

Case 15 – Payment of PHI benefit

Payment of PHI claim after cessation of membership – fairness of insurer's decision – insurer had incorrectly terminated PHI benefit

Background

1. The claimant, who had been employed as a staff co-ordinator by a Bank, with mostly sedentary duties of query resolution, client services, management of credit and credit risk and general office administration, last reported for duty on 12 November 2010.
2. He had submitted a claim for a permanent health insurance (PHI) benefit on 1 December 2010, based on the following medical history:
 - In 2007 he had sustained injuries in a motor vehicle accident, which were treated with simple conservative treatment.
 - A year thereafter he had developed migraines; and an MRI performed in 2009 had showed a problem with discs C5/6 & C6/7. A rhizotomy was performed, which only relieved his headaches but did not help with his shoulder spasm and right upper limb tremor.
 - A C5/6 & C6/7 disc replacement and infiltration at C2 made his condition (pain and spasms) worse, and he developed depression. Another rhizotomy was performed in 2010, after which his condition was diagnosed as “Neuropathic/Intractable Pain Syndrome”. As treatment for the condition he was given powerful analgesics which he reportedly began to abuse.
 - The depression that had developed after the disc replacement led him to attempt suicide in November 2010 (cutting his wrists) and December 2010 (overdosing on analgesics). He was admitted to Riverfield Lodge for 2 weeks after the second suicide attempt, and the treatment with analgesics was replaced with psychiatric treatment. His pain syndrome had improved and was under control.

3. The claim was admitted on 2nd March 2011 and a monthly PHI benefit became payable. The benefit was paid in terms of the provisions of the group PHI policy. In terms of the clause a member is regarded as disabled if in the reasonable opinion of the insurer, injury or illness has rendered him totally incapable of engaging in his own occupation.
4. The insurer is entitled to, at any stage after the payment of the benefit has commenced, assess whether the claimant is then capable of engaging in his own occupation. If the insurer, on the basis of objective medical evidence, should regard him as capable of performing his own occupation, the benefit shall be reduced according with the formula set out in the policy.
5. The policy provides for the re-assessment of the claimant, 24 months after the date of disablement, to determine whether or not he is capable of performing an alternative occupation. If the insurer, on the basis of objective medical evidence, should regard him as capable of performing an alternative occupation (whether or not he can find employment in such occupation), the benefit shall be reduced according to a formula.
6. Momentum decided to terminate the benefit during October 2012 after a review of the complainant's medical and functional condition. The complainant was not happy about the termination of the benefit and submitted a complaint to our office with medical reports in support of his position that he was still entitled to continue receiving the benefit.
7. All of the medical evidence was considered by the office and the office was of the view that Mr B was not yet fit to resume an occupation on a full-time basis. Our view was that the insurer should not have terminated the benefit, but could consider whether or not the complainant is capable of returning to work on a part-time basis, and employ reasonable interventions like work-hardening exercises, while paying him a benefit calculated in accordance with a formula set out in the policy, which allows for a reduction of the benefit for partial disability. The office made a provisional

determination that the benefit should be reinstated from the date it had been terminated.

8. Following receipt of the provisional determination Momentum advised that the complainant had reached a settlement with his employer in the interim and his services had been terminated in April 2013.

Momentum pointed out that the policy (by way of an endorsement) contained the following clause:

“Clause 5.2. Cessation of Benefit

The Benefit payments in respect of a Claimant shall cease on the date of the happening of the earliest of the following:

his resignation or withdrawal in terms of the rules of a pension or provident fund of which he is a member.”

Momentum asked us to advise on the way forward with this claim.

9. The complainant made it clear to us that he still wished to pursue the payment of his benefit (past the date of the termination of employment). It appeared from the correspondence from the complainant and his attorney that the complainant had not been aware that signing the settlement agreement would impact on his entitlement to a benefit under the Group PHI Policy.
10. According to the complainant’s wife the copy of the policy they received (from a PHI consultant) did not contain the endorsement clause referred to above. The settlement agreement, refers to an outstanding complaint in the following terms:

“7. Payment of the above amount will be in full and final settlement of any claim and/or dispute of whatever nature that the Employee may have against the Employer.

