Case 23 – Disability claim

Group life policy – insurer terminated disability benefits on grounds complainant can perform an alternate occupation; what constitutes an alternate occupation?

Background

In terms of the policy "disabled" means:

> ...that Capital Alliance considers the Member to be disabled because he is, in Capital Alliance's opinion, no longer able, due to illness, Accident or injury, to fulfil a significant part of the duties of
>
> (a) the Member's Own Occupation during the Initial Period; and
> (b) an Alternate Occupation thereafter.

"Own Occupation" is defined as:

> ... the Full-Time usual and routine duties of the occupation that a Member was engaged in immediately before the Date of Disablement ...

"Alternate Occupation" is defined as:

> ... an alternate occupation with any employer in the open labour market for which a Member is reasonably suited or may become suited by virtue of his experience, knowledge, training, education or ability, even if the Member is not following such occupation or is unable to secure such position. The definition becomes effective after the expiry of the Initial period.

Immediately prior to his disablement the complainant was working as a specialist attorney for a firm of attorneys.

With effect from 5 January 2009 Liberty Life ("the insurer") admitted the complainant's disability claim on the basis of his depressive illness which prevented him from performing his own occupation.

With effect from 31 July 2014, after the expiry of the initial period, the insurer terminated the complainant's disability payments on the basis that it considered him capable of performing an "alternate occupation" as defined in the policy.

At the time, the complainant was performing work as a legal editor/consultant.

The complainant then lodged a complaint with our office contending that the insurer had acted unreasonably by terminating his benefits. The complainant argued that the legal editor/consultant work which he did could not be considered an “alternate occupation” as contemplated by the policy.

Provisional determination

The complainant did not accept the first provisional determination that was issued by the office dismissing his complaint.

Therefore in accordance with our office procedure the matter was allocated to another adjudicator for reconsideration.

After the case had been discussed at a meeting of the adjudicators, a second provisional ruling upholding the complaint was issued, a summary of which is set out below:

- It is common cause that the complainant is incapable of performing his own occupation. The nub of the dispute is whether the complainant is capable of performing an ‘alternate occupation’ *as defined in the policy*.

- The definition of ‘alternate occupation’ expressly refers to the experience, knowledge, training, education or ability of the life insured and the requirement of reasonableness.

- Prior to disablement the complainant worked as a high level specialist attorney for a large firm of attorneys firm earning approximately R1 million per annum.

- The complainant currently works as a legal editor /consultant earning on average between R9000 and R9600 per month.

- The meeting considered the vast discrepancy in income between what the complainant earns as a legal editor / consultant and what he earned as a specialist attorney.

- The meeting also compared the nature of the duties which the complainant performed as a specialist attorney and those he performed as a legal editor / consultant and came to the conclusion that the work of the latter could not be construed as an 'alternate occupation' as contemplated by the policy.

- Therefore the meeting agreed that it did not follow from the fact that the complainant currently performs work for a legal publishing company that he is capable of performing an 'alternate' occupation.

- The meeting carefully canvassed all the medical evidence and was satisfied that it showed on a balance of probabilities that the complainant has since the date of disablement been prevented from performing his own occupation and also an 'alternate occupation'.

Insurer's response to the provisional determination

In response to the provisional determination, the insurer made the following submissions:

- '*Based on the medical records we had at the time of assessment, we concluded that [the complainant] was able to perform an alternate occupation using his experience, knowledge, training and education.'*

- '[*The complainant] failed throughout the case management to submit his own medical evidence to substantiate a different conclusion.'*

- *'We believe that a huge part of the current occupation involves skills used in his own occupation, therefore he did not have to significantly alter or adjust his skills set.'*

- *'... [the complainant's] income prior to claiming a disability benefit was given as R827 259.00 and not an approximate R1 million per annum.'*

- *'If one examines the summaries of important case law that the complainant published on certain web subscription pages, one must assume that the complainant has the ability to function in an 'alternate occupation'. Summarising the facts of lengthy scripts or court cases takes a significant amount of concentration and reliance on memory to conclude all the facts into editorials published widely for reference by the law fraternity.'*

- *'An example of an alternate occupation would be that of a legal editor. The complainant published a significant amount of editorials and summaries during 2012 and up to November 2014, on more than one website, specifically related to important labour case law through Judgements of the Labour Court and Labour Appeal Court.*

  Members of the law fraternity and the public in South Africa pay a subscription fee to access the above information as 'summarised case law', which generates an income for [the complainant].

