his mood would need to improve before he would have a reasonable chance of succeeding in any place of work."*

Following this assessment, the Provider wrote to the Complainant on **28 March 2019**, regarding the assessment of the Complainant's claim, as follows:

"We have now carried out our assessment of your claim from both a physical and mental health perspective. Based on the reports from [the Occupational Health Physician] *and* [the Neuropsychologist]*, it remains our opinion that you do not meet the definition as required by the policy, and are fit to carry out the duties of your normal occupation.*

However, as you are aware from my letter of 18th February 2019, we offered to arrange an additional Independent Medical Examination with a Consultant Cardiologist. This offer remains open […]

In her report, [the Neuropsychologist] *has made some recommendations that she feels would assist you in a return to work. In view of this, we are happy to offer the service of an External Case Manager to support you in a transition back to work. We acknowledge that any return-to-work plan will take time to arrange, and as such, we are prepared to pay six months benefit on an ex-gratia basis to support you in this regard.* […]*"*

/Cont'd…

I note that the Complainant's Representative provided a detailed response to the Provider's decision to decline the Complainant's claim on **3 April 2019**. This was followed by a further exchange of correspondence between the parties.

Clarifications on Medical Assessments

During **April 2020**, the Provider enquired with Consultant Psychiatrist 1, Consultant Psychiatrist 2, the Occupational Health Physician and the Neuropsychologist as to whether each one had sight of the Complainant's job description when completing their reports and, if not, whether this altered the opinion contained in the relevant report.

Consultant Psychiatrist 1 wrote to the Provider on **29 April 2020**, as follows:

> *"I have reviewed the job description which was sent to me* […]. *I have also reviewed my notes and report from the assessment of* [the Complainant] *on 07/06/2016.*
>
> *The information contained in the job description does not alter in any way the opinion I expressed in my report of 07/06/2016."*

Consultant Psychiatrist 2 wrote to the Provider by letter dated **26 April 2020**, as follows:

> *"*[The Provider] *asked if I had sight of this job description when compiling my report on* [the Complainant] *on 03/11/2016 and if not, whether the job description caused me to alter my opinion in any way.*
>
> *Having carefully studied the job description supplied as well as my Independent Confidential Psychiatric Assessment Report dated 03/11/2016, I wish to state as follows:*
>
> 1. *From the Sources of Information section of my report, it does not appear that I had sight of the specific job description.*
>
> 2. *However, on pages 6 and 7 of my report, under the heading, "*[The Complainant's] *Perception of his Ability to Work",* [the Complainant] *himself had given a reasonably detailed account of the type of work that he did with respect to emails and dealing with clients.*
>
> 3. *The job description supplied is that of Client Advisor and it is clear from the items listed under the heading "Main Responsibilities" that a thorough knowledge of the [type redacted] industry is required.*

/Cont'd…

Comment:

[The Complainant] *had been in the* [redacted] *industry since leaving school.*

4. *It was clear that he met the criteria under "Skills and Experience" and also under "Knowledge".*

5. *The "Interpersonal Skills" required were those to be expected for any such position.*

Conclusions/Opinion:

6. *The impression I had from other sources of information of* [the Complainant's] *day-to-day duties does not differ substantially from the formal job description supplied.*

7. *The detailed discussion I had with* [the Complainant] *allowed me to reach justifiable conclusions with respect to his ability to perform his work duties.*

8. *The job description supplied does not cause me to alter or amend the Conclusion/Opinion expressed in my report of 03/11/2016."*

The Occupational Health Physician wrote to the Provider in respect of the Complainant's job description by email dated **24 April 2020**, as follows:

> *"I do not recall having this particular job description to hand at the time of assessment, however the assessment was done in 2018 and there is no way I could confirm or refute this at this point in time.*
>
> *However I can confirm that a detailed occupational history was obtained with a review of job requirements and responsibilities at the time of my OH assessment.*
>
> *I can confirm having reviewed this job description and my own report that my opinion would have remained unchanged."*

In a further email dated **29 April 2020** relating to the reports considered by the Occupational Health Physician, she advised that:

/Cont'd…

"I do not recall having these reports to hand at the time of assessment, the assessment was done in 2018 and there is no way I could confirm or refute this at this point in time.

I would usually reference letters/reports where I received them as part of my assessments but I would not retain this data once a report is released.

However I can confirm that the cardiology report is very reassuring with regard to his cardiac function, stress test and an absence of inducible myocardial ischemia.

I can confirm having reviewed these letters and my own report that my opinion would have remained unchanged with regard to his fitness to resume work from a cardiac and mental health perspective."

