

## **The complaint**

Mr O is unhappy about the way Phoenix Life Limited ('Phoenix') calculated the benefit under his permanent health insurance policy.

## **What happened**

Many years ago, Mr O took a permanent health insurance policy ('the policy') which would provide a weekly benefit in the event of ill health (or accident).

In the Spring of 2020, Mr O made a claim under the policy. From a medical perspective, the claim was accepted in June 2020 but at that stage, Phoenix needed more financial information from Mr O so that it could calculate the benefit he was due under the policy.

Phoenix says the benefit due under the policy is restricted if the income received whilst off work (for this policy, any similar insurances, and any earnings payable) is more than two thirds of his normal earnings.

Phoenix also says when calculating normal earnings under the policy, it looks at relevant income received in the 12 months prior to incapacity.

To assess Mr O's pre-incapacity earnings – and the benefit amount due to Mr O under the policy - Phoenix requested copies of his annual tax returns and company accounts. Having considered the information, Phoenix concluded that Mr O's income for the 12 months prior to incapacity would've resulted in no benefit being payable under the terms of the policy.

So, it decided to average Mr O's income over a period of three years prior to his incapacity, amounting to around £7,350 – which it said was the maximum entitlement under the policy.

Under the policy terms, Phoenix said the benefit equated to two thirds of this amounts, meaning that the annual benefit was just under £5,000. However, from this amount, it said it was entitled to deduct any earnings (or other insurance benefit) Mr O received whilst he was off work. It asked Mr O to provide an estimate of his anticipated earnings whilst he was wasn't working.

Unhappy with the way in which Phoenix calculated the benefit under the policy, Mr O raised a complaint with Phoenix. He says he should be entitled to the sum assured under the policy - around £28,240 per year at the time of his claim.

Phoenix didn't think it had done anything wrong. So, Mr O referred his complaint to our service. Our investigator looked into what happened and didn't uphold Mr O's complaint. Mr O disagreed. So, his complaint was passed to me to consider everything afresh and decide.

I issued my provisional decision in June 2022 explaining why I was intending to uphold most of Mr O's concerns. I said:

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“Phoenix has an obligation to handle claims promptly and fairly. And it mustn’t unreasonably decline a claim.

Mr O’s schedule of insurance (‘Schedule’) sets out the weekly benefit in the event of a successful claim, which it says will be payable every four weeks in arrears.

Next to the heading: ‘benefit and event’ it says:

*The Benefit is payable during continuous total disability of the Life Assured continuing beyond the waiting period of 8 weeks subject to the conditions contained herein...*

The claim was accepted, Mr O having satisfied that he was continuously and totally disabled during the 8 weeks’ waiting period.

So subject to the remaining terms and conditions of the policy, Mr O was entitled to the benefit under the policy.

The policy does have a section entitled: ‘Limitation of Benefits’. It says:

*The combined weekly benefits secured by this and any other insurances against disability by sickness or accident, including benefits from the Life Assured’s employer, must not exceed two thirds of the Life Assured’s weekly earnings.*

The term “weekly earnings” isn’t defined under the policy terms Phoenix has more recently provided our service, as being applicable to Mr O’s claim.

It’s stated on Mr O’s tax return 2020 that he’s in employment. He’s ticked the box to say that he is an employee, director, office holder or agency worker in the year to 5 April 2020. Given what he’s told us, I’m satisfied that he was an employee and director of a company that he and his wife run (‘the company’).

#### How Phoenix has calculated the benefit

In a letter to Mr O dated July 2020, Phoenix has set out a breakdown of the calculation it’s used to support the benefit amount under the policy.

It has calculated Mr O’s pre-incapacity earnings as follows:

2019 H M Revenue & Customs Tax Return

Dividends: £29,147.93, of which £29,040.00 are from the company

PAYE: £4,620.00

In receipt of monies from property rental but this will continue so not taken into account.

2019 Accounts for year ending 31 March 2019

Net Loss of £33,057.00

2018 H M Revenue & Customs Tax Return

Dividends: £26,722.00, of which £26,400.00 are from the company.

PAYE: £4,620.00

In receipt of monies from property rental but this will continue so not taken into account.

2018 Accounts for year ending 31 March 2018  
Net profit of £8,164.00

2017 H M Revenue & Customs Tax Return  
Dividends: £22,313.14, of which £22,200.00 are from the company  
PAYE: £4,620.00  
In receipt of monies from property rental but this will continue so not taken into Account

2017 Accounts for year ending 31 March 2017  
Net Loss of £29,070.00

Phoenix has then taken the lesser of the net profit or dividends over an average of three years and calculated the benefit as follows:

2017 - loss  
2018 - profit of £8,164.00  
2019 – loss

Average over three years = £8,164.00

Divided by three years = £2,721.33 per year

It's then added the PAYE salary of £4,620.00 to that figure, totalling £7,341.33.