  Due to the number of editorials and publications posted from 2012 to 2014, it is clear that the complainant has spent a significant amount of time producing these important editorials and summaries for the law fraternity and public, by using his own experience, knowledge, training, education and ability, as these publications are widely accepted and offered to the law fraternity and public as correct interpretations of the complex details in case law. Therefore one can argue he is fully functional in an alternate occupation.'

- *'One must also be cognisant that if a significant amount of people subscribe to these web pages and request access to his published editorials, he could easily earn more than his original income. Having the ability to edit, summarise and publish case law for South African law use is a strong indication that the complainant is capable of working in an alternate occupation and generating a substantial income from this.'*

Final Determination

1. On 10 February 2015 a provisional ruling was made, dismissing the complaint. The complainant did not accept the provisional ruling and, in accordance with the usual procedure in the office, the matter was allocated to another Adjudicator for reconsideration. On 29 July 2015 I held a meeting with my Deputy, Ms Preiss, and with Mr Engelbrecht, Ms Myrdal and Ms Shrosbree who are Adjudicators in our office. At this meeting a decision was made in favour of the complainant and a second provisional ruling, dated 31 July 2015, upholding the complaint was handed down accordingly. This final determination must be read with the second provisional ruling, dated 31 July 2015 ("the second provisional ruling").
2. The last but one paragraph of the second provisional ruling reads as follows:

> "The meeting therefore agreed that retrospectively, with effect from the date that the first benefit reduction was applied, the insurer should be directed to pay the full benefit less the income earned from the legal publishing company (as per clause 5.1.2.3) and less benefit payments already made."

3. The parties were afforded an opportunity until 31 August 2015 to challenge the correctness of the second provisional ruling. The insurer availed itself of this opportunity in a letter, dated 31 August 2015.
4. On 3 September 2015 I held a further meeting with the persons referred to in paragraph 1, above, and at this meeting it was unanimously decided that a final determination should be made, as follows:
   - 4.1 That a declaratory order is made to the effect that the insurer was not entitled to terminate the complainant's disability benefit with effect from 31 July 2014.
   - 4.2 That the insurer is directed to re-instate the said benefit with effect from 1 August 2014.
   - 4.3 That the insurer is directed to pay to the complainant:
     - 4.3.1 The arrear benefit for the period 1 August 2014 to 31 August 2015, including interest thereon;
     - 4.3.2 The monthly benefit from 1 September 2015,

     subject to the conditions set out in paragraphs 4.4 and 4.5, below.

4.4 The complainant is directed to take all steps which may be reasonably required by the insurer in order to enable it to comply with paragraph 4.3, above.

4.5 The insurer is directed to calculate the amounts due to the complainant in terms of paragraph 4.3, above in accordance with the provisions of the relevant policy, notably clause 5 thereof.

4.6 Leave is granted to each party to approach this office for further directions relating to the implementation of paragraph 4.3, above.

5. It is common cause:

5.1 That the complainant is incapable of performing his own occupation, which is that of an attorney.

5.2 That the complainant has, from time to time, earned an income.

5.3 That the exact extent of the income referred to in paragraph 5.2 has yet to be proven to this office and to the insurer.

5.4 That, as a result of the fact set out in paragraph 5.3, above:

5.4.1 this office is not in a position to order the insurer to pay a specific amount to the complainant by way of a benefit in terms of the policy;

5.4.2 the insurer is not in a position to do the calculation envisaged in paragraph 4.5, above.

5.5 That the principal issue to decide in this final determination is whether the complainant fell within the scope of the following provision of the policy on 31 July 2014:

> "Alternative Occupation means an alternate occupation with any employer in the open labour market for which a member is reasonably suited or may become suited by virtue of his experience, knowledge, training, education or ability, even if the member is not following such occupation or is unable to secure such position."