8. This full and final settlement also includes the understanding that the employee has referred Momentum’s decline for the employee to remain medically boarded to the Pension Fund Adjudicator. All parties to this agreement therefore accept that even should the Ombudsperson find in favour of the employee’s appeal, that this settlement will stand without any amendments.”

11. There was also a letter by the complainant, dated 22 March, to his employer in which the complainant agrees to a “pakket”, which clearly indicates his understanding that the acceptance would not affect his PHI claim as it states:

“Sal julle asseblief verseker dat my dienssertifikaat ‘Ill Health’ reflekteer en nie ‘Voluntary Resignation’ nie. Met ‘Voluntary Resignation’ kan ek nie ‘loss of income’ eis nie.”

12. We asked the complainant’s employer, through the insurer’s offices, whether the provisions of termination clause were brought to the complainant’s attention before he entered into the agreement. The employer did not answer our question. It was simply stated that *“the settlement would be in full and final settlement – irrespective of any appeals”*.
13. The view of the office based on the above and on the complainant’s submission was, that the implications of accepting the settlement on his PHI benefit, were not brought to his attention. It may even be that the Bank staff members did not understand the implications themselves. The words *“irrespective of any appeals”* would not be meaningful in the context of the settlement agreement if both parties understood that the PHI benefit could no longer apply.

14. It was in any event illogical that Mr B would have acted as he did by accepting the settlement on the terms he did, if he understood that his PHI benefit would no longer be available. He was in continuous contact with our office and he would have raised this aspect with us, as he did with other matters, during the time his complaint was with us for determination.
15. It was clear from the correspondence that the pressure on Mr B to accept a 'package' came about because of Momentum's decision to terminate his PHI benefits, which decision this office subsequently found to be incorrect. It would be unfair to penalise the complainant in these circumstances as he was awaiting the resolution of the dispute that followed.
16. In these circumstances the view was expressed that Momentum should pay the benefit as directed in our provisional determination, to the complainant until such time as it is established that Mr B is no longer disabled and can return to full time work.
17. Momentum responded as follows:

“As this is an Employer-owned contract, Momentum is of the opinion that it is not the Insurer's responsibility to ensure that the claimants (members of the fund) are educated / informed of the provisions of the policy or of any changes made via endorsements. This would be the responsibility of the Employer / Policyholder. As such, we were not involved in any discussion held between the Employer and Employee and we are therefore not able to comment on whether or not Mr B was advised that his withdrawal or resignation would result in the termination of his PHI benefits.

In light of the above, Momentum is of the opinion that it cannot carry on paying the disability benefit after Mr B's membership of the Fund ceased as this is not in line with the provisions of the policy. Please note that the relevant endorsement became effective from 1 June 2008 and was in place at Mr B's date of disability on 12 November 2010. Given that it would appear

that the claimant was not adequately educated by the policyholder as to the implications of withdrawing from the pension/provident fund of which he was a member, it is our opinion that Mr B should seek recourse from his Employer.

While we understand that Mr B may have been under financial pressure as a result of his PHI benefit being terminated, it was he who requested assistance from the Office of the Ombudsman regarding this situation and it is unclear why he would have signed any 'settlement' or accepted any 'package' from his Employer prior to his matter being finalized by your Office, given that they are intimately linked. We note from all correspondence with your Office that our last correspondence with Ms Edith Field on this matter was dated 08 April 2013 wherein we requested the Ombudsman to make a final ruling on this matter (this was prior to Mr B signing the settlement agreement with his Employer on 24 April 2013). The provisional determination was received from your offices on 06 May 2013.

In light of our comments above, we accept the provisional ruling as made by your offices and agree that PHI benefits are payable to Mr B from the date of termination of the benefit until date of withdrawal i.e. 1 February 2013 to 30 April 2013. No further benefits are payable after his date of withdrawal from the fund.”

