

Case 25 - Late Submission - Equity Jurisdiction

Background

The complainant was employed as a machine operator for approximately 14 years.

He was diagnosed with diabetes with ‘severe peripheral neuropathy’ as a result of which by July 2012 he was no longer able to perform his duties at work.

The employer’s occupational health doctor thereafter recommended that the complainant apply for 6 months temporary disability through the Unemployment Insurance Fund (“UIF”).

It appears that the complainant successfully claimed against the UIF for the months of September 2012, October 2012 and November 2012.

In December 2012 when the complainant’s symptoms had showed no signs of improvement, the occupational health doctor recommended he be considered for disability benefits.

The complainant’s claim was received by Liberty Life (“the insurer”) on 3 May 2013.

In terms of the scheme rules the date of disability is defined to mean the date on which the member ceased his normal occupation as a result of disablement.

Liberty Life pegged 31 July 2012 as being the date of disability. Therefore, according to the Liberty Life, the claim was lodged some six months beyond the period prescribed by the policy. On the grounds of its late submission Liberty Life then repudiated the claim.

The complainant thereafter lodged a complaint with our office.

Provisional determination

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

- Whilst contractually the insurer may be entitled to repudiate the claim, that is not the end of the matter as in certain circumstances our office may, in terms of our equity jurisdiction, request an insurer to consider a claim despite its lateness.
- In deciding whether or not it would be appropriate to invoke equity, we look at a range of factors, including the explanation for the delay, the degree of lateness, the prospects of success and the prejudice/potential prejudice to the insurer.
- The employer explained that it did not expect 31 July 2012 to be the complainant’s last day of service and that due to the complex nature of the complainant’s illness, the matter at that stage was not regarded as a disability claim.

However as soon as the employer received the recommendation of its occupational health doctor that the complainant be considered for disability benefits, it embarked on the claims process.

The employer also pointed to the transfer of the scheme from the insurer to a new insurer with effect from 1 December 2012 as being a further complicating factor.

The meeting was satisfied that this constituted a plausible and reasonable explanation for the delay.

- The meeting was also satisfied that a delay of some six months was not an inordinate delay particularly in the context of the explanation for the delay.
- Furthermore based on the available medical evidence, the meeting was of the view that the prospects of success on the merits were good.
- Whilst the insurer contended that it would be significantly prejudiced if required to receive the claim beyond the prescribed period, the explanation provided to support such contention was not entirely clear.

During a teleconference between our office and the insurer’s actuary, it transpired that the information provided by the insurer initially in this regard was erroneous in some respects.

The following table sets out the incorrect information initially provided by Liberty Life, juxtaposed with the clarification and corrections provided by the insurer’s actuary during the teleconference and subsequent email:

Liberty Life’s initial submissions	Correct position
Since the scheme terminated it no longer has access to the IBNR (provision for claims that have been incurred but not yet reported)	The IBNR is calculated at an aggregate level, not at a scheme level; therefore the fact that the scheme has terminated does not mean that Liberty Life does not have access to the IBNR to pay the claim
When a scheme terminates the IBNR reserves relating to that scheme are then released into the income statement of Liberty Life	The IBNR is calculated at an aggregate level, not at a scheme level; therefore the IBNR reserves are not earmarked proportionally for each scheme
	During the telecon the actuary stated that in fact the IBNR is not affected when an individual scheme is terminated
There are no reserves/funds available for Liberty Life to pay the claim at this late stage	Liberty Life has now conceded that at any point in time Liberty Corporate holds an “IBNR provision” for claims that have been incurred but not yet reported

The meeting considered the insurer’s submissions on the question of prejudice in their entirety and concluded that prejudice to Liberty Life *specifically* in relation to this claim had not been proven.

- Absent any proven prejudice to Liberty Life and taking into account the explanation for the delay, the degree of lateness and the prospects of success it was the unanimous decision of the meeting that on the grounds of equity, the late submission in this instance should be condoned and Liberty Life should be required to assess the claim accordingly.

Liberty Life's response to the provisional determination

Liberty Life's responded to the provisional determination as follows:

- (1) *"The date of disability is July 2012. The disability claim application was submitted to us on 6 May 2013 and the employer did not provide any reasons for the delay for the late submission of the claim. The employer only provided us with reasons for the delay in August 2014, after the complainant had lodged a complaint with your office."*
- (2) *"The employer previously submitted 2 claims outside the notification period. We agreed to waive the late notification clause for these cases. However, we clearly informed the employer that future claims notified late will not be assessed or validated."*
- (3) *"The seriousness of the employee's medical condition and knowledge of the time frame within which to submit claims, coupled with the change in underwriters should in fact have compelled the employer to resolve this matter earlier by submitting the claim timeously."*
- (4) *"... a claim submitted six months after the expiry of an already reasonable contractual allowance of three months, therefore tripling the time frame for submission, cannot be regarded as reasonable."*
- (5) *"The employer terminated its participation in the group policy effective 1 December 2012 as it was changing insurers. Our legal obligation towards the employer, as policyholder, therefore terminated at this date."*
- (6) *"If the employer omitted to meet its commercially agreed contractual obligations with Liberty Life, alternatively failed to execute those with care and in good faith on behalf of the employee, the insurer cannot be held liable for such inaction."*
- (7) *"... an equitable resolution for this matter must be obtained from the employer."*
- (8) *"... if an employer's very late submission of a claim is accepted by an insurer then such employer is in fact incentivised to delays its claims, as the employer will get lower premiums if they switch insurance companies or negotiate new risk premiums, because the higher the historical claims rate, the higher the future premium."*
- (9) With regards to the IBNR, the Liberty Life had the following to say:

“We base the calculation only on accepted claims which would include claims we previously waived late submission on.