Two thirds of £7,341.33 = £4,894.22 per annum.

As mentioned above, Phoenix's calculations are based on its position that Mr O's pre-incapacity earnings are calculated using an average of the lesser of the net profit or dividends over the three complete financial years prior to incapacity, plus PAYE in the twelve months prior to incapacity.

However, that isn't set out anywhere in the policy terms Phoenix has recently provided to our service as being applicable to Mr O's claim. There's no mention of net profit at all in the policy terms (or earnings being restricted to the amount of net profit earned by the Company).

So, I've gone on to consider whether the way in which Phoenix has calculated earnings is fair and reasonable in the circumstances of this case.

As mentioned above, "earnings" (or pre-incapacity earnings) isn't defined under the policy.

I think it's good industry practice for underwriters of insurance policies to clearly set out the terms, including providing clear definitions of key words or phrases which could be ambiguous and have various different meanings – like "earnings" in this case.

I'm satisfied that "earnings" can have many meanings. I've thought very carefully about whether Phoenix's interpretation of earnings in Mr O's case is fair and reasonable. And I don't think it is. So, I don't think it's calculated the benefit under the policy fairly and reasonably here.

In the circumstances of this case, I'm satisfied that a reasonable person would reasonably interpret "earnings" to include dividends that are paid to Mr O, as a director, and PAYE salary earned in connection with his employment. After all, it is through both dividends and PAYE salary that Mr O is remunerated.

Phoenix says it calculates earnings in the 12 months before incapacity. Again, that's not contained in the policy terms. There is reference to average weekly earnings during the 12 months prior to disability in the *proportionate benefit* section of the policy. But I don't think that's applicable here as that relates to certain circumstances where the Life Assured engages in another occupation after the end of the waiting period. Mr O didn't engage in *another* occupation after the end of the waiting period. Further, there's also mention of this time period when calculating the rehabilitation benefit but again that's relevant to when the policyholder returns to work after the waiting period but the return to work is restricted, resulting in a loss of earnings.

But in this case, I'm prepared to accept earnings being calculated over the 12 months before incapacity. As that's the most beneficial period to Mr O – looking at the PAYE salary and dividends he received each year from 2013 – even considering an average over three, or even seven years here. So, I don't think he's being disadvantaged by taking that as the appropriate period of time.

Taking into account dividends and PAYE salary paid to Mr O for the 12 months prior to Mr O's total disability, his earnings exceeded the sum assured – which was around £28,400 at the time of claim.

I'm satisfied that the weekly earnings would be the amount Mr O received in PAYE salary and dividends in the 12 months prior to incapacity. Based on the figures put forward by Phoenix in its letter dated July 2020 – which aren't inconsistent with information put forward by Mr O's accountant – this equates to around £33,660.

And two thirds of that amount is around £22,440.

Phoenix has also pointed to the application form completed by or on behalf of Mr O in the early 1990's. On the form it says:

*The benefits will be restricted if the income you receive whilst off work (from this policy, any similar insurances and any earnings still payable) is more than two thirds or your normal earnings.*

However, that's different to what the policy says.

The 'Limitation of Benefits' section of the policy says the combined weekly benefits secured by the policy and any other insurances against disability by sickness or accident, including benefits from the Life Assured's employer, must not exceed two thirds of the Life Assured's weekly earnings.

So, I think the policy is clear; the benefits paid by the employer should be taken into account when considering whether the maximum benefit exceeds two thirds of Mr O's weekly earnings; and it doesn't include "any earnings still payable" as set out in the application form. I'm not persuaded that the application form forms part of the insurance contract Mr O entered into with Phoenix, and I don't think it would be fair and reasonable to read that into the limitation of benefit term.

Phoenix has said in its letter to Mr O dated 9 July 2020 that it's required to deduct any continued earnings from pre-incapacity earnings (for the period in which the claim is payable and Mr O remain totally disabled because of illness). But again, that's not set out in the policy terms and conditions.

So, although from the accountant's letter I've seen dated November 2020, Mr O was paid

around £9,000 in PAYE salary for 2020 (some of which would've been during the period he wasn't working due to illness) and around £3,000 in dividends (60% of the total dividends paid by the Company that year), I don't think it would be fair and reasonable for Phoenix to deduct such amounts from the benefit to be paid under the policy whilst Mr O was off sick from work in the absence of a term in the policy expressly allowing it to do so.