5.6 That the insurer contends for an affirmative answer to the enquiry posed in paragraph 5.5, above, while the complainant disputes this assertion.

6. Before I turn to a consideration of the relevant facts, I draw the attention to specific provisions of the definition and to the relevant practice in our office with regard to similar definitions.

7. The words "in the open labour market" which form part of the definition may not be ignored and must be given their usual meaning.

8. The words “for which a member is reasonably suited” also fall to be interpreted. On 17 September 1999 Prof. R H Christie QC furnished an opinion in which he considered a policy provision which envisaged “any occupation for which she is suited by her education, training or earnings ability”. He said this:

> “To my mind these words can bear only one meaning. The occupation which is being considered must be one which a person of the plan member’s education, training or earnings ability would (unless disabled) be able to follow, but which a person of lesser education, training or earnings ability would not be able to follow. Any other interpretation would give insufficient weight to the word ‘suited’, which as normally understood is broadly synonymous with ‘appropriate’ or ‘fitting’. An employment agent would not suggest to a client that he was suited for an available job if it could be performed by a person of lesser education, training or earnings ability. To put it another way, the clause is referring only to occupations at the plan member’s level, but not at a lower level. To argue the contrary invites the question of how low the level can be before an occupation is not ‘suited’ to the plan member. If the answer is that there is no lower limit the clause is being equated with the common ‘any occupation whatsoever’ clause, which it manifestly is not.”

9. I am in agreement with the opinion of Prof. Christie and, on the facts of this case, it means that another occupation must be “reasonably appropriate” or “reasonably fitting” to the complainant, bearing in mind the nature of his previous profession and the level at which he practised it, before that other occupation can pass muster as an “alternative occupation” in terms of the definition. This office also endorses the view of Prof. Christie and on page 360 of **Life Insurance in South Africa** by Nienaber and Reinecke the following is said:

> “... any other **suited** occupation must be interpreted to refer to an occupation at the same and not at a lower level.”

Of course, in the insurer’s definition there is the important further requirement of reasonableness.

10. It is important to point out what the practice of this office is relating to definitions such as the one under consideration. On page 359 of the publication referred to in paragraph 9, above, the authors say this:

> “The approach of the office is that an insurer must specify the particular occupations which it contends the insured can follow, with the complainant being given the opportunity, if he contests this, to state why he would not be able to follow the suggested occupations.”

11. I point out that the approach referred to in paragraph 10, above, is practical and it accords with common sense. Moreover, it finds cogent and persuasive support in another opinion by Prof. Christie, dated 24 February 1998. Applied to the facts of this case, the said practice entails that the issue to be determined in the final determination is whether the insurer established or demonstrated that, at the time when terminated the complainant's disability benefit with effect from 31 July 2014, it was entitled to do so. It is implicit in the order referred to in paragraph 4.1, above, that the meeting held that the insurer had not established or demonstrated that entitlement. See further, paragraph 5.5, above.
12. It is trite that a policy such as the one in question "insures against disability, not against unemployment" – Nienaber and Reinecke, **op. cit.**, page 354. On page 358 the authors stress that the "notion of reasonableness is once again paramount" and they say that the "ultimate question will always be whether it is reasonable to expect the insured to pursue a particular occupation".
13. In the definition there are five factors with reference to or "by virtue of" which the question is determined whether an occupation is "reasonably suited" to the insured, namely "his experience, knowledge, training, education or ability".
14. On page 361 of **Life Insurance in South Africa**, the authors refer to a "summary" by the Association for Savings and Investment, of which the insurer is a member. According to the authors this document "provides a helpful summary of some of the relevant factors to be taken into account when evaluating the reasonableness of an alternative or similar occupation". With reference to "income" it is then said:

    > "A general guideline should be that a drop in income of more than 25 per cent would be regarded as unfair".