Therefore, there is some allowance in the experience of past admitted claims, where our internal complaints handling committee has decided to condone the late submission. This would allow us to continue to consider each late claim on its merits, on a basis consistent with our current approach to handling late claims, when we condone this. Any additional claims would result in financial prejudice to Liberty.

...

We also calculate the IBNR reserves at scheme level when analysing the rates for a particular scheme and to understand whether that scheme’s experience is good or poor, and whether the rates being charged are still appropriate. This means that generally, receiving claims well after notification date, negatively impacts our ability to set the appropriate price for an employer’s scheme, and negatively impacts our ability to manage and investigate our pricing basis.”

Final Determination

Points (1) to (9) are dealt with consecutively below:

- (1) If the employer’s explanation for the delay is reasonable then the fact that such was not conveyed to Liberty Life at the time the claim was submitted does not render the explanation unreasonable.
- (2) It does not necessarily follow from the fact that Liberty Life brought the submission period to the employer’s attention, that the employer was negligent in submitting *this* claim late.

The employer’s explanation for the delay is not that it was unaware of the submission period.

As set out in the provisional determination, its explanation for the delay is that it did not expect 31 July 2012 to be the complainant’s last day of service and that due to the complex nature of the complainant’s illness the matter was not considered to be a disability claim at that stage.

- (3) Liberty Life has pointed to the seriousness of the complainant’s medical condition and the change in underwriters which should also have prompted the employer to submit the claim timeously.

Again, the employer explains that the seriousness of the complainant’s medical condition only came to its attention when the occupational health doctor recommended he be considered for disability benefits.

Regarding the change in underwriters, it is not clear how this advances Liberty Life’s case.

The employer received confirmation of disablement after the change of underwriter on 1 December 2012 and the claim was therefore (understandably in our view) submitted to the new insurer which received the claim on 28 March 2013.

During the course of the new insurer's assessment it transpired that in fact Liberty Life was on risk when the claim arose. The employer thereafter submitted the claim to Liberty Life on 3 May 2013. It follows that had there been no change of underwriter, Liberty Life would probably have received the claim sooner than it did.

Therefore the change of underwriters occurring in and around the time that the claim was submitted does not, as Liberty Life suggests, demonstrate the unreasonableness of the delay but rather provides a further explanation for it.

- (4) In effect the Liberty Life is saying that a delay of six months or more should in every case be regarded as unreasonable irrespective of the circumstances. However such a blanket approach in this context is problematic. A six month delay in one set of circumstances may be excessive or unreasonable but in another set of circumstances it may not be.

The meeting was satisfied that in the circumstances of this case, a delay of six months was not inordinate.

- (5) We agree that Liberty Life's legal obligation towards the employer terminated with effect from 1 December 2012. However on Liberty Life's own version the date of disability is 31 July 2012 and therefore the claim arose prior to 1 December 2012 when Liberty Life was still on risk.
- (6) We would agree that if the late submission was as a result of the employer failing to execute its contractual obligations with care and good faith then that would be a relevant consideration.

However in light of the employer's explanation for the delay, it appears that the late submission was not as a result of the employer failing to execute its contractual obligations with care and good faith. As such the question of holding Liberty Life liable for the employer's 'inaction' does not arise in this case.

- (7) In so far as Liberty Life suggests that resolution must be obtained from employer, the complainant would only have a rightful claim against the employer if he were able to prove, on a balance of probabilities, that the late submission constituted negligence on its part. Given the employer's explanation for the delay, the complainant's prospects of success in a claim against the employer seem doubtful.
- (8) The meeting was of the view that a delay of six months in this particular case did not constitute a 'very' late submission as Liberty Life suggests.

The meeting was also not satisfied that in the circumstances of this case there was any proof or indeed any indication that the employer had deliberately submitted the claim out of time in order to secure more favourable rates.

- (9) The meeting noted with approval that Liberty Life does consider each late claim on its merits. We assume that Liberty Life exercises its discretion in this regard properly and reasonably by taking into account all relevant considerations and excluding all irrelevant considerations – an approach akin to that adopted by this office in the exercise of its discretion.

The import of what Liberty Life is saying appears to be that whilst it does on occasion pay claims that have been submitted late, the present claim does not fall into that category (late submission claims category) but into the category of ‘additional claims’ which would result in financial prejudice to Liberty Life. The meeting did not understand this argument.

Regarding the calculation of IBNR reserves at scheme level and the contention that claims received well after the notification date have a negative impact on Liberty Life’s ability to set the appropriate price for an employee’s scheme, the meeting did not understand the relevance to the present case, given that the scheme was terminated with Liberty Life with effect from 1 December 2012.

As a consequence of the apparently contradictory explanations provided by Liberty Life on the prejudice issue, we deemed it necessary to consult an independent actuary to ensure that our understanding was correct.

The independent actuary agreed with us that Liberty Life’s submissions were indeed confusing and in some respects unconvincing.

The meeting concluded that Liberty Life’s explanation in this regard could not be accepted and that the matter should therefore proceed on the basis that Liberty Life had failed to show that it would suffer prejudiced *specifically* in relation to this claim if it were required to assess the claim despite its late submission.

The meeting therefore confirmed its decision in the provisional determination that in the absence of any proven prejudice to Liberty Life and taking into account the prospects of success, the explanation for the delay and the degree of lateness, it was the unanimous decision of the meeting that on the grounds of equity, the late submission in this instance should be condoned and Liberty Life should be required to assess the claim accordingly.

This is our final determination.

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