### Rehabilitation benefit

The policy also says:

*If immediately following a period during which the full benefit has been payable, the Life Assured... resumes the occupations(s) in which he was engaged immediately prior to disability on a basis restricted by disability with a consequent loss of earnings, a reduced benefit will be payable.*

This benefit is calculated as follows:

*A proportion of the benefit stated in the Schedule which the loss of weekly earnings bears to the average weekly earnings during the 12 months prior to disability*

The rehabilitation benefit will be paid for a maximum of 12 months.

Mr O says he returned to work, in a limited capacity, in May 2021 "probably working a couple of days a week". Mr O says he was receiving a salary of £1,000 per month from the company in May 2021 and that continues to date – but he says he hasn't received dividends due to the performance of the company whilst he was off sick and since he returned.

Upon Mr O providing Phoenix with documentary evidence of his return to work in May 2021 (in a limited capacity), I think it would be fair and reasonable for it to consider a claim for rehabilitation under the policy.

However, I don't think it's entirely clear from the policy terms how the rehabilitation benefit is to be calculated. When responding to my provisional decision, I'd be grateful if Phoenix could provide to our service an explanation as to how it intends to calculate the rehabilitation benefit and – taking into account my provisional findings above about the calculation of "earnings".

### Rental income

Mr O has said that the rental income he received from renting a property he and his wife owned to the company should also be included in earnings. And it shouldn't be deducted from ongoing earnings as the company would only be paying rent to him for the period the company could afford to pay him. And if he wasn't working, the company is unlikely to be able to continue to pay the rent.

In the absence of "earnings" being defined in the policy; I don't think Phoenix has acted unfairly by not including the rental income in the benefit calculations.

In the circumstances of this case, I don't think rental income can fairly and reasonably be considered to be "earnings" arising from Mr O's employment in this particular case. And so, I don't think it would be fair to include the rental income in his pre-incapacity earnings.

Even if there was no lease, contract or tenancy agreement in place which determines or guarantees Mr O and his wife income rent, as it's detailed as rent on his tax returns, I don't think Phoenix has acted unfairly by not taking this into account as part of his earnings.

### The cost of the accountant's report

Mr O provided Phoenix with an accountant's report, setting out a breakdown of certain amounts paid to him by the company over many years before he became totally disabled in 2020 – and for 2020.

He was invoiced almost £2,000 for this.

I accept that Phoenix didn't request this information from Mr O and although I can see why he felt the accountant's report provided key information, I also accept that most of the information contained in the report could've been ascertained from his tax returns and the company accounts provided.

I've thought very carefully about whether it would be fair and reasonable for me to direct Phoenix to reimburse him for this fee. And I think Phoenix ought to.

Mr O wanted to provide this information so that Phoenix could see the company's expenditure on salary, rent and dividends going back to 2013. And that was only because Phoenix had said it would go back three years and Mr O thought it would be fair for Phoenix to look back over a longer period. However, that would've all been avoided if Phoenix had acted fairly and reasonably in the interpretation of the policy terms when providing a breakdown of the benefit calculation in July 2020.

### Waiver of premium

The policy terms and conditions also say that:

*If the benefit becomes payable, the premiums (or part thereof) which correspond to the period which benefit is paid will be waived or refunded.*

As I understand Phoenix has still been collecting monthly premiums from Mr O during the time he was out of work and after he'd made a claim under the policy.

As I'm currently satisfied that Mr O's claim should've been paid shortly after the waiting period had ended, I'm also satisfied that the premium shouldn't have been collected from that point.

It's not clear from the policy when the premium waiver ends. It says it will be paid for the period during which the benefit is paid. But it's not clear whether the premium waiver continues during the period when the rehabilitation benefit is paid. As this is also a benefit payable under the policy, in the absence of the policy being explicit on this point, I think it's fair and reasonable in this case to extend the premium waiver until the date on which the rehabilitation benefit ends.

### Distress and inconvenience

Mr O has said he had to borrow £10,000 from a family member in 2020 and another £5,000 in 2021. He's also borrowed money from the business to pay for his travel season ticket.

Given that Mr O's absence from work coincided with the emergence of the global Covid-19 pandemic, I think it's reasonable to assume that this would've been a very worrying time for Mr O – particularly given his health at the time.

However, I also accept that having to engage in lots of correspondence with Phoenix

would've caused him unnecessary additional distress and inconvenience. And not receiving the benefit under the policy – and Phoenix's repeated explanations – which I've provisionally decided were misplaced and not based on the terms of the policy Mr O had the benefit of – would've caused him considerable distress, worry and frustration over a significant period of time. And this was at a time he was also unwell and undergoing treatment. This has also been made worse by Phoenix continuing to collect monthly premiums from Mr O.