18. Our final determination then followed:

1. “The complainant had first complained to this office on 19/12/2012. He then advised us on 30/1/2013 that he would have to return to work despite his disability because he would otherwise be without an income as Momentum had advised him that it would terminate his benefits on 1/2/2012. He thereafter advised that he would be on special leave for a month granted by his employer pending the outcome of his complaint in this office.
2. There then followed correspondence between this office and Momentum regarding a report by Mr M, which report Momentum chose to disregard. In

the interim while Momentum was corresponding about the ‘admissibility’ of Mr M’s report, Mr B’s situation from an employment perspective continued to be problematic as he was no longer in receipt of an income disability benefit and his special leave had come to an end.

3. The case was referred to an adjudicators’ meeting and the provisional determination of 6/5/2013 followed. Our office advised you that Momentum had to resume payment of the income disability payments as your decision to terminate Mr B’s benefits was wrong.
4. In the interim Mr B had entered into an agreement with his employer terminating his employment. The agreement mentions the dispute with Momentum (incorrectly referring to the Pension Funds Adjudicator instead of this office). It is also clear from other documents sent by Mr B and his attorney that Mr B, nor probably his employer, understood the implications of the termination of his employment on the dispute regarding his income disability benefits.
5. According to the complainant’s wife the copy of the policy they received (from a PHI consultant) did not contain the endorsement providing for termination of benefits following resignation from the pension fund. There is also the letter by the complainant, dated 22 March 2013, in which the complainant agrees to a ‘pakket’, this letter indicates his understanding that the acceptance would not affect his PHI claim as it states:

“Sal julle asseblief verseker dat my dienssertifikaat ‘Ill Health’ reflekteer en nie ‘Voluntary Resignation’ nie. Met ‘Voluntary Resignation’ kan ek nie ‘loss of income’ eis nie.”

6. It is in any event illogical that Mr B would have acted as he did by accepting the settlement on the terms he did, if he understood that his PHI benefit would no longer be available as he was continuing with his complaint in this office. He was in continuous contact with our office and he would have raised this aspect with us, as he did with other matters, during the time his complaint

was with us for resolution if he thought it could affect his right to disability income benefits.

7. The complainant was thus in a financial situation where he was no longer receiving a benefit and his employer no longer paid him a salary. His choices were limited and he chose to receive his termination benefits. It would appear that this proposal was initiated by his employer as the employer could not await a decision in this complaint.

8. To summarise the situation is therefore as follows:
 - Momentum incorrectly terminates Mr B's income disability benefits.
 - The complainant's employer puts pressure on Mr B to make a decision to terminate his employment because it no longer wishes to keep him on as an employee.
 - It appears that the employer did not explain the implications of this termination on any right to a continuation of his disability benefits.
 - Under pressure from his employer and financial pressure Mr B agrees to a termination of employment and a settlement agreement, without understanding the implications of this on his continued right to any income disability benefits.
 - Momentum now wishes to rely on the provision in the policy which states that a claimant's benefit ceases when his membership of his pension fund ceases.

9. In our view this reliance would be unfair to Mr B. It was as a result of Momentum's incorrect decision to terminate his income disability benefits that Mr B was placed in the position where he had very little choice but to resign. Momentum cannot now benefit from their own mistake by prematurely terminating his benefits. Momentum has to demonstrate that Mr B is capable of returning to full-time employment before it can terminate the benefit.

10. Momentum must, therefore, pay Mr B the benefit as indicated in our provisional determination, until such time as Mr B is capable of returning to full-time employment.
11. This is a final determination.”
19. The insurer thereafter paid a lump sum in respect of arrear instalments to the complainant and continued to pay his monthly installments.
20. Our office subsequently received a question from Mr B’s previous employer, asking whether it could recoup the settlement amount from Mr B, due to the reinstatement of his PHI benefit. We referred the employer to the settlement agreement clause 8. quoted above, which states that the settlement agreement would stand even should the “Ombudsperson find in favour of the employee’s appeal”.

JP