

## **Case 8/2010 FINAL DETERMINATION**

*Late submission of disability claim; complainant dismissed while still able to work and reinstated after he became disabled; application of equity jurisdiction*

### **Background**

1. The facts of the matter are as follows: Mr B worked as an administrator/ accountant since 1988, and was covered under Old Mutual's Orion group life policy. He was dismissed on grounds of alleged misconduct on 5 May 2008, and the employer removed him from the group policy. He declared a dispute with the CCMA, but while the CCMA process was continuing his health deteriorated (he suffered from ischaemic heart disease) to the point where it became evident that he could no longer work; his Old Mutual Greenlight policy paid him an occupational disability accelerator benefit on 23 September 2008.
2. The CCMA process eventually resulted in a settlement agreement on 3 February 2009. In terms of the agreement he was reinstated retrospectively in his employment from 5 May 2008, and the employer was to reinstate him on the policy with payment of premiums from May 2008 to the date of his reinstatement, so that he could apply for disability benefits. The disability claim forms were signed on 30 June 2009 and reached Old Mutual on 23 July 2009.
3. The relevant clauses in the policy regarding the time for submitting claims read as follows:

"The claim must be submitted to Old Mutual no later than 4 weeks after the expiry of the waiting period or 13 weeks after the date on which the loss of limbs occurred, as the case may be. If this requirement is not met, the right to claim will lapse".

*"Waiting period:* A continuous 6-month period of absence from the Participating Employer's usual place of business due to injury or illness during which the Insured Person does not perform the material duties of his job. Such period will be calculated from the first day that the Insured Person is absent from work".
4. On 4 November 2009 Old Mutual declined the claim on the grounds that he had not been actively at work since 6 May 2008, and that the claim was submitted late.

### **The arguments**

5. The parties' arguments have been made in correspondence which ensued after the complaint was lodged with our office on 15 March 2010. The following is a summary thereof.
6. The complainant argued (12 March 2010) that his understanding was that the waiting period would have commenced from 3 February 2009

when he was reinstated and should have been re-introduced onto the policy. If this were so his claim would not have been lodged out of time.

7. The Old Mutual Internal Arbitrator noted (22 April 2010) that the “actively at work” requirement only applied to death claims, but took the view that the claim had been properly declined on the ground of late submission. He stated that it would not be equitable to decline the claim on the ground that it was submitted more than 4 weeks after the expiry of the waiting period, but it would be equitable to decline it on the ground that it was submitted more than 4 weeks after the date on which the complainant’s membership of the scheme was re-instated, ie 3 February 2009. If this date is used, the claim would have been submitted 4 months and 20 days late.
8. The Internal Arbitrator set out his arguments: that the claim was not only a fraction late, that Old Mutual was not aware of the claim before it was actually submitted, that the delay was not due to Old Mutual’s conduct, that neither the employer nor the complainant had supplied any good reasons for the delay in submitting the claim, that the complainant could institute a negligence claim against his employer, and that unless employers faced severe consequences for not submitting claims within the contractually agreed time frames they may be incentivised to delay their claims to obtain lower premiums if they were switching life assurance companies or negotiating new risk premiums.
9. The Internal Arbitrator argued further on 13 May 2010 that it was not necessary to consider whether Mr B had been confused as to the time period for submission, as he had received further information from the employer convincing him that the reinstatement amounted to anti-selection. He quoted from an email dated 12 May 2010 received from the employer: “*B was not expected to work again. He had to be employed in order to apply for disability*”, and argued that the real reason for Mr B’s reinstatement was to enable him to apply for disability benefits. However after receiving further information from Mr B’s attorney, about the substantive and procedural fairness of the dismissal, the Internal Arbitrator stated (27 July 2010) that he was no longer concerned that there was any anti-selection.
10. Nevertheless, he remained of the opinion that Old Mutual was justified in rejecting the claim on grounds of late submission, for the reasons set out in his letter of 22 April 2010, and he referred to Old Mutual’s further argument (of 26 July 2010) that “it seems the member’s issue is with the employer for not submitting the claim timeously”.
11. Mr B in response (7 July 2010) provided reasons for the late submission. These related to the confusion which prevailed after the conclusion of the settlement agreement as to when and whether the policy was reinstated (as it clearly would eventually have to be, given

that the reinstatement overrode the dismissal). It appeared from letters he furnished from the employer's attorneys that correspondence on this issue was ongoing between the employer and Old Mutual (whether via the intermediary or directly) until at least June 2009. Mr B also stated that he could not get an appointment with his physician until 25 June 2009, as the physician was on leave in March and April 2009, and fully booked thereafter until 25 June 2009.