The Neuropsychologist wrote to the Provider on **1 May 2020**, advising that:

"I assume that nothing has materially changed in [the Complainant's] *circumstances since his visit to me in February 2019. His cognitive facilities are relatively well preserved, and his medical condition is stable at this time. Therefore, there is no formal block to* [the Complainant] *returning to work, albeit perhaps in a less pressurised role, or with a different set of responsibilities, to allow for his long absence from the work-place and the need to catch up with developments. The issues which may block a successful return seem to lie between him and his employer, and to, partly at least, predate his heart attack.*

Thus, it is hoped that he and they can come to a satisfactory agreement regarding how they might facilitate [the Complainant's] *progress in work from this point on. I would like to see intensive psychotherapeutic input and a graduated return for him, to support a successful integration."*

Analysis

I am mindful that provision 2 of the plan document states that *"in the event of total disablement as in Sub-Provision 1 (i) there shall be payable under this Policy an amount equal to the Benefit."* Provision 1(i) defines total Disablement as being *"unable to carry out the duties pertaining to his normal occupation by reason of disablement arising from bodily injury sustained or sickness or illness contracted* [and] *not engaging in any other occupation for profit or reward or remuneration"*.

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Accordingly, in making a claim, the Complainant must establish that he meets the above definition of total disablement. In such circumstances, it is for the Complainant to put forward whatever medical evidence he considers sufficient to satisfy this definition, and it appears it was at all times open to the Complainant to do so during the assessment of the claim. Leading on from this, I do not accept the position advanced by the Complainant's Representative that the Provider should contact the Complainant's medical witnesses to request additional information, if their evidence was considered inadequate.

On receipt of the Complainant's medical evidence the Provider is entitled to request that the Complainant undergo medical assessment. Once this is complete, the Provider must then evaluate the available medical evidence to determine whether the definition of total disablement has been met. If the medical evidence does not satisfy this definition the Provider is entitled to decline the claim. However, I do not accept, as suggested by the Complainant's Representative, that there is an onus on the Provider to establish that the Complainant is fit to return to work. Further to this, I do not accept the position that the wording of the Income Protection Plan is ambiguous.

Insofar as concerns the Provider's assessment of the Complainant's medical health and its assessment of the medical evidence, it is important to emphasise that it is not the role of this Office to comment on or form an opinion as to the nature or severity of the Complainant's illness or condition. It is the role of this Office to establish whether, on the basis of an objective assessment of the medical evidence submitted, the Provider has adequately assessed the Complainant's claim and whether it was reasonably entitled to arrive at the decision it did following its assessment of the medical evidence submitted.

The Provider's assessment of the claim initially took place during **June 2016**. At this point, it appears that the information available to the Provider was the Claim Notification, the Claim Form, the Employment Information Form, letters/assessments from the Occupational Physician and a report from Consultant Psychiatrist 1.

In the most recent correspondence from the Occupational Physician dated **19 February 2016**, the opinion was expressed that the Complainant was fit to engage in an industrial relations process and fit to make a decision as to whether to return to work. In the report of Consultant Psychiatrist 1 dated **7 June 2016**, it was noted that there were certain workplace issues but the opinion was expressed that the Complainant was fit to carry out his normal occupation. In those circumstances, the Complainant was advised of the Provider's decision to decline the claim by letter dated **30 June 2016**.

The Complainant appealed the Provider's decision to decline the claim. In support of his appeal, the Complainant submitted a report from Consultant Psychiatrist A dated **7 October 2016**.

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In this report, Consultant Psychiatrist A expressed the view that it was hard to see how the Complainant could return to work at present. Consultant Psychiatrist A further opined that if the Complainant responded to intensive therapy over a 12 to 24 month period he might be able to consider a return to the workplace and, at that time, it would be harmful for him to return to the same situation.

On reviewing the report of Consultant Psychiatrist A, the opinions expressed in this report appear to me to have been in the context of the Complainant's workplace environment. However, the report does not appear to have given an opinion as to whether the Complainant was unable to carry out the duties pertaining to his normal occupation by reason of disablement arising from bodily injury, sickness, or illness, as required by the terms and conditions of the Income Protection Plan. It is also not clear whether, and to what extent, Consultant Psychiatrist A was aware of, or whether the Complainant explained and to what extent, the duties pertaining to the Complainant's normal occupation. Further to this, it is not clear from the report whether the report of Consultant Psychiatrist 1 was made available to Consultant Psychiatrist A.

The Complainant attended with Consultant Psychiatrist 2 on foot of a request from the Provider. In the report prepared by Consultant Psychiatrist 2 dated **3 November 2016**, the difficulties associated with the Complainant's work environment were noted but the view was expressed that the Complainant's prognosis was good and that he was not unable by reason of illness or injury to carry out the duties of his normal occupation. I also note that Consultant Psychiatrist 2 was furnished with, amongst other documentation, Consultant Psychiatrist 1's report and the Complainant's letter dated **11 October 2016** (which enclosed the report of Consultant Psychiatrist A).