I accept what Mr O says about asking a family member for financial support and although he won't have to pay any interest on the loan amounts, I think he experienced unnecessary inconvenience having to ask the family member for two loans. It's likely this would've all been avoided if Phoenix had calculated Mr O's benefit correctly to start with.

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I then set out what I intended Phoenix to do to put things right for Mr O.

#### Responses to my provisional decision

I invited both parties to respond to my provisional decision with any comments or further information. Phoenix didn't reply.

Mr O responded. In summary he said:

- That this was a very distressing time. He felt Phoenix did everything they could to reduce their financial obligations putting in place arbitrary rules regarding dividends and profits.
- Rent should not be considered as rent in the circumstances of this particular case and he explained why.
- He would like to claim 12 months of rehabilitation benefit under the policy.

#### **What I've decided – and why**

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having done so, I uphold Mr O's complaint to the extent set out in my provisional decision – an extract of which appears above. When concluding this, I've taken on board the points Mr O has recently made.

- I appreciate that this was a very distressing time for Mr O. I've explained in my provisional decision Phoenix's failure to correctly calculate Mr O's benefit at the outset caused him considerable and unnecessary distress, worry and frustration over a significant period of time. And this would've exacerbated an already very difficult time for him. I think it's fair and reasonable for Phoenix to pay him £750 compensation to reflect this.
- I understand the points Mr O has raised regarding the rental income. But as I explained in my provisional decision, in the absence of "earnings" being defined in the policy, I don't think Phoenix has acted unfairly by not including the rental income in the benefit calculations. In the circumstances of this case, I don't think rental income can fairly and reasonably be considered to be "earnings" arising from Mr O's employment. Even if there was no lease, contract or tenancy agreement in place which determines or guarantees Mr O and his wife income rent, as it's detailed as rent on his tax returns, I don't think Phoenix has acted unfairly by not taking this into

account as part of his earnings. And the points Mr O has raised in response to my provisional decision don't change my mind on this issue.

- Phoenix hasn't responded to my provisional decision or provided an explanation as to how it intends to calculate the rehabilitation benefit. But upon Mr O providing Phoenix with documentary evidence of his return to work in May 2021 (in a limited capacity), I think it would be fair and reasonable for it to consider a claim for rehabilitation benefit under the policy. If Mr O is unhappy with Phoenix's assessment of that claim, he is free to complain to Phoenix Life Limited about that in the first instance.

### **Putting things right**

In light of my findings above – which includes those detailed in my provisional decision - I direct Phoenix Life Limited to put things right by:

- Recalculating the exact amount of the weekly benefit Mr O was entitled to under the policy and paying that amount to him until he returned to work – even in a limited capacity;
- Paying Mr O simple interest at a rate of 8% per annum from the date on which the first benefit payment was due to him after the expiry of the waiting period (so from 1 July 2020) to the date on which it makes payment;
- Paying Mr O simple interest at a rate of 8% per annum from the date on which he should've received each amount from the date of each of the monthly payment dates after 1 July 2020 to the date on which it makes payment;
- Paying Mr O compensation for distress and inconvenience in the sum of £750;
- Paying Mr O the cost of the report in the sum of £1,956;
- Upon Mr O providing Phoenix with documentary evidence of the date on which he paid the accountant as per the invoice, paying Mr O simple interest at a rate of 8% per annum from the date on which Mr O settled the invoice, dated 17 November 2020, to the date on which the interest payment is made to him;
- Refunding Mr O the monthly premiums he paid for the policy from the date on which the eight weeks' waiting period expired to the date on which he was no longer entitled to any benefit under the policy (including the rehabilitation benefit);
- Paying Mr O simple interest at a rate of 8% per annum in respect of each monthly premium that should've been waived from the date on which the first premium should've been waived and simple interest at a rate of 8% per annum from the date on which the each subsequent monthly premium should've been waived - to the date on which it makes payment.

I also direct Phoenix to provide Mr O with a written breakdown of all interest calculations set out above within 21 days from the date on which it makes payment to him.

And if Phoenix considers it's required by HM Revenue & Customs to take off income tax from any interest paid, it should tell Mr O how much it's taken off. It should also give Mr O a certificate showing this if he asks for one. That way Mr O can reclaim the tax from HM Revenue & Customs, if appropriate.

### **My final decision**

I uphold Mr O's complaint and direct Phoenix Life Limited to put things right as I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr O to accept or



reject my decision before 4 August 2022.

David Curtis-Johnson  
**Ombudsman**