#### Provisional determination

12. Having considered the arguments at an adjudicators' meeting, we made a provisional ruling on 18 August 2010.
13. We pointed out in the provisional ruling that the date on which the claim arose would be the date upon which Mr B's disabling illness would have caused his absence from work. That date is not clear; at the earliest it would be after 5 May 2008 (the dismissal date) and at the latest, 23 September 2008, when Old Mutual paid him an occupational disability accelerator benefit under his Greenlight policy. Even at best for the complainant, if one were to calculate the six months waiting period from 23 September 2008, plus the 4 weeks thereafter, the expiry date for submitting the claim would be 23 April 2009. Thus the claim, lodged on 23 July 2009, would still be out of time.
14. Our office has the power to apply equity if a strict legal approach gives rise to an unfair result. In this case we considered whether the circumstances were such that fairness to both parties required that we exercise our equity jurisdiction in Mr B's favour.
15. We took into account that the complainant had, in his latest submission, provided reasons for the late submission.
16. In our view the confusion surrounding the confirmation of reinstatement on the policy, as well as the fact that up to date supporting medical information could only be obtained in June 2009, constituted good reasons for the delay in the policyholder submitting the claim. There was also confusion as to the commencement date of the waiting period, and hence the expiry date of the time allowed for lodging claims. This confusion was understandable given the dismissal and retrospective reinstatement, and the fact that the policy does not regulate such unusual situations. The meeting did not consider that a delay of between two and seven months was a considerable delay in these circumstances.
17. The meeting considered the point about general prejudice to the insurer if employers did not face severe consequences for late submissions, but was of the view that this could not be an overriding consideration. It did not appear that there would be any specific prejudice to Old Mutual if this specific claim was assessed. The amount of time which had elapsed did not appear to preclude a proper

evaluation of the medical evidence. On the other hand there would be considerable prejudice to the complainant if he were denied assessment of his claim as a result of a technicality, arising out of the unusual circumstances of his dismissal from employment and subsequent reinstatement.

18. It was therefore our provisional determination that the late lodging should be condoned on grounds of equity, and the claim should be assessed.

#### Further submissions from Old Mutual

19. In response to the provisional ruling the Internal Arbitrator sent us a Memorandum by Mr S of Old Mutual. The Internal Arbitrator stated that he had nothing to add to his previous responses, save to note that nothing prevented the submission of Mr B's claim within four weeks after his re-instatement, as he need not have consulted a doctor again, considering that Old Mutual had already admitted his Greenlight claim. The Internal Arbitrator remained of the view that his recourse should be against his employer, not the insurer.
20. Mr S of Old Mutual in his Memorandum stated that the contract was between the employer and Old Mutual, not between Mr B and Old Mutual, and that it is the policyholder (the employer) that must institute a claim on behalf of the employee. For this reason he was of the view that it was important not to underestimate the conduct of the employer when considering a claim on grounds of equity. He argued that if the employer were allowed to submit claims beyond the time limits, there would be potential for anti-selecting against the insurer, as the employer could withhold claims until after the premium review date to ensure that it received a more favourable premium rate compared to what it would have been if the claims had been submitted timeously. While the insurer could then impose a much larger premium increase at the next review, the employer could avoid this by moving its business to another insurer. Mr S stated that the annual premium income for the company concerned was R20 697, and that a single disability claim could quickly exceed the premiums received from this employer.
21. Mr S stated that he took note of the unique circumstances we pointed out in this case, but was of the view that as the employer was aware from the reinstatement date (3 February 2009) that Mr B might well be classified as disabled, the employer should have instituted a disability claim at the same time as reinstating the employee. He also speculated that Mr B could have told the employer about the medical examination he used for his Greenlight claim in August 2008, which would mean there would have been no need for him to wait for a further medical appointment before the claim on the group scheme was submitted in July 2009.

## Final determination

22. The further submissions were considered at an adjudicators' meeting on 7 October 2010.
23. It was the view of the meeting that the special circumstances in this case apply to the policyholder (the employer) as well as the member, Mr B. There was confusion surrounding when and whether the insurance cover had in fact been reinstated alongside the reinstatement of employment. As mentioned in the provisional ruling, correspondence on this issue continued between the employer and Old Mutual (via the intermediary or directly) until at least June 2009. There was also confusion after the member was reinstated in his employment as to when the waiting period should commence. This meant there was no certainty as to the expiry date of the time allowed for lodging a claim. The policy does not regulate such unusual situations, and all parties were therefore uncertain about the issues, including the employer. These are good reasons explaining the delay in lodging the claim.
24. It is the general practice of insurers to require up to date medical evidence when a claim is submitted, and it was not for the policyholder to surmise that Old Mutual might be satisfied with medical information that would have been a year old, if indeed the policyholder was aware of this information. It was therefore reasonable that Mr B set about obtaining up to date information from his specialist physician, especially as he was still waiting, until at least June 2009, for confirmation that his policy had been reinstated.
25. The meeting was of the view that Old Mutual has not demonstrated that there would be any specific prejudice to it if this specific claim was assessed. If the claim had not been lodged a few months late, the insurer would in all likelihood have been obliged to pay the claim, given the favourable prospects for the success of this claim on its merits. In considering the factors favouring both parties a proper balance must be struck. In our view the prejudice that would inure to the complainant if he were denied assessment of this claim as a result of a technicality, arising out of the unusual circumstances of his dismissal from employment and subsequent reinstatement, far outweighs any general prejudice to the insurer if this claim were to be assessed.
26. For the reasons set out in the provisional ruling and here, it was the decision of the meeting that, on grounds of equity, the late lodgement should be condoned and the claim assessed.
27. This is our final ruling.

**SM**  
**November 2010**