The Complainant's appeal was then declined by the Provider by letter dated **23 November 2016** and a Final Response letter issued dated **7 December 2016**. A complaint was then made to the Financial Services Ombudsman's Bureau and following investigation of that complaint, a Legally Binding Decision was issued dated **16 March 2018**. In the Legally Binding Decision, it was considered that the Provider had not fully assessed all aspects of the Complainant's claim, mental and physical. As a result, the Legally Binding Decision stated that the Complainant was to be given the opportunity to submit medical evidence from his GP and Consultant Cardiologist, pertaining to his ability to return to work from the point of view of his cardiac health, and the Provider could then arrange further medical evaluation, as required, relating to both the mental and physical aspects of the Complainant's claim, and then issue its decision to the Complainant.

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I note that arising from the Legally Binding Decision, the Complainant submitted to the Provider a letter from his GP dated **26 April 2018** and a letter from a Consultant Cardiologist dated **26 September 2018**.

With respect of the letter from the Complainant's GP, it was stated that the Complainant suffers from ischaemic heart disease and that psychological stress can potentially increase risk in patients with ischaemic heart disease.

In my opinion, the GP letter is quite general and abstract. The GP letter does not offer any opinion as to the Complainant's ability to carry out the duties pertaining to his normal occupation by reference to his cardiac health. Additionally, the GP letter advises that psychological stress can potentially increase risk in patients with ischaemic heart disease, but it does not indicate how this was referable to the Complainant.

The Consultant Cardiologist letter does not appear to deal directly with the question of the Complainant's ability to carry out the duties pertaining to his normal occupation, by reference to his cardiac health. However, it was noted that:

> *"There has been some very significant work stress and I have asked him to try and minimise exposures to this type of environment."*

While significant work stress was noted, the view was not expressed that the Complainant was unable to carry out the duties pertaining to his normal occupation. Rather, the view was expressed that the Complainant should minimise exposures to this type of environment, which does not however demonstrate that the Complainant was unable to carry out the duties pertaining to his normal occupation.

The Complainant was assessed by an Occupational Health Physician on **3 December 2018** and a report was later prepared dated **24 December 2018**. On reviewing this report, it can be seen that the Complainant was examined from a physical and mental perspective. In concluding the report, the Occupational Health Physician expressed the opinion that there was no convincing evidence that any mental health symptoms or physical symptoms of which the Complainant complained, were so disabling as to interfere with his capacity to work and that the Complainant was fit for work.

In an email dated **24 April 2020**, the Occupational Health Physician advised that a detailed occupational history was obtained from the Complainant with a review of his job requirements and responsibilities at the time of the assessment and, having reviewed the job description recently furnished by the Provider, her opinion remained unchanged. In a further email dated **29 April 2020**, the Occupational Health Physician appears to have been provided with copies of the GP letter and the Consultant Cardiologist letter.

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The Occupational Health Physician advised that her opinion remained unchanged with regard to the Complainant's fitness to resume work from a cardiac and mental health perspective.

It is submitted by the Complainant's Representative that the Provider could have arranged for the Complainant to attend a consultant cardiologist and that the Provider did not adequately assess the claim, due to the fact it did not offer an independent assessment with a consultant cardiologist until **18 February 2019**.

The Legally Binding Decision is clear in that the Complainant was to be given the opportunity to submit medical evidence from his GP and Consultant Cardiologist pertaining to his ability to return to work from the point of view of his cardiac health. The Legally Binding Decision also stated that if the Provider wished to obtain *"further specialist medical evidence"* it could request the Complainant to undergo an examination by *"a specialist medical examiner"*. However, this further assessment was not limited or confined to a particular type of specialist medical examiner and it was open to the Provider to choose whatever medical professional it considered competent to carry out the examination.

Consequently, I do not accept that the Provider was necessarily required to request that the Complainant undergo an examination with a cardiac specialist. The Provider chose an occupational health physician. Having considered the matter, I take the view that the Provider was reasonably entitled to request that the Complainant attend this type of medical professional, for the purpose of assessing his mental and physical health.

On considering the Occupational Health Physician's report, I note that certain inconsistent statements are recorded but I accept the Provider's position that these are based on the Complainant's description of himself and do not appear to represent the view of the Occupational Health Physician.

It appears that the Occupational Health Physician recorded the description as given by the Complainant. In fact, the Occupational Health Physician appears to have been very much aware of the inconsistent comments made by the Complainant, as it was noted that the Complainant had difficulty concentrating and yet read voraciously. In this respect, the Occupational Health Physician recommended neuropsychological testing.

The Complainant underwent a neuropsychological assessment on **26 February 2019** with the Neuropsychologist. The Neuropsychological Report concluded that technically there was no reason why the Complainant could not return to work to fulfil the functions he had done over the years. However, in view of his negative experiences and memories relating to his employer, the Complainant was unable to contemplate returning.

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The report recommended that the Complainant benefit from a period of preparation, before returning to work. The report also stated that the Neuropsychologist was unable to offer a definitive diagnosis for the Complainant. By letter dated **1 May 2020**, the Neuropsychologist advised that there was no formal block to the Complainant returning to work. However, this was noted to be in the context of possibly a less pressurised role or a role with a different set of responsibilities to allow for the Complainant's long absence from the workplace and the need to catch up with developments.

On reviewing the Neuropsychological Report, I am satisfied that the Neuropsychologist was in a position to give a reasonable opinion as to the Complainant's ability to carry out the duties pertaining to his normal occupation. This opinion was clear in that the Neuropsychologist saw no reason why the Complainant could not fulfil the functions of his normal occupation. While certain experiences and memories were noted as factors discouraging the Complainant from returning to work, the Neuropsychologist did not suggest these meant that the Complainant was unable to carry out the duties, pertaining to this occupation.

In **May 2020**, the Neuropsychologist advised that there was no formal block to the Complainant returning to work, but also noted that certain accommodations could be made regarding the nature of the work he would undertake. However, I do not consider this necessarily means the Complainant was unable to carry out the duties pertaining to his normal occupation and rather, as can be seen from the Neuropsychological Report, the Neuropsychologist was seeking instead to facilitate the Complainant's integration back into the workplace.

The Complainant's Representative states that the Provider through its independent medical examiners refused requests for another party to be present during the relevant assessments. The Complainant's Representative further states that the Provider would not allow her to attend the Complainant's independent medical examinations. The Complainant's Representative considers that this gave rise to an unfairness and a lack of transparency.

In a letter dated **3 April 2019**, the Complainant's Representative stated that:

> *"I would have welcomed the opportunity to discuss* [the Complainant's] *mental and physical symptoms with the medical personnel, especially in view of the fact that I have been the main witness of* [the Complainant's] *mental and physical deterioration over the past four years."*

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In a letter dated **18 April 2019**, the Provider stated that:

> *"I note the comments regarding your wife's wish to attend the Independent Medical Examination with* [the Neuropsychologist]. *The vast majority of Independent Medical Examiners prefer to assess and interview an Income Protection claimant alone, and in the past have refused a request for another party to be present during the assessment. I note that* [the Neuropsychologist] *would have been willing to allow your wife to attend however, I can confirm that* [the Provider] *were completely unaware of this. If your wife wished to attend* [the Neuropsychologist's] *examination with you and we were notified of this in advance on the appointment, we certainly would have raised the matter with* [the Neuropsychologist]*."*

Based on the available evidence, I do not accept that there was a refusal to allow the Complainant's Representative to attend the Complainant's medical assessments. In any event, I do not accept that any non-attendance of the Complainant's Representative at these assessments, gave rise to any unfairness or lack of transparency. On the contrary, in light of the reason advanced by the Complainant's Representative for her attendance at the assessments, her attendance could arguably give rise to a perception, however unintended, that she was seeking to influence the medical examiner's opinion, rather than ensuring the fairness and transparency of the process. In her comments since the preliminary decision of this office was issued, she says that:

> *"I take great exception to the statement "she was seeking to influence the medical examiner's opinion". I do not consider this statement to be either "impartial or fair"."*

It should be noted that this Office is not suggesting that the Complainant's representative was seeking to influence the outcome. Rather the comment is made regarding the potential perception, however unintended.

Further to this, on reviewing the various reports prepared at the Provider's request and the observations made by the Complainant's Representative in respect of these reports, there does not appear to me to have been a lack of transparency as to the manner in which the assessments were conducted.

Having considered the matter at length, I accept that the Provider was entitled to form the view that the balance of the medical evidence suggested that the Complainant was capable of carrying out the duties pertaining to his normal occupation, and that he did not therefore meet the definition of disablement under the policy provisions.

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While the Complainant may have been experiencing certain psychological difficulties and he displayed concern regarding the workplace environment, the balance of the medical evidence did not suggest that the Complainant was unable to carry out the duties pertaining to his normal occupation.

On the basis of an objective assessment of the medical evidence, I am satisfied the Provider adequately assessed the Complainant's claim and that the Provider was reasonably entitled to decline the claim on the basis of the medical evidence available to it. Consequently, I do not consider there to be any reasonable basis upon which to 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.

MARYROSE MCGOVERN
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN (ACTING)

22 August 2022

PUBLICATION

Complaints about the conduct of financial service providers

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.

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Complaints about the conduct of pension providers

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will **publish case studies** in relation to complaints concerning pension 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.