15. On the crucial issue for determination the second provisional ruling concluded that "the meeting agreed that it did not follow from the fact that the complainant currently performs work for a legal publishing company that he is capable of performing an 'alternate' occupation". That meeting in effect held that the complainant's employment at the legal publishing company was not "reasonably suited", having regard to the five factors stipulated in the definition and that, therefore, that occupation is not an "alternate occupation" within the meaning of the definition.

16. The insurer challenges the correctness of the findings referred to in paragraph 15, above.

17. The complainant last worked as an attorney in December 2008. He was then, in the words of the second provisional ruling, working as a "high level specialist attorney" in a large practice.

18. Before the second provisional ruling was made the insurer relied on a so-called "HR Report" which was "last updated" in 2008. In this document reference is made to two occupations, namely "legal officer" and "legal services manager". In respect of each of these positions the following is said:

    "Salary figures are based on a full working day."

    The weight of the evidence establishes that the complainant was, at all relevant times, and is at present, incapable of performing "a full working day". In its challenge of the second provisional ruling the insurer no longer appears to rely on this "HR Report" – which is unsurprising.

19. I do not consider it necessary to trawl through the numerous and voluminous medical reports. As a general observation I state that I did not get the impression from any one of these reports that the complainant is malingering or that he is exaggerating his limitations and symptoms.

20. I briefly considered the two most recent medical reports, which were obtained by the insurer, in paragraphs 21 and 22, below.

21. **Report by Dr K, dated 24 August 2015**

    Dr K is a psychiatrist who studied 13 reports relating to the complainant and covering the period from 29 April 2009 to 27 July 2013. Dr K's report concludes as follows:

> "As can occur at times, his depression was treatment resistant which can occur in a small percentage of depressed patients. Because of his failure to improve he has consulted four different psychiatrists, also not unusual in patients with treatment resistant depression.
>
> Although his depression symptoms have almost cleared his long period of depression has damaged his functioning and greatly impaired his professional abilities. Prior to his depression he was a high functioning man working as an attorney, specialising in complex legal matters.
>
> I am of the opinion that [the complainant's] long history of depression has permanently impaired his ability to function as an attorney, despite the improvement in his condition.
>
> In addition, his report that his memory and concentration has improved, but is still not back to normal. In view of his family history of Alzheimer's Disease I

have recommended that he discuss this with his psychiatrist, [Dr E] with the view to have psychiatrist testing of cognitive functioning."

22. **Report by Ms I, dated 30 August 2015**

Ms I is a graduate Occupational Therapist who practises as an Incapacity and Claims Consultant. Her report concludes as follows:

> "Given the assessment findings it is evident that [the complainant] suffers with on-going psychiatric symptoms associated with anxiety.
> Based on the high cognitive demands associated with [the complainant's] senior role at [X attorneys], coupled with his current functional limitations and coping strategies, it is not realistic for him to resume his full professional occupational duties.
>
> What he is currently managing professionally, within the parameters and confines in which he achieves such outputs, is probably the most optimal occupational performance [the complainant] is going to achieve currently and in the longer term future.
> In my opinion, given my findings during the assessment; his age and lengthy medical history; as well as the limited amount of improvement in over six years, [the complainant] is not suited to any formal position within the open labour market within the field of law.
> The legal field is exceptionally demanding on all levels and does not accommodate (or easily tolerate) the inability of a professional to 'keep up' with what is required on a daily basis."

23. At present the evidence of Dr K and Ms I (as to which see paragraphs 21 and 22, above) strongly suggests that the complainant cannot function full-time in the open market in any stress-inducing position. Of course, the reports of these two experts were not available to the insurer when it terminated the complainant's benefits with effect from 31 July 2014.

24. However the report dated 2 August 2013, of the Occupational Therapist, Ms S, was available to the insurer when it terminated the complainant's benefit. Leaving aside the report referred to in paragraph 22, above, the report of Ms S is the most recent report from an Occupational Therapist submitted to us. This is despite Dr E's suggestion in his report, dated 20 May 2014, that the complainant should be referred back to Ms S for a review assessment of his functional progress. In her report Ms S said the following:

> "At this stage [the complainant] is still not regarded capable for returning to work in the **open labour market** on a full time basis, mainly because of the impact of the anxiety symptoms on his functioning. He is coping relatively well working from home where he is not exposed to any external work pressures and he can pace himself" (emphasis supplied).

25. From a fair reading of the complainant's various submissions to this office, it appears that Ms S's report referred to in paragraph 24, above, offers strong support for his self-reported limitations. To demonstrate the validity of this observation I refer to the complainant's statements in paragraph 26, below, which are taken from the letter, dated 23 February 2015, which the complainant wrote to this office.

26. **The complainant's submissions**

26.1 "The five attributes in question all relate to the factors that would determine the employee's income earning ability and therefore one's income is, by implication, also involved, although indirectly, in the test for whether an occupation is an alternate occupation. To exclude the potential income of an envisaged occupation would be to negate the effect of the five attributes listed in the definition."

26.2 In my view the complainant's reasoning in paragraph 26.1, above, is unassailable and it makes good common sense. See, further, paragraph 14, above.

26.3 The complainant refers to the termination of his benefits and the application of clause 5 of the policy, to which I referred in paragraph 4.5, above, and says this:

> "In my case I assume that the insurer came up with an amount that reduced my benefits to zero. I say 'assume' because I have not been told any amount or for that matter any alternative occupation for which, in its opinion, I may be suited."

In my view the complainant's factual averments are correct. See, in this regard, paragraph 10, above, and paragraph 29.8.2, below.

26.4 As will become apparent hereinafter, the insurer has now suggested, in its letter, dated 31 August 2015, that for the complainant a suitable alternate occupation could be that of a "legal editor". See, further, paragraph 27, below, and compare paragraphs 10 and 11, above.

26.5 The complainant then said this:

> "This then would be a convenient point at which to discuss the notion of an appropriate 'alternate occupation' in my case. When I left my position as a publisher at [the legal publishing company] in 2000 I set out on a deliberate path to acquire skills and experience that would increase my income. I started out as a small legal consultancy and gradually expanded to a two man practice. I established a profile for

myself by writing articles for publication which led to my appearance on television being interviewed about changes to financial legislation. I was then headhunted to join [X attorneys] ... where I expanded my profile immensely by speaking at numerous seminars and conferences. To say that I worked hard at establishing myself would be an understatement: I devoured all relevant knowledge, staying up late at night, immersing myself in documents and reports in order to understand financial, mathematical and actuarial concepts. I attended lectures and presentations of relevant financial and labour law specialists. To put this into the five attributes listed in the definition of 'alternate occupation', my experience, knowledge, training, education and ability made me not just an attorney but a specialist dealing in claims running into hundreds of millions of rand. And I was remunerated on that basis. To say that I must now accept that my alternate occupation is as a law reports editor (and restrict my earnings to those of a law reports editor) is to deny the five essential elements of the enquiry.

Applying the definition of 'disabled' to my situation I am unable to perform a significant part of even a lesser occupation such as, for want of a better term, an ordinary attorney. As I get immensely tired at around midday and need to sleep I could not find employment and I don't at present have the energy, confidence, focus or concentration to start my own firm where I can work on my own terms and at my own times. I am not saying that I cannot get there: I am merely saying that I am not at that stage at present even though I would love nothing more than to be there.

Other 'alternate occupations'? I have, I think, considered all other options, this is not by any ways an exhaustive list: legal adviser; conveyancer; law lecturer; prosecutor; mediator; magistrate; labour consultant; public defender; assessor and deeds registrar. Apart from the fact that I don't have the necessary skill sets for some of these occupations, they all require that I be in an office or court for most of the day and I am simply unable to do that. That is of course apart from the fact that I need to check and double check everything that I do because of stupid error I make through losing concentration or focus."

27. On 31 August 2015 the insurer wrote to this office, challenging the correctness of the second provisional ruling. I will refer to certain aspects of this letter, but by way of a general introduction to my analysis thereof, I wish to make certain observations.

    27.1 As mentioned, the insurer suggested that the complainant could be a legal editor.

    27.2 The insurer did not, however, aver that the suggested alternate occupation could be held "with any employer in the open labour market" and that the complainant "is reasonably suited" for that occupation.

28. In fairness to the insurer I quote below its statement of the essence of its case, which is set out in its letter referred to in paragraph 27, above, justifying its decision to terminate the complainant's benefit with effect from 31 July 2014:

> "Due to the number of editorials and publications posted from 2012 to 2014, it is clear that [the complainant] has spent a significant amount of time producing these important editorials and summaries for the law fraternity and public, by using his own experience, knowledge, training, education and ability, as these publications are widely accepted and offered to the law fraternity and public as correct interpretations of the complex details in case law. Therefore one can argue he is fully functional in an **alternate occupation**.
>
> One must also be cognisant that if a significant amount of people subscribe to these web pages and request access to his published editorials, he could easily earn more than his original income. Having the ability to edit, summarise and publish case law for South African law use is a strong indication that [the complainant] is capable of working in an **alternate occupation** and generating a substantial income from this.
>
> It must be further noted that the insurer cannot be held responsible for any lack of subscribers to the web pages, or lack of income generated from these online web pages. The insurer is also not responsible for [the complainant's] inability to secure employment.
>
> If our interpretation of the value of these publications and editorials is incorrect, we would like a detailed explanation directly from [the complainant].
>
> When we concluded [the complainant] was able to perform an **alternate occupation** (based on the medical records submitted to us that indicated significant improvement), we believe that we allowed him sufficient time to return to work and we agreed to several extensions."

29. **The insurer's suggested alternate occupation**

29.1 By way of an introduction to my analysis of the insurer's case, I express the view that the insurer may be under a misapprehension what the complainant's occupation is. I, therefore, briefly set out the relevant facts. A good starting point is the following statement in the report referred to in paragraph 22, above:

> "He currently works on an ad hoc and contractual basis for [company X] (a textbook publishing company) and works from home in his own private and personal capacity. He is able to self manage the quantity and pace of his work as he is able to request the amount of work that is allocated to him in a given week. The role predominantly involves reading, editing and summarising court judgements in preparation for distribution to the legal profession by [company X]. His completed work is submitted via email to the publisher."

The complainant intended to start up a so-called “on-line legal information” business, but this never got off the ground. The complainant does not operate a “web site business”. It may be that the insurer erroneously assumed that in addition to the complainant’s occupation with [company X] he also conducts a separate “web site business”. However, case summaries done by the complainant appear on legal web sites which are not owned by him.

29.2 One of the relevant considerations is the income which the complainant could earn in the alternate occupation compared with his previous profession as a specialist attorney. See paragraphs 26.1 and 26.2, above. The insurer pointed out that the complainant’s “income prior to claiming a disability benefit was given as R827 259.00 per annum and not an approximate R1 million per annum”. This is so, but the R827 259.00 was a 2008 salary – in July 2014 it was more than 5 years ago. The question is whether at present the income which the complainant could be expected to earn as a legal editor is reasonably comparable to the salary which the complainant would probably have earned today, but for his disability. Of course, all the other factors stated in the policy definition must be borne in mind. One must adopt a holistic approach when determining whether the complainant “is reasonably suited to be a legal editor”.

29.3 The insurer said that “if one examines the summaries of important case law that [the complainant] published on certain web subscription pages, one must assume that [the complainant] has the ability to function in an **alternate occupation**”. The insurer’s choice of words may be indicative of a flawed approach to the matter under investigation. The question is not whether the complainant can “function” in an alternate occupation, but whether there is “an alternate occupation .... in the open labour market for which (the complainant) is reasonably suited” if one has regard to (or, “by virtue of”) the five enumerated factors or considerations. Unless one asks the right question, it is unlikely that one will find the correct answer.

29.4 The insurer referred to the number of “editorials and publications posted” by the complainant from 2012 to 2014 and said that these indicate that the complainant had done this work “by using his own experience, knowledge, training, education and ability”. The insurer is, of course, referring to the said factors. The insurer states that one could, therefore, “argue (that the complainant) is fully functional in an **alternate occupation**”. The test is not whether one can argue or submit that a certain proposition should be accepted as being correct. The question is whether the insurer demonstrated that the position of a legal editor is an alternate occupation, which falls within the ambit of the definition.

29.5 I point out that the insurer emphasised the expression “an **alternate occupation**” every time it is used. I assume that this was done to emphasise that the insurer had in mind the requirements of the definition and that it was not intended to emphasise the point that, as long as there is **an** alternative occupation which the complainant can perform (i.e **any** alternative occupation) he is not entitled to the policy benefit.

29.6 The insurer then makes a bold leap of assumption by saying this:

> “One must also be cognisant that if a significant amount (**sic**) of people subscribe to these web pages and request access to his published editorials, he could easily earn more than his original income”.

There is not a scrap of evidence to substantiate this sweeping statement.

29.7 The insurer continues to make another unsubstantiated statement when it says that “having the ability to edit, summarise and publish case law for South African law use is a strong indication that [the complainant] is capable of working in an **alternative occupation** and generating a substantial income from this”.

29.8 The insurer said the following:

> “When we concluded [the complainant] was able to perform an **alternate occupation** (based on the medical records submitted to us that indicated significant improvement) we believe that we allowed him sufficient time to return to work and we agreed to several extensions”

I comment as follows:

29.8.1 The medical reports reflected an improvement in the complaint's condition.

29.8.2 In my judgment the available evidence, including the medical records to which the insurer referred, did not justify the termination of the benefits. This is so, particularly because the correct question was **not** whether the complainant's condition had improved. The issue for determination was whether, at that time, the complainant fell within the definition of "alternate occupation". It can safely be said that no, or inadequate, weight was attached to the definition requirements of "in the open labour market" and "reasonably suited". To test the validity of this inference, one can ask: What occupation was, at that time, considered by the insurer to be one "in the open labour market for which (the complainant) was reasonably suited"? If this correct question was not asked, it is almost inevitable that the answer would be wrong. **If** (and now I emphasise the word) this question was asked, it was answered incorrectly. In paragraph 26.3, above, I pointed out what the complainant's version is about this issue.

29.8.3 Our office made enquiries regarding the nature of the occupation of a legal editor in the open labour market. The result is revealing – as will be seen from the attached advertisement by [company X] Law for the position of a Law Reports Editor. The fourth and sixth "Attributes" required by the publisher clearly disqualify the complainant – let alone the inherent requirement that this is a full-time position.

30. The insurer made the following request:

> "If our interpretation of the value of these publications and editorials is incorrect, we would like a detailed explanation directly from [the complainant]".

The insurer is entitled to review or to re-assess the claim for benefits under the policy from time to time. In the second provisional ruling it was held that "there

was no basis upon which the insurer was entitled to terminate the benefit altogether with effect from 31 July 2014". That ruling was open to challenge by the parties until 31 August 2015. The insurer made such a challenge and the time is ripe for a final determination to be made. The parties had ample opportunity to present their cases relating to the termination of the complainant's benefits on 31 July 2014. This office has sufficient information at its disposal to make a final determination and fairness demands that such a determination should now be made. In the concluding paragraphs of the insurer's letter there are listed certain "requirements" for the complainant to comply with "before (the insurer is) able to proceed any further with this matter". The complainant's compliance with the insurer's requests for "a detailed explanation" and for the information/documents encompassed by its "requirements" may (and I put it no higher than that) in the future disclose facts which may entitle the insurer to reduce or to terminate the complainant's benefits. Such facts may also amount to "new evidence" of the nature envisaged in Rule 2.2.2 of the Rules which regulate the procedure in this office. Such facts will undoubtedly determine the insurer's future course of conduct. But those are matters for the future.

31. For the above reasons the meeting referred to in paragraph 1, above, came to a unanimous decision that the insurer's termination of the complainant's benefits on 31 July 2014 was not justified.

Judge R P McLaren
Ombudsman for Long-Term